THE CLASS ACTIONS LAW REVIEW

SECOND EDITION

Editor
Richard Swallow

THE LAWREVIEWS

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PREFACE

Class actions and major group litigation can be a seismic event not only for large commercial entities but for whole industries. Their reach and impact mean they are one of the few types of claim that have become truly global in both importance and scope as reflected in this second edition.

There are also a whole host of factors currently coalescing around the litigation space that increase the likelihood and magnitude of such actions, where very significant sums are now routinely at stake. These factors include the recent political change in Europe and North America, which has begun to impact the regulatory sphere, as for the first time in decades, there is a shift towards protectionism and greater regulatory oversight. Advances in technology not only change our understanding of the world but also result in new and ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

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

Despite this, or perhaps because this is an area that, although much anticipated, has only relatively recently been recognised as a real and present threat, little attempt has been made to provide a comprehensive study of the class actions sphere. As with the first edition 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.

Richard Swallow
Slaughter and May
London
April 2018

Chapter 1

AUSTRALIA

Beverley Newbold, Julia Avis and Rafael Aiolfi[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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.[2] 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:

a at least seven people have claims against the same person;
b the claims arise out of the same, similar or related circumstances; and
c the claims give rise to substantial common issues of law or fact.[3]

The applicant may bring proceedings against several respondents even if not all class members have a claim against all the 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.[4]

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.'[5] No consent is required by 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 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

1 Beverley Newbold is a partner, Julia Avis is a special counsel and Rafael Aiolfi is an associate at MinterEllison.

2 See discussion at Section III.

3 Section 33C of the Federal Court of Australia Act 1976 (Cth) (FCA Act), Section 33C of the Supreme Court Act 1986 (Vic) (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).

4 *Cash Converters International Limited v. Gray* (2014) 223 FCR 139.

5 *Madgwick v. Kelly* (2013) 212 FCR 1 at [151].

in the legislation, in 2007, the Full Federal Court held that a closed or limited group class action is permissible.[6] 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.

The most common category of class actions since the introduction of the Federal Court class action regime is claims by investors. Securities or shareholder class actions, claims concerning financial products or services, and consumer protection claims have comprised an increasing proportion of class actions in recent years.

II THE YEAR IN REVIEW

i First proceedings under Queensland regime

The Queensland class action regime commenced on 1 March 2017;[7] two funded securities class actions were commenced against Shine Corporate Limited (a listed law firm) and Surfstitch Group Limited.[8]

ii Scrutiny of litigation funding

The Victorian and federal governments have launched inquiries into third party funding of class actions. The Victorian Law Reform Commission is expected to report by 31 March 2018. The Australian Law Reform Commission is due to report by 21 December 2018.

iii Record settlements

On 1 December 2016 the Federal Court approved a A$250 million settlement, regarding a defective hip device, described as the country's third-biggest class action settlement, and the biggest settlement in a Federal Court class action and product liability class action.[9]

On 28 December 2017, QBE Insurance Group Limited agreed to settle a shareholder class action to pay A$132.5 million (subject to court approval). The settlement has been described as the third-largest shareholder claim settlement in Australian history.[10]

iv Developments on common fund orders

Prior to 2016, litigation funders were generally only able to recover fees from those class members who had entered into funding agreements with the funder. This was one of the primary drivers for the 'closed class' 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, the Full Federal Court approved an application for a 'common fund' order.[11]

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6 *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

7 Part 13A CPA QLD came into force on 1 March 2017.

8 The *Surfstitch* proceeding has since been ordered to be transferred to the NSW Supreme Court to be case managed with a competing open class action in the NSW court; both proceedings are now stayed against Surfstitch as it subsequently went into administration.

9 Morabito, V, An Empirical Study of Australia's Class Action Regimes Fifth Report: The First Twenty-Five Years of Class Actions in Australia (2017) (Morabito Fifth Report), at p. 20.

10 'Strong signal': QBE settles class action for $132.5m, *Sydney Morning Herald*, 29 December 2017.

11 *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited* [2016] FCAFC 148 (26 October 2016) (*Money Max*).

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 has the potential to encourage litigation funders to fund more open class actions, as they can safely presume that they will be able to recover monies from all class members, including those who did not execute a funding agreement.[12]

Although this may appear to enable the funder to receive a greater amount than it would with equalisation adjustment mechanisms made on a case-by-case basis, the court imposed some important safeguards. Critically, the court held that it is appropriate for it to supervise litigation funding charges, as it does with legal costs. The court will review and approve the rate of funding commission proposed to be charged by the funder, so the existing rates imposed by funders may not withstand court scrutiny. Indeed, the court suggested that in some cases, it may impose a cap on the total funding commission payable in order to avoid payment of an excessive amount, disproportionate to the risk assumed by the funder.[13] The court also ordered that no amount payable by class members is to exceed the amount otherwise recoverable had no common fund order been made. This potential to limit the amount of the funding commission under a common fund order was the court's response to the submission that class members will be worse off under a common fund order.[14]

The court in *Money Max* observed that a common fund approach to funding is consistent with broader policy considerations.[15] The court commented on the difficulties posed by closed class actions, including the reduction in access to justice, barriers to settlement, the potential to exacerbate the risk of overlapping or competing class actions, and potential conflicts of interest. In the court's view, the common fund approach would enhance access to justice by encouraging open class actions.

Two of the judges in the Full Court in *Money Max* have since retreated to some extent from the *Money Max* rider. Both Justice Beach and Justice Murphy have emphasised that the *Money Max* rider may be unnecessary, as there may be no useful comparator, and it should not be decontextualised.[16]

In *Allco*, Justice Beach stated that as the rider was 'no worse off', it permitted the situation that the group members with a common fund order could do better than a funding equalisation mechanism.[17] This was a function of three things: the common fund commission rate being less than the rates fixed in the funding agreement, the ratio of funded to unfunded group members and that the funding agreements stipulated that under a funding equalisation mechanism the commission rates payable would be applied to the incremental amounts added back to funded group members' share from unfunded group members.[18] In endorsing a commission rate of 30 per cent, Justice Beach made some observations 'lest it be thought to have decontextualised precedent value in other proceedings'[19] including that

12 On this point see further at Section V.

13 *Money Max* at [85] to [87] and [90] to [91].

14 *Money Max* at [97] to [102].

15 *Money Max* at [176] to [205].

16 *Blairgowrie Trading Ltd & Anor v. Allco Finance Group Ltd (ACN 007 721 129) (rec and mgrs apptd) (in liq & Ors (No. 3)* (2017) 343 ALR 476 (Allco), at [105]; *Pearson v. Queensland* [2017] FCA 1096 (Pearson) at [30].

17 *Allco* at [104].

18 *Allco* at [104].

19 *Allco* at [157].

30 per cent on the net settlement sum equated to 22 per cent on the gross sum, and that had the settlement sum been substantially higher, he would have set a lower percentage rate so that the amount paid to the funder would have remained proportionate to the investment and risk undertaken.[20]

In *Pearson*, Justice Murphy provided for a commission rate of 20 per cent or such lower percentage as the court considers reasonable at a time when the court has more complete information, likely to be on settlement approval or distribution of damages. [21]

Although *Allco* and *Pearson* did not adopt the *Money Max* rider, both emphasise the court's ability to set a commission rate that it considers reasonable and proportionate in the circumstances of the case at the time when it has sufficient information to do so.

Prior to 2016, one unresolved issue in shareholder class actions had been whether shareholders were required to prove reliance on the company's alleged misleading statements prior to purchasing shares on the market. In the United States, this issue has been addressed by the 'fraud on the market' theory, which creates a rebuttable presumption of shareholder reliance on a company's material public statements. In *HIH Insurance Limited (in liquidation) & Ors,*[22] 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 non-disclosed material or misleading information without needing to prove direct reliance, when they purchased their shares on-market, on that non-disclosure or misleading statement by a company. While the decision was not a class action and has not been tested at the appellate level, the reasoning is being deployed by parties in shareholder class actions.

III PROCEDURE

Class actions in the Federal Court are regulated by Part IVA of the FCA Act 1976 (Cth), Division 9.3 (Grouped proceedings) of the Federal Court Rules 2011 (Cth) and a number of practice notes that provide further direction in relation to matters of practice and procedure. In 2016, the Federal Court issued a new practice note regulating class actions commenced under Part IVA.[23]

In the Supreme Court of Victoria, class actions are regulated by Part 4A of the SC VIC Act, Order 18A (Group Proceedings) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic), and various practice notes. In the Supreme Court of New South Wales, the regime is regulated by Part 10 of the CPA NSW and practice notes issued by the court. In the Supreme Court of Queensland, the regime is regulated by Part 13A of the CPA Act QLD and practice notes issued by the court. The state regimes broadly reflect the Federal Court legislation.

20 *Allco* at [158] and [160].

21 *Pearson* at [23].

22 [2016] NSWSC 482.

23 Class Actions Practice Note (GPN-CA), 25 October 2016.

This chapter is primarily concerned with class actions commenced under these provisions. There are other procedures that allow the court to deal with related claims, including the general power to join one or more persons as applicants or respondents in any proceeding,[24] and representative proceedings.[25]

i Types of action available

Since the introduction of class action regimes in Australia, numerous cases have been commenced pursuant to causes of action falling broadly within the following categories:[26]

a personal injury through food, water or product contamination;
b personal injury through defective products;
c actions under the Migration Act 1958 (Cth);
d shareholder class actions;
e investor class actions;[27]
f anti-cartel class actions;
g natural disaster class actions;
h consumer class actions;
i environmental class actions;
j human rights class actions; and
k trade union class actions.[28]

The limitation period that applies to a class action is determined by the cause of action pleaded. For example, certain of Australia's product liability laws require that a product liability action against manufacturers must commence within 10 years of the time the manufacturer supplied the goods with safety defects.

Limitation periods do not continue to run for class members while their claim is included in a class action before the court. This is designed to obviate the need for class members to commence an individual proceeding to protect themselves from expiry of the relevant limitation period in the event that the class action is dismissed on a procedural basis without judgment being given on the merits.[29] The limitation period does not begin to run again until:

a the class member opts out of the proceeding; or
b any appeals arising from the proceedings are determined without finally disposing of the class member's claim.[30]

24 Rule 9.2 of the Federal Court Rules 2011 (Cth), Rule 6.19 of the Uniform Civil Procedure Rules 2005 (NSW) and Rule 9.02 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) and Rules 65 and 69 of the Uniform Civil Procedure Rules 1999 (Qld).

25 Federal Court Rules 2011 Division 9.2 (Representative Proceedings) and General Civil Procedure Rules 2015 (Vic) Order 18 (Representative Proceedings).

26 Murphy, Justice Bernard, 'The operation of the Australian class action regime' (FCA) [2013] FedJSchol 43. See also Morabito Fifth Report at Chapter 3, p. 27, which has data up to May 2017.

27 Claims by investors complaining of conduct by the promoters of various investments.

28 Underpayment claims, disputes about employer conduct in obtaining workplace agreements.

29 Explanatory Memorandum to the Federal Court of Australia Amendment Bill 1991 (Cth).

30 Section 33ZE(2) of the FCA Act, Section 33ZE(2) of the SC Vic Act, Section 182(2) of the CPA NSW, and Section 103Z of the CPA QLD.

ii Commencing proceedings

The class actions regime in Australia is often perceived by practitioners in other jurisdictions as quite liberal. Proceedings can be commenced without the consent of class members, and there is no need for the class action to be certified by the court before it can proceed. However, the court has power, on application or of its own motion, to order that proceedings no longer continue if it is satisfied that it is in the interests of justice to do so.[31]

If the threshold requirements have been met,[32] then a representative in the class will have 'sufficient interest' to commence a proceeding on behalf of the group.[33] A class action can be commenced by a person by filing an originating application that sets out:

a the class members either by name or characteristic;

b the nature of the claims and the relief claimed by the applicant on its own behalf and on behalf of the class members; and

c the common questions of law or fact that are said to arise in the action.

A potential class member can be located outside Australia as long as the cause of action forming the basis of the claim contains the appropriate jurisdictional connection with Australia. Under the Victorian legislation, however, the court has power to make an order excluding a class member if the court decides that the person does not have a sufficient connection to Australia, or for any other just reason.[34] The importance of this is discussed in the section below regarding cross-border issues.

In many instances, class actions are commenced with the support of a litigation funder, because in large part of the associated costs and risks of such litigation. In Australia, court rules expose unsuccessful litigants to the risk of substantial adverse costs orders by which the unsuccessful party must, generally speaking, pay the successful party's legal costs. In 2006, the High Court of Australia confirmed the legitimacy of third parties funding litigation or agreeing to indemnify litigants for costs, in exchange for a percentage of any recovery.[35] Recent data suggest that between June 2012 and May 2017, almost 50 per cent of class actions filed in Australia were backed by a third-party funder.[36]

In unfunded cases, plaintiff law firms sometimes represent class members on a conditional fee arrangement, where no legal fees are charged unless the outcome is successful. The fees are calculated on an ordinary time and cost basis, and may include an 'uplift fee'.

At present, lawyers in all Australian jurisdictions are prohibited from charging clients a percentage of any damages awarded in the proceedings. The Australian Productivity Commission has recommended removing this prohibition on 'damages-based' or contingency fees by lawyers (other than in relation to criminal and family law matters) provided that comprehensive disclosure requirements and consumer protection measures

31 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.

32 See Section I.

33 Sections 33C–33D of the FCA Act, Section 33C of the SC Vic Act, Sections 158(1) and (3) of the CPA NSW, and Section 103C of the CPA QLD.

34 Section 33KA of the SC Vic Act.

35 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386; *Mobil Oil Australia Pty Ltd v. Trendlen Pty Ltd* [2006] HCA 4.

36 Morabito Fifth Report at p. 33.

are implemented.[37] Some of the larger plaintiff law firms agitate for this recommendation to be legislated, contending that they would then be able to fund class actions for a lower percentage commission than is typically charged by litigation funders. As discussed above, the Victorian Law Reform Commission and Australian Law Reform Commission are also currently exploring this issue.

iii Procedural rules

Class actions are generally case managed by an individual judge or a group of judges. Practitioners and the court are expected to conduct proceedings as quickly, inexpensively and efficiently as possible.[38] The courts have significant powers to supervise the litigation, including a broad power to make any order the judge thinks is 'necessary' to ensure that justice is done in the proceedings.[39]

At a certain stage in the proceedings, the court will fix a date by which class members may opt out of the proceedings. The form and content of the opt out notices are approved by the court.[40] If class members do not opt out by the specified date, then they are deemed to be members of the class action, even if they do not see or receive a copy of the opt out notice and were unaware of the existence of the class action.

In recent cases, opt out notices have been closely scrutinised by the court at the settlement approval stage of the proceeding. In *Kelly v. Willmott Forests Ltd (in liquidation) (No. 4)*[41] Justice Murphy refused to approve a settlement because, among other factors, the opt out notice failed properly to explain to class members that they would lose their rights to raise individual claims or defences regarding their exposures to a lender if the settlement was approved.

In Australia, discovery (or disclosure) plays an important part in providing access to information required to determine the issues in dispute. In the Federal Court, parties are usually required to produce documents in a party's control that are directly relevant to an issue in the proceedings and of which the party is aware after a reasonable search. However, discovery is only available if it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. Likewise, in the state supreme courts, the ambit of discovery has been narrowed. In applying for discovery the parties are required to detail:

a the reason why disclosure is necessary for the resolution of the real issues in dispute;
b the classes of documents in respect of which disclosure is sought; and
c the likely cost of such disclosure.[42]

37 Australian Government Productivity Commission, Access to Justice Arrangements, Inquiry Report No. 72 (2014) ch 18.

38 Sections 37M-N of the FCA Act, Sections 56 and 57 of the CPA NSW, Part 2.1 of the Civil Procedure Act 2010 (Vic) and Section 5 of the Uniform Civil Procedure Rules 1999 (QLD).

39 Section 33ZF of the FCA Act, Section 33ZF of the SC Vic Act, Section 173 of the CPA NSW, and Section 103ZA of the CPA QLD.

40 GPN-CA above footnote 23, at [11].

41 [2016] FCA 323 (*Willmott Forests*).

42 Division 20.1 of the Federal Court Rules, Part 21 of the CPA NSW and Order 29 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). The disclosure regime in Queensland is governed by Division 1, Chapter 7 of the Uniform Civil Procedure Rules (QLD), under which the duty to disclose applies to documents that are directly relevant to an allegation in issue on the pleadings.

Despite these rules, discovery continues to be a significant burden, which typically falls on the respondent. Class members – who are not parties – are not required to give discovery during the initial phase dealing with common questions of law and fact.

The timing of discovery will vary depending on a number of factors, including the jurisdiction in which the proceedings are brought and the type of case, but is usually after the close of pleadings as these bear on the scope of discovery required.

Respondents in Australia are also at an increasing risk of facing multiple or competing class actions. However, courts do have powers to manage the conduct of multiple proceedings, including:

a consolidation of two proceedings into one proceeding;
b permanent stay of one of the proceedings;
c making a 'declassing' order under Section 33N(1) of the Federal Court Act;
d closing one class and leaving the other open; and
e ordering a joint trial.[43]

Two recent decisions have addressed the judicial treatment of competing class actions. In *Smith*, Justice Ball addressed the problem of two competing class actions with overlapping class members by ordering a joint trial and proposing orders that class members should choose to opt out of one of the proceedings. The court concluded that a class member who had not opted out of class action A by a specified date would be taken to have opted out of class action B.

In *Bellamy's*, Justice Beach dealt with two open class actions with overlapping members and causes of action. After considering a number of options, Justice Beach held that the appropriate approach was to close one class, giving its members the option to opt out and register in the other open class, and case managing the proceedings together, adopting orders to reduce duplication of costs. The number of signed-up group members in each proceeding was a significant factor. Justice Beach observed that, but for the fact that in both proceedings more than 1,000 group members had signed litigation funding agreements he would have permanently stayed one of the proceedings.[44]

The courts also have power to order that questions of liability be decided separately from questions of quantum, and usually make such orders.

iv Damages and costs

Civil proceedings in Australia are generally heard by a single judge sitting without a jury. The judge therefore is the trier of both fact and law.

In the event an applicant is successful in a class action, the fundamental principle governing the award of damages, in respect of any legal wrong, is that they are compensatory[45] (the measure depends on the cause of action). The assessment of damages is therefore guided by the loss suffered by the class members. In the context of class actions, the court has the power to award:

43 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) (*Bellamy's*) at [9], and *Smith v. Australian Executor Trustees Limited*; *Creighton v. Australian Executor Trustees Limited* [2016] NSWSC 17 (*Smith*).

44 *Bellamy's* at [8].

45 *Whitfeld v. De Lauret & Co Ltd* (1920) 29 CLR 7; *Johnson v. Perez* (1988) 166 CLR 351.

a damages in specified amounts for class members, sub-group members or individual class members; or

b damages in an aggregate amount without specifying amounts awarded in respect of individual class members.

In addition to compensatory damages, courts can make an award for exemplary 'punitive' damages.[46]

The usual costs orders are for the successful party's legal fees and expenses (costs) to be payable by the unsuccessful party, based on the principle that costs 'follow the event'.[47] Practice shows that successful parties are usually able to recover between 60 and 70 per cent of their actual legal costs from the losing party. The Australian position in relation to costs is distinct from the United States, where the general rule is that parties must pay their own costs.

v Settlement

Class actions are frequently resolved through settlement. Not surprisingly, settlement has been described as one of the most important stages in a class action.[48]

A settlement or discontinuance of the substantive claims has no legal effect until it is approved by the court.[49] Generally, the court will not approve a settlement unless it is satisfied that the settlement is fair and reasonable having regard to the interests of the class members who will be bound by it, including by not preferring one group of class members over another.

Class members are bound by any judgment or settlement entered into in the class action unless they have opted out of the proceeding. Judges are taking an increasingly active role in scrutinising proposed settlements. In assessing the reasonableness of a settlement, the court will assume a 'protective role in relation to the interests of class members, akin to a guardian or the role the court assumes when approving an infant's compromise.'[50] In *Willmott Forests,* Justice Murphy took the unusual step of appointing a contradictor to represent the interests of class members who were not clients of the applicants' lawyers at the settlement approval stage.[51]

In *Williams v. FAI Home Security Pty Ltd* (No. 4) (2000) 180 ALR 459, Justice Goldberg set out a number of factors relevant to the court's consideration of an application for settlement approval:

a the amount offered to each class member;

b the prospects of success in the proceeding;

c the likelihood of the class members obtaining judgment for an amount significantly in excess of the settlement offer;

46 *Lamb v. Cotogno* (1987) 164 CLR 1.

47 *Laguillo v. Haden Engineering Pty Ltd* [1978] 1 NSWLR 306.

48 *Willmott Forests*, at [3].

49 Section 33V of the FCA Act, Section 33V of the Civil Procedure Act 2010 (Vic), Section 173 of the CPA NSW, and Section 103R of the CPA QLD.

50 *Willmott Forests*, at [5].

51 Section 33V of the FCA Act, Section 33V of the SC Vic Act, Section 173 of the CPA NSW and Section 103R of the CPA QLD.

d the terms of any advice received from counsel and any advice from any independent expert in relation to the issues that arise in the proceeding;
e the likely duration and cost of the proceeding if it continued to judgment; and
f the attitude of the class members to the settlement.

Justice Murphy rejected the settlement in *Willmott Forests* on reasonableness grounds where the settlement required, among a number of things, differential treatment of groups of class members and broad releases of the respondents.

In another case, Justice Beach approved a settlement that included a release in favour of the respondent company and its related entities, although he expressed some concern that a release of related entities had not been flagged in the opt out notices issued to class members some 14 months earlier.[52] Justice Beach ultimately accepted that such releases were 'a common feature' of commercial settlements, and that settlements would be unlikely to be achieved without them.

IV CROSS-BORDER ISSUES

Respondents in class actions in Australia may be companies with global operations, or that sell products overseas, or have shares traded on an exchange open to overseas investors. Not surprisingly, class actions involve cross-border considerations.

As to service and evidence preparation, Australia is a signatory to a number of agreements, treaties and conventions, which contemplate international cooperation or engagement, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Australian courts often require assistance from foreign courts and vice versa. Such assistance comes in different forms, such as service of originating documents, assisting with depositions, obtaining documentary evidence, and enforcement of judgments.

Australian courts have the power to decline to exercise jurisdiction when an alternate forum is more convenient to hear the claim. In the class action context, a respondent facing a competing class action in an overseas jurisdiction may seek a stay of the Australian proceedings. However, these issues are yet to be tested in the context of class actions.

As noted in Section III.ii, in Victoria the court can exclude class members who do not have a sufficient connection to Australia. This may serve to protect the interests of class members who are overseas and may not receive an opt-out notice. This is particularly important if the result of the class closure process and opt-out orders is that 'do nothing' class members' rights are lost.

Settlements or orders following judgment should be carefully drafted to prevent double dipping by class members who are, or may be, involved in more than one class action, and also to ensure that settlement in relation to that class is valid and binding in other jurisdictions.

Cross-border issues may also arise in the context of discovery. A party to an Australian proceeding, whether based in Australia or overseas, may be required to discover documents (in accordance with the rules referred in Section III.iii) whether those documents are in Australia or elsewhere.

52 *Newstart 123 Pty Ltd v. Billabong International Ltd* [2016] FCA 1194.

The fact that compliance with an order for discovery might render a party subject to the risk of a prosecution under foreign law (for example, data protection laws) is a relevant consideration for the court in the exercise of its discretion to make an order for foreign discovery, but is not a reason in and of itself not to make the order.[53] In fact, the Federal Court recently ordered respondents to produce documents held in France despite the fact that production of the documents could be in breach of the 'French blocking statute' – a law that makes the communication of documents in overseas proceedings a criminal offence.[54]

V OUTLOOK AND CONCLUSIONS

Over the five years to May 2017, there were, for the first time, more funded than unfunded class actions brought in the Federal Court.[55] The lack of specific regulation for funders, the recent Full Court approval of common fund orders, and the overall plaintiff-friendly nature of the class action regime, are transforming Australia into an attractive jurisdiction for litigation funders. Whether developments in common fund orders lead to an increase in open classes remains to be seen. The most recent empirical research published by Professor Morabito on this point is inconclusive.[56] In the same period, there has been an increase of 115 per cent in the total number of securities class actions compared with the number commenced in the preceding five years.[57]

Investors are also beginning to hold companies accountable for lack of consideration of the impact of climate change. In 2017, Australia saw its first shareholder case brought against Commonwealth Bank for failing adequately to disclose climate change risk in its annual report.[58] Although the case was not a class action, and was dismissed, a similar claim could be articulated as a class action.

Existing class actions set to attract significant attention in 2018 include:

a a shareholder class action against Commonwealth Bank for a fall in its share price following the commencement of proceedings by AUSTRAC against the bank alleging breaches anti-money laundering and terrorism finance laws;

b a shareholder class action against Crown Resorts for a fall in its share price following the arrest of 18 of its employees in China; and

c a class action against Ford for the car company's alleged failure to rectify faults in the PowerShift transmission fitted to Ford Fiestas.

53 *ACCC v. Prsymian Cavi E Sistemi Energia SRL* (No. 7) [2014] FCA 5. Leave to appeal against this decision was denied by White J in *Nexans SA RCS Paris v. ACCC* (2014) FCA 255.

54 See orders dated 2 June 2016 in *Newstart 123 Pty Ltd v. Billabong International Limited* VID143/2015.

55 Morabito Fifth Report at p. 34.

56 Morabito Fifth Report at pp. 39–40.

57 Morabito Fifth Report at p. 30.

58 *Guy Abrahams v Commonwealth Bank of Australia* VID 879/2017.

Chapter 2

AUSTRIA

Holger Bielesz and Paul Krepil[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Austrian civil procedural law does not provide for a class action system that is comparable to real class action provisions like those implemented in other jurisdictions such as the United States.

Nonetheless there are options of enforcing collective interests. These options do not, however, strictly classify as class actions in a common sense.

i Austrian-style class actions

Austrian legal practitioners implemented a model process, by which – most frequently – consumer organisations as the Austrian Consumer Information Association (VKI), but also the National Chamber of Labour bring claims on behalf of parties that have previously assigned their rights to the organisation. In these cases the organisation then claims all assigned rights in an ordinary two-party lawsuit.

There are no restrictions as to which entity or person may be assigned to pursue mass claims on its behalf. Not just consumer organisations but also other entities may be assigned to promote claims throughout mass proceedings. This often goes along with third-party funding.

ii Joinder of parties

Other provisions under the Austrian Code of Civil Procedure (ACCP) facilitate a consolidation of claims when (1) the jurisdiction for all respective claims lies with the same court, (2) the same type of procedure is applicable to all claims, and (3) the matter in dispute is of a similar or identical nature and addresses the similar or identical type of facts.

iii Linking of proceedings

Also, judges may bundle proceedings, bringing a reduction of costs and helping to speed up or simplify the procedure.

iv Actions by representative bodies

Also worth mentioning are representative actions by associations. Various laws such as the Act Against Unfair Competition and the Austrian Consumer Protection Act authorise

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certain representative bodies to bring actions for injunctive or declaratory relief on behalf of consumers. However, as the standing to sue lies with the representative bodies, such actions do not constitute a class action instrument in the strict sense.

II THE YEAR IN REVIEW

In the past year efforts to implement 'real' class action provisions in Austria have generally increased. Next to consumer organisations that have been calling for the implementation of class actions provisions in Austria for years, political parties have also now focused on the topic and submitted parliamentary motions calling for the introduction of an effective system to enforce collective interests. Furthermore, scholars and judges openly joined the discussion and spoke out to the media for the implementation of class action provisions.[2] A crowdfunding platform in support of class actions in Austria as initiated by the former head of the VKI has, however, lost some momentum owing to a lack of financial support in the past year.[3] At the same time, the entry into force of the General Data Protection Regulation (GDPR)[4] in combination with legislative implementation steps taken by Austria[5] will bring about means for non-profit organisations to file lawsuits for damages in case of breach of data protection rules upon the mandate of affected persons, which can include claims brought by a large number of affected persons.[6]

Backing the predominant Austrian system, critics of the current 'pro class action efforts' point out that the Austrian Civil Procedure Code already provides for possibilities to enforce collective interests.[7] Furthermore, critics red flag a certain blackmailing potential of class actions.[8]

With regard to potential future litigation, it should be mentioned that Wienwert Holding AG, an issuer of certificates related to real estate investments, became insolvent in February 2018. Collective customer claims, and lawsuits, may follow in that context.[9] Further, the Austrian consumer protection association VKI is currently assessing possibilities for collective action against Volkswagen.[10] Finally, another platform working together with an international litigation funder have recently launched a collective action against Volkswagen in Austria and plan to file more going forward.[11]

2 *Klauser*. Warum Österreich eine echte Sammelklage braucht, Der Standard 2 October 2017; *Kodek*, Die Presse 2017/40/05; *Wendehorst*, Die Presse 2017/42/03.

3 http://help.orf.at/stories/2848692/ (visited on 19 February 2018).

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; GDPR).

5 Data Protection Adaptation Act 2018 [Datenschutz-Anpassungsgesetz 2018], Federal Gazette No. I 120/2017.

6 Cf. Sections 28, 29 Data Protection Adaptation Act 2018.

7 As described in some detail below.

8 *Stefan Albiez*, VbR 2017/74, 111.

9 https://diepresse.com/home/wirtschaft/verbraucher/5356458/Wienwert_Was-Anleger-nun-machen koennen?direct=5356830 (visited on 19 February 2018).

10 https://verbraucherrecht.at/cms/index.php?id=2419 (visited on 20 March 2018).

11 https://www.dieselklage.at (visited on 20 March 2018).

III PROCEDURE

As outlined above, the following procedural tools are useful for pursuing collective interests, although they differ from real class action provisions.

i Joinder of parties

If two or more parties on one side of the civil proceedings are involved in a court dispute against a single opponent, Section 11 ACCP allows a joinder of parties to facilitate the proceedings, save costs and to allow uniform decisions. This procedural instrument distinguishes between a formal joinder and a material joinder of parties.[12]

Material joinders occur in cases, where several parties jointly hold a claim (co-heirs, co-owners, etc.), or for cases where the underlying facts of each claim are identical (similarity of facts is not enough in this regard).[13] A material joinder establishes a common place of jurisdiction (competent court) and causes the claim amounts to be added up (affecting the costs of the proceedings).[14] A material joinder is useful for either a group of claimants that forms a group of creditors by operation of law or for parties that constitute any other form of legal community or alliance.[15] Examples are several persons injured by one and the same accident or tenants that rent the same apartment.

For a formal joinder, different requirements are provided for. It can be established under the following conditions:

a one and the same court has jurisdiction for all claims (therefore, a common place of jurisdiction is created, for example, because the claim is directed against a single defendant at the place where the latter is domiciled); and

b the matter in dispute is based on the same nexus, meaning similar facts and similar questions of law. Complete identity of the facts is not required for a formal joinder.[16]

Regarding formal joinders, claim amounts remain separate, underlining the independence of each claim from each other. In general a formal joinder is the appropriate procedural tool for cases involving a number of similar claims. Obvious examples would be that a group of tenants of different apartments is sued for outstanding house rent, or a group of employees sues the employer for outstanding salary.

Both in case of material and formal joinders, the individual claims remain formally independent. Consequently, each claim must fulfil the procedural requirements for civil claims individually, and the same kind of procedure applies to all claims. The proceedings are merely combined. As a result procedural steps taken by one claimant that solely address the course of the procedure also have an impact on the other joinders, while procedural moves, which address the individual civil claim, only affect the claim of the joinder that takes this procedural action.[17] In other words, each claimant can waive, settle or set off one's

12 For the sake of clarity, the following explanations are simplified. In particular, cases, where the claim of several parties must necessarily lead to the same court decision for or against all claimants (Section 14 ACCP; e.g., a claim of several shareholders of a partnership to exclude one co-partner), are not covered here, because they are regularly not relevant in class action scenarios.

13 *Schneider* in *Fasching/Konecny* (Third edition, 2017) II/1 Section 11 ZPO, Rz 7.

14 *Rechberger/Simotta, Zivilprozessrecht* (Ninth edition, 2017), p. 187.

15 *Rechberger/Simotta, Zivilprozessrecht* (Ninth edition, 2017), p. 185.

16 *Schneider* in *Fasching/Konecny* (Third edition, 2017) II/1 Section 11 ZPO, Rz21.

17 *Rechberger/Simotta,* Zivilprozessrecht (Ninth edition, 2017), pp. 187–188.

claim without affecting other joinders. The same holds true for remedies, amendments or withdrawals of claims. This kind of conduct only affects the claim of the joinder that sets the respective procedural action.

With regard to both formal and material joinders of parties, court rulings only address the individual claims. Thus, a court ruling on one claim does not constitute a legally binding precedent for all the other joinders – rulings may even differ. However, practice shows that in most cases a ruling on one claimant has a factual impact on the outcome of the claims of the other joinders.

Joinders of parties do not solely depend on the discretion of the court. Also, parties are entitled to initiate this kind of procedural tool.

Even though a joinder of parties helps to facilitate proceedings that involve more than one party on one side of the proceedings, this procedural instrument soon reaches its limits. In practice, real mass proceedings would still not be feasible. Joint proceedings including hundreds of parties would simply not be administrable.

ii Linking of proceedings

In terms of efficiency of civil proceedings – especially reducing overall costs and duration – civil courts are authorised to link separate and pending civil proceedings pursuant to Section 187, Paragraph 1 of the ACCP.

In order to apply this provision the following preconditions have to be met:

a the proceedings to be linked have to be pending before the same court; and

b at least one party to the proceedings has to be involved in the same role in all proceedings (either the respondent or the plaintiff).

The linking of proceedings depends on the discretion of the court.[18] At any time linked proceedings can also be separated again. The parties themselves do not have the right to demand either the linking or the separation. In this respect there are no remedies against the court's decision.

According to Austrian law, linked proceedings do not have the effect that parties are joined; also, the amounts in dispute are not added up. As a result, the parties' claims remain entirely separate.[19] One party's procedural conduct has no legal effect on other parties of the linked proceedings. Also, a ruling on one party does not set a legally binding precedent for other involved parties (although a factual impact on the outcome of the other claims can be expected).

Even though the preconditions outlined above are the only requirements for courts to link proceedings, judges will most likely only link proceedings regarding related claims. This goes along with the provision's objectives to simplify proceedings, and reduce their duration and overall costs.

For collecting collective interest in real mass proceedings this procedural tool is also not a satisfying solution. Uniform decisions still cannot be ensured and more importantly parties are not entitled to initiate the linking of the proceedings. Generally, courts are reluctant to link proceedings, because of the additional workload involved for the judge linking

18 *Höllwerth* in *Fasching/Konecny* (Third edition, 2017) II/3 Section 187 ZPO, Rz 28.

19 *Höllwerth* in *Fasching/Konecny* (Third edition, 2017) II/3 Section 187 ZPO, Rz 4.

proceedings together. In light of the fact that the parties do not have a right to formally request the linking, the practical importance of this tool in general (i.e., even outside the scope of 'class actions') must not be overestimated.

iii Austrian-style class actions

This procedural tool was originally developed through case law. After several court decisions the Austrian Supreme Court approved the concept in its milestone decision under reference No. 4 Ob 116/05w. In this case, multiple aggrieved parties assigned claims for the return of excessive consumer loan interest payments to the Federal Chamber of Labour. The concept is now often used in connection with third-party funding.

As outlined above, class actions in Austria work differently from class actions under, for example, the US rule. Under the US rule one or several claimants (representative parties) act on behalf of a large number of other affected persons who – in most cases – are not engaged in the proceedings themselves and sometimes are not even known by name to the competent court. Nevertheless a possible ruling has an effect on all individuals affected by the case.[20] Under the US rule this effect can only be barred by 'opting out' from a possible ruling.

Under Austrian law this mechanism is not permitted. According to the provisions of the Code of Civil Procedure it is necessary for an affected person to assign the right to claim to another entity or person in order that the latter obtains *locus standi* to pursue the claim in the interest of the assigning parties. This person or entity then pursues the claim on its own behalf, usually in an ordinary 'two-person trial'. As a matter of fact, the assigned entity or person then functions as the sole claimant in a procedural way. There are no procedural limitations as to who may bring a class action claim (in the Austrian manner). So far most class actions (in Austria) have, however, been brought by the VKI and the Federal Chamber of Labour.

In Austria, the effect of rulings in class action proceedings only includes parties that have previously assigned their rights to the formally claiming entity. Nevertheless, although the claims are accumulated by way of the class action, each claim remains legally separate and the court must decide on each claim (but possibly in one single judgment or by way of partial judgments). Thus, a decision on one claim does not constitute a legally binding precedent for other claims, although such a decision will typically have substantial factual impact on the other claims.

In order to bring class actions, the following preconditions developed by the Austrian Supreme Court (4 Ob 116/05w) must be met:

a the base as well as the respective questions of law and facts must be of similar kind or essentially the same; and

b the same procedure must be applicable for all claims.

It is not necessary for the facts or the questions of law to be completely identical. There is also no minimum number of claims to make this procedural tool available.

Unlike class actions under US law, each asserted claim that has been assigned is also subject to individual examination with regard to procedural requirements and specification of the claimed amount. For effective law enforcement it is therefore necessary to gain a clear understanding of each assigned claim also with regard to the amount in dispute. Substantive

20 *Knötzl*, Sammelklage – Unsere ZPO am Prüfstand?, AnwBl 2006, 82, 2.

plea is necessary for each claim. In 2011, the Austrian Supreme Court rejected a class action claim in a retail investor's dispute due to a lack of plea on every single investor contract of each claimant (3 Ob 2/11g).[21] In addition, each assigned claim needs to be supported by substantive evidence. Before submission of the claim it is also necessary to check whether the class action claim is also partly based on claims assigned by minors. According to Section 167 of the Austrian Civil Code, civil claims on wealth-related matters (like a claim for damages) require the approval of the guardianship court.[22] The careful preparation of a class action claim involving the claims of hundreds or even thousands of individuals is therefore essential and requires considerable organisational effort and costs.

iv Actions by representative bodies

Representative actions by associations play an important role with regard to the practical enforcement of consumer interests. Even though such actions cannot be compared to real class action provisions, they are comparable given that one single court action aims to protect the interests of an entire group of persons, mainly consumers or competitors. The main issues can be summarised as follows.

In principle, the right of action lies with designated representative bodies. Consequently, other natural persons or legal entities do not have the right to use this tool. The right of action is also limited to prevent companies from using certain general terms and conditions as well as from engaging in certain unlawful business practices. The relevant provisions regarding this course of action designed to protect consumers' interests can be found in the Austrian Consumer Protection Act. Further, an equivalent tool is foreseen in the Austrian Act against Unfair Competition, which sets out the rules to fight unfair, aggressive or misleading business practices. Further, cases of discrimination against disabled people may entitle consumer organisations to bring representative actions.[23] Representative actions, therefore, mainly pursue public interests. Following a successful representative action, the respective clause in the terms and conditions under scrutiny or the relevant market conduct must not be used any more towards any customer or consumer. This means that the representative action exonerates the consumers or affected customers from taking costly and risky legal action themselves.[24]

The institutions entitled to initiate representative actions are outlined in Section 29 of the Consumer Protection Act and Section 14 of the Act against Unfair Competition. Among those organisations, the most important entities are:

a the Austrian Chamber of Commerce;
b the National Chamber of Labour;
c the Austrian Trade Federation; and
d the VKI.

Many of these institutions have compulsory membership or are publicly funded.

21 *Koller*, Effektive Rechtsdurchsetzung durch Sammelklagen!?, Zak 2012, 63, 3.

22 *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON1.04 Section 167, Rz 27.

23 Section 13 of the Federal Act on Employment of Disabled Persons (Federal Gazette [BGBl.] I No. 82/2005).

24 *Welser/Zöchling-Jud*, Grundriss des bürgerlichen Rechts (14th edition, 2015), p. 355.

v Commencing proceedings

Class actions

As already mentioned above, class actions in Austria can be initiated by any person or entity to which the individual damaged parties have previously assigned their rights. There are no restrictions in this regard. In practice, claims are usually brought by consumer organisations or other entities powered by or cooperating with third-party funders.

Class actions in Austria work on an 'opt-in' basis, since Austrian Civil Procedure law sets forth that the decision to claim lies within the sole discretion of each party.[25] There is (subject to exceptions not relevant here) no way under Austrian procedural law to bind a party to a procedure that it was not formally part of.

Class actions need thorough preparation before a formal claim is actually filed. In the first place, the legal entity designated to ultimately file the lawsuit needs to attract a sufficient number of damaged parties interested in transferring their claims in order to make the project commercially viable (i.e., large enough to attract third-party funding). Third-party funders will generally only be interested in the case, if the aggregate amount in dispute is big enough to cover its compensation if the litigation is successful, this being at least a high six-digit, or preferably a seven-digit euro or US dollar amount. Since this takes time and damage claims are normally subject to a limitation period of three years from the time the damaged party comes to know of the damage and the responsible party, timing is of the essence. In other words, potential 'class action' cases need to be identified at an early stage in order to raise the chances for the claimants to proceed with good prospects of success. After identifying the claims, a lot of 'marketing' is required in order that as many individual parties as possible are made aware that they may join a class action. In particular, the consumer organisations often initiate campaigns in the media to inform about a possible course of action. For example, the VKI offers online forms for potential claimants in order to quickly gather and analyse the necessary data. In any event, such campaigns take place on an optional basis. Nobody is obliged to participate in this court process and can decide to pursue his or her claims alone instead.

Subject to the precondition being met that Austrian courts assume jurisdiction, there are no restrictions in place on who can be included in the claim. The only requirement is that the claimant has assigned one's right to the person or entity that subsequently pursues the class action claim on its behalf in Austria. Since court rulings only address parties involved in the civil proceedings, claimants need to 'opt in' to the proceedings by way of transferring their respective claim. In general, parties to civil proceedings are determined by the claim that also defines the rights and obligations arising from the procedure. The claim outlines who is a claimant and who is a respondent. Consequently, except for intervening parties, there are no legal grounds for parties to join civil proceeding at a later stage.

According to Austrian law, it is allowed to use the instrument of third-party funding to receive the funds to initiate mass proceedings (this issue was, however, heavily discussed among scholars). In case of success, the funder takes a substantial share of the litigation proceeds (e.g., one-third or more); in case of a loss, the funder covers the claimant's costs and the opponent's costs. As described above, affected persons have to assign their right to claim to such a funding entity that then pursues the claim in an ordinary two-person lawsuit.

25 *Rechberger/Simotta*, Zivilprozessrecht (Ninth edition, 2017), p. 243.

vi Joinder of parties

When the certain conditions for either a formal or material joinder are met, parties are entitled to initiate civil proceedings as joinder of parties. Joinders of parties are on an 'opt-in' basis. As described above, it is a key principle of the Austrian Code of Civil Procedure that the decision to claim lies at the sole discretion of every party. Claimants and defendants are determined by the claim.

vii Linked proceedings

The linking of proceedings depends on the discretion of the court. Therefore, parties do not have the procedural right to demand such an action. Parties do not have a remedy to challenge a court's decision on whether proceedings are linked or not. Practical experience shows that judges seem generally reluctant to link proceedings together, which is also because of the fact that linking proceedings increases the workload for the judge taking such decision (see above).

viii Representative actions

As outlined above, representative actions can only be initiated by consumer or other legally privileged organisations that are determined by the law. The subject matter is limited to injunctive or declaratory relief arising from general terms and conditions or certain business practices. With regard to representative actions, the 'class' is defined by the people affected by the unlawful conduct of the defendant.

ix Procedural rules

As the existing class action system in Austria was mainly developed through case law, there are no special provisions that differentiate class action proceedings from ordinary two-party civil proceedings. The above-mentioned class action is actually – from a procedural perspective – a standard two-party procedure, since the plaintiff files the claim on the basis of a number of claims previously transferred to him or her by way of transfer agreement. In contrast, in case of joined proceedings, the court has to apply the same procedural rules for a case joining a greater number of plaintiffs filing action against the defendant than for a standard case with just two or three parties on either the plaintiff's or the defendant's side. This is why joining proceedings is unlikely to bring about any time and efficiency (and also cost) benefits once the number of plaintiffs gets too high. The same holds true for the method of linked proceedings.

How to structure court proceedings is largely up to the discretion of the court. The standard process is to assess the entire factual basis of the claim, including both the issues relevant for the liability of the defendant in principle and the quantum. However, in cases where the assessment of the quantum triggers substantial additional process, the courts are allowed to issue an interim judgment deciding on the liability of the defendant in principle (interim judgment). This judgment can be appealed separately, which assists a timely final resolution of this prerequisite of any damage claim before spending too much time and resources on quantum. This general procedural tool is likely to be helpful in class actions in particular.

Against this backdrop, the likely duration of class action proceedings can only be estimated with a view to general experience, taking into account the specifics of assessing the facts relevant for the claims of a higher number of persons on plaintiff's side. A significant number of witnesses to be heard adds as much to the timeline as the involvement of court

experts assessing factual issues, which requires specific knowledge that a judge does not have. In fairly straightforward cases the first instance proceedings take – on average – one to two years, while more complex cases may prolong the procedure to three or even four years with exceptional cases going beyond that timeline.

It is fair to say that a class action will, in many cases, require such a broader factual assessment. In many cases, the various damaged parties (i.e., the parties who have previously transferred their claims to the formal plaintiff in case of the Austrian class action) need to be heard by the court and, depending on each damaged party, additional witnesses may play a role. Having said that, 'class action' proceedings will likely take approximately three years in the first instance, if not longer. They still do, however, help to reduce the duration of civil proceedings in general. By way of comparison: if many individual claimants initiated lawsuits against a single defendant, there would be the possibility for courts to pick one procedure as a model case in order to have the main questions of the case decided and not pursue all the other proceedings until then. Depending on the progress of the case defined as the model procedure, decisions in other proceedings will be delayed.

Appeal proceedings or third instance proceedings to the Supreme Court are added to the timeline described above. While it is obvious that complex cases also take more resources of the higher courts weighing on the timeline, it is notable that the factual review in the appeal stage is strictly limited to grave errors of factual appraisal and procedural errors, which negatively affected the collection of the factual basis of the judgment. No party is allowed to bring up any new factual allegations or any additional evidence in the appeal stage. Typically, appeal court proceedings take approximately six to nine months, and the same holds true for the third instance to the Supreme Court. Given the additional complexities of class actions, it is realistic to estimate the duration of the appeal and third instance proceedings to the Supreme Court as one year to 15 months each.

x Damages and costs

The Austrian court procedure in commercial cases does not foresee a jury process. Juries are used for criminal cases involving very severe crimes only. Typically, commercial court cases are handled by a single judge, who is assigned the case through a predetermined internal case assignment system. In cases with higher amounts in dispute, which a class action 'Austrian style' will likely qualify for, each party may request the dispute to be dealt with by a three judge's senate. Depending on the nature of the case (civil or commercial law), these judges are either professional judges or partly lay judges.

Depending on the nature of the case, the calculation of damage may require the involvement of court experts, such as public accountants, if more complex issues need to be considered. If damages only need to be added together depending on the number of damaged parties involved, most judges would do this calculation work themselves. In some cases an accountant may be retained as an expert by the court to do this job. The calculation method for damages under Austrian law is driven by a rather strict causality test. The plaintiff needs to prove that owing to the unlawful action of the defendant certain measurable damage was caused. As a principle only the direct loss is covered. In cases of gross default (intent and gross negligence) or in commercial business relationships, the loss of profit is also reimbursed. There are no punitive damages in Austria. Damages for personal injury including compensation for pain and suffering are recoverable, but the amounts awarded by the courts are much lower than, for example, those a US court may grant in comparable cases.

Costs of civil proceedings in Austria depend on the number of parties involved, the duration and complexity of the case (numerous witnesses need to be heard orally before the court, need for expert opinions, etc.) and the amount in dispute (affecting both court fees and level of attorneys' fees). For each court instance from filing the lawsuit, appeal stage and third instance to the Supreme Court a court fee pursuant to the Court Fee Act falls due, which is calculated as a fixed percentage fee based on the amount in dispute. Court fees add significantly to the costs of court litigation, especially in case of higher amounts in dispute. By way of example, a civil claim of €10 million triggers a court fee of €122,987. Plaintiffs therefore need to calculate the damage diligently in order to avoid excessive claims. At the same time, this regime discourages strategically driven exorbitant claims to induce a fast settlement with the defendant.

According to Austrian civil procedural law, parties to civil proceedings initially have to bear their own costs (including costs for attorneys). The first instance court fee must be paid by the claimant upon filing of the lawsuit; the appeal court and third instance court fee must initially be paid by the party losing in the foregoing instance. Generally, civil proceedings in Austria are governed by strict liability, meaning that reimbursement of costs (including court fees and other costs of the procedure, e.g., fees of a court expert) depends on the outcome of the proceedings.[26] In the case of a 100 per cent win, the losing party has to fully reimburse the winner. In the case of a shared win, reimbursement depends on the success rate. In this regard only the ruling of the final instance is decisive. Reimbursement of attorneys' fees solely takes place according to the Austrian Lawyer's Fee Act that stipulates rates for work hours at the court and for briefs.

With regard to class actions, the court will award the costs according to the scheme described above only between the defendant and the procedural claimant, which means the claimant to whom the individual claims have been assigned. The distribution of the awarded costs among the parties assigning the individual claims is not governed by the procedural law (since the assigning parties are not formally parties to the proceedings), but is subject to the agreement between the assigning parties and the procedural claimant.

In case of joined or linked proceedings, the court will ultimately issue a court decision on costs with respect to each party involved. As each case is subject to individual court assessment, the cost decisions with respect to each claimant may vary.

xi Settlement

As there are no special provisions for class action claims in Austria, ordinary civil procedural law is applicable. Settlement agreements are typically concluded both out of court and in court. If the parties settle a dispute out of court, the claimant typically simply withdraws the claim or the claim is suspended by way of mutual consent of the parties. A settlement in court also terminates the dispute and the settlement agreement is enforceable as such.

The effect of a settlement only binds the parties that have entered into a settlement agreement. Settling a dispute lies with the sole discretion of each party. This also applies to class actions. The claimant to whom the claims have been assigned can freely decide whether or not to settle a claim. To what extent the individual assigning parties may have a right to approve or reject a settlement offer, depends on the arrangements made on the occasion of

26 *Rechberger/Simotta*, Zivilprozessrecht (Ninth edition, 2017), pp. 263–264.

the claims assignment. The assigning parties – since they have transferred their respective claims – cannot independently prevent a settlement entered into by the procedural claimant (unless on the basis of the contractual arrangement between the assignors and the assignee).

IV CROSS-BORDER ISSUES

As Austrian procedural law does not foresee tailor-made rules for class actions, Austria will primarily be the place to file the claim, if the defendant is domiciled in Austria or Austrian courts assume jurisdiction on the basis of the places of special jurisdiction pursuant to the Brussels Ia Regulation, for example, the place of performance (Article 7 No. 1) or claims based on tort (Article 7 No. 2), provided that the plaintiff is domiciled in an EU Member State. Further, parties domiciled in another EU Member State may be added to Austrian proceedings as co-defendants if the various claims are closely connected (Article 8 No. 1) However, as much as any other judgment issued by a court of a jurisdiction in the territorial scope of the Brussels Ia Regulation or the Lugano Convention II, a final Austrian court judgment will then be recognised and enforceable within (most) European Member States.

Further, as described above, the effects of an Austrian court judgment are (subject to a few exceptions) limited to the persons that are formal parties to the proceedings. Parties that do not play a part in the procedure, no matter whether domiciled inside or outside Austria, are not affected by the judgment.

As regards enforcement of foreign judgments in Austria, again the rules of the Brussels Ia Regulation are of primary importance. On this basis, Austria by and large recognises and enforces judgments issued by an EU court. In several instances, bilateral treaties are in place providing for mutual recognition and enforcement of judgments. However, failing any such treaty guaranteeing reciprocal treatment of judgments of either state, Austria does not recognise a foreign judgment. Even factual reciprocity does not suffice. Consequently, for example, US court judgments are generally not recognised and enforced in Austria. If overseas claimants have assets within Austria or the European Union, those assets can, however, be subject to enforcement measures based on an Austrian ruling. Last but not least, Austria recognises and enforces foreign EU judgments based on the Brussels Ia Regulation with no regard as to whether these foreign judgments have been rendered on the basis of standard proceedings or specific class action regimes applicable in the EU Member State of origin of the judgment.

V OUTLOOK AND CONCLUSIONS

It is subject to ongoing debate whether the Austrian legislator shall implement specific class action rules, or the existing procedural tools including the Austrian class action provide the necessary amenities to ensure that well-founded claims can be filed by damaged parties without being deterred by the cost risk, duration and complexity of single court action.

Chapter 3

BELGIUM

Hakim Boularbah and Maria-Clara Van den Bossche[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

i Definition of class or collective actions

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

Action for collective redress (class action)

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

Collective actions (related actions)

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

Action of collective interest

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

ii Use of class or collective actions

In principle, class actions are not permitted under Belgian law. For actions to be admissible, the claimant must fulfil the 'personal interest' requirement (Articles 17 to 18, Belgian Judicial

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Code). An important exception to this principle was introduced in Title 2 of Book XVII of the Belgian Code of Economic Law by the Act of 28 March 2014, providing for the 'action for collective redress'. The scope of this action is strictly limited: only groups of consumers represented by non-profit organisations or public bodies are 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 the Act entered into force in September 2014, six 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

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

Collective actions can be brought before the ordinary competent court. If all the related actions do not fall within the jurisdiction of the same court, Article 566 of the Belgian Judicial Code provides an order of preference for the different competent courts.

There are specific rules for actions of collective interest.

Following a new draft bill (extending the scope of class actions under Belgian law; see Section V), it will no longer be possible to initiate class actions before the Court of First Instance.

II THE YEAR IN REVIEW

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

The first was launched to obtain compensation from the national railway company, SNCB/NBMS, for the interruption and the suspension of the train service during eight days of strikes in 2014 and 2015. The second action was brought against the commercial airline company Thomas Cook following a major delay of a flight from Tenerife South to Belgium. 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 most recent class action was initiated against the marketing company Groupon following a sales offer for diapers by a company named Luierbox.

III PROCEDURE

i Types of action available

Different mechanisms

Under Belgian Law, for the time being, only groups of consumers represented by non-profit organisations or public bodies are 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.

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

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

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

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

Action for collective redress can only be commenced for alleged violations by an enterprise of its contractual obligations or of specifically enumerated Belgian and European Rules (Article XVII.36(1) and Article XVII.37, the Code of Economic Law). These rules have in common that they all contribute to the protection of consumers. This list includes provisions included in the sections of the Code relating to competition law, price developments, market practices, consumer protection, payment and credit services, safety of products and services, intellectual property and electronic economy. There are also special pieces of legislation regarding privacy protection, electronic signatures, insurance, health, professional liability, banking and finance, tour operators, passenger transport, energy and product liability, among others.

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

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

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

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

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

ii Limitation periods

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

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.

Most other claims are time-barred after 10 years (for example, contractual liability).

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

The term of limitation of consumers' individual actions who have exercised their 'opt-out' option is suspended for the period running 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 consumers inform the court registry of their option (Article XVII.63, Section 1, the Code of Economic Law).

If the action for collective redress ends because of a lack of consumers' representative, the term of limitation of consumers' individual actions who are members of the group is suspended for the period running 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 end of the action is ascertained (Article XVII.63, Section 2, the Code of Economic Law).

The term of limitation of consumers' individual actions who have been excluded from the action is suspended for the period running 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 consumers are informed by the court registry that they are not members of the group (Article XVII.63, Section 3, the Code of Economic Law).

iii Commencing proceedings

Definition of class

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

The group of consumers that may 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 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 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 of the group having their habitual residence in Belgium (Article XVII.38, Section 1(1) and Article XVII.43, Section 2(3), of the Code of Economic Law).

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

a for consumers who do not have their habitual residence in Belgium;
b if the action aims for restoration of physical or moral collective damage;

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

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

The decision on the admissibility of the class action initiated by Test Achats against the airline Thomas Cook was the first decision on the admissibility of a class action in Belgium. The court held that, in considering 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.

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.

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 the 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).

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

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.

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

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

a ensuring that the group members are soundly represented considering that, without having granted any mandate or proxy to the group representative, they will, however, be bound by the decision obtained by the latter;

b protecting defendants by avoiding frivolous actions; and

c if several candidates apply, enabling selection by the judge of the most suitable representative, excluding the principle of 'first come, first served'.

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

In the decision of 17 March 2016 (see Section III.i), the Belgian Constitutional Court held that the limitation of bodies who can act as group representative is reasonably justified in the light of the above-mentioned objectives.

In that same decision, the Court held that, in addition to the above-mentioned bodies, class actions are also admissible if they are brought by the organisations mentioned in

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

Therefore, class actions can also be brought by the representative entities designated for this purpose by the Member States of the EU and EEA.

Under the Recommendation, these entities must be designated 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 in respect of which the action is brought; 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 interests.

Following the decision of the Constitutional Court, these entities are now explicitly included in Article XVII.39, 4° of the Code of Economic Law as a fourth category of potential group representatives.

Professional claimants

Only consumers 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.

The Belgian 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 an agreement is concluded between the third-party funder and the group members before the distribution of the compensation, which is unlikely. If a consumer uses third-party funding, it will not give the third-party funder standing to participate in the proceedings. However, given the potential influence of the third-party funding on the action for collective redress, its existence must be disclosed in the application initiating proceedings in order for the judge to rule on its adequacy (as for the group representative).

No public funding is available for actions for collective redress.

The Belgian 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 with 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.iv).

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

There are no other funding options available.

It is very likely that the lack of a funding regime will affect the attractiveness and frequency of actions for collective redress in Belgium since group representatives must have an important financial capacity in order to undertake such actions on behalf of consumers, without any remuneration and with a 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, all six class actions initiated so far have been initiated by Test Achats, the main Belgian consumer protection organisation. Although class actions cannot be initiated for profit and the class actions initiated by Test Achats can be joined by consumers without payment, it appears that class actions have become an important source of income for the organisation. By launching actions for collective redress, on the one hand, and activities relating to collective purchase of products and services, on the other hand, the organisation has reached 2.4 million consumers in recent years, which has resulted in 60,000 new paid member subscriptions and in an increased use of its service platform.

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

iv Procedural rules

Timetabling

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

a Admissibility phase (two months after the filing). However, it appears that this legal deadline is not applied in practice. In the class actions initiated so far, taking into account the importance of the admissibility phase and the rights of defence (of the defendant in particular), a procedural timetable was set with deadlines for the parties to exchange briefs regarding the admissibility of the class action, followed by oral pleadings concerning this aspect only. Since this timetable has always been (and is usually likely to be) spread over several months, the decision on the admissibility is generally not rendered within two months after the filing of the class action.

b Compulsory negotiation phase (three to six months after the judgment on the admissibility).

c Litigation phase. This involves:
- proceedings on the merits;
- exchange of briefs;
- oral pleadings held before the court; and
- judgment rendered by the court.

d Distribution of compensation phase.

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

Certification and qualification

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

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

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

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

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

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

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

In theory, the court must rule on the admissibility of the action for collective redress within the two months following its filing with the court (however, see above 'Timetabling'). If the court considers the action for collective redress admissible, the judgment will authorise the group representative to act as such. The judgment must identify the group and any sub-categories. 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. An action for collective redress can only be admissible if it appears more effective than an individual action of ordinary law. As indicated, the (potential) number of the claimants is an important factor to be taken into consideration by the judge when examining the admissibility requirement (see Section III.i).

An action for collective redress is more likely to be deemed more efficient than individual actions when an important amount 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 compensations were 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 become without basis (that is, devoid of purpose) because once they are compensated, they will automatically lose their substantive right. Therefore, a decision on the admissibility becomes unnecessary.

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

v Damages and costs

Damages

Under Belgian law, the basic principle is the full compensation of the actual damage suffered. The injured person must be reinstated into the position he or she would have been in if the injury had not been committed. To that extent, punitive damages are prohibited. Quantification of the actual loss suffered is calculated by the judge on the ground 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 in order 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 2017) at 2 per cent per annum.

To date, no decision on the merits of an action for collective redress has been rendered yet, and as such, no damages have been awarded.

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 may 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) (Articles XVII.45 to 51 of the Code of Economic Law). This compulsory stay of the proceedings is provided to allow parties to negotiate a potential collective settlement agreement within a specific time frame decided by the court.

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

Otherwise, if the parties reach an amicable settlement of the case 'out of court' before the decision on the merits, they are entitled to 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 in order to rule on the merits.

IV CROSS-BORDER ISSUES

Claimants outside the jurisdiction

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

V OUTLOOK AND CONCLUSIONS

Proposals for reform

At the national level, the Belgian federal government carried out an evaluation of the procedure for collective redress (by means of a questionnaire disseminated to all stakeholders) in order to examine, among other things, whether the scope of application of the procedure (currently open to consumers) could be extended to small and medium enterprises (SMEs).

At the European level, Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the Member States (Antitrust Damages Directive) was adopted by the Council and the Parliament in November 2014. The aim of this directive on 'private enforcement' of competition law is to provide effective access to justice to obtain compensation for direct and indirect victims, both consumers and SMEs, for violations of competition law.

The Antitrust Damages Directive does not require member states to introduce collective redress mechanisms for the enforcement of competition law (Preamble, Section 13). However, considering the ratio of the directive (effective access to justice) and the nature of the damage

(mass damage, for which class or collective actions are recommended based on grounds of procedural economy), the European institutions did recommend that the Member States introduce such collective redress mechanisms open to SMEs.

As mentioned, in June 2017, the Belgian legislator extended the scope of the class action regime to include infringements of EU competition law.

Following the above-mentioned evaluation of the Act on the one hand and the recent Fipronil crisis in the EU on the other hand, the Belgian government has also decided to extend the scope of the collective action under Belgian law. Accordingly, on 1 September 2017, the Belgian Council of Ministers approved a preliminary draft bill extending the access to collective actions to small and medium-sized enterprises. On 26 October 2017, the Council of State issued its opinion on the draft bill. On 22 January 2018, a new draft bill was submitted to the Chamber of Representatives so as to take into account the comments of the Council of State. The draft bill was adopted by the responsible committee on 6 March 2018 and is soon to be put to vote in plenary session.

Following the new bill, class actions can be initiated by a group of SMEs injured as a result of a common cause, represented by a group representative acting on behalf of the group. In the event both consumers and SMEs decide to act in the same cause, the two groups will have to be represented separately.

Within this context, SMEs are defined – in accordance with the EU Recommendation 2003/361/CE on SMEs – as enterprises that employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million.

The following entities can act as group representative: (1) an inter-professional organisation having legal personality and defending the interests of SMEs that is either represented in the High Council for the Self-employed and the SMEs, or authorised by the Minister of Economy; (2) a non-profit organisation authorised by the Minister of Economy that has existed for more than three years; or (3) a representative entity designated for this purpose by a Member State of the EU or EEA that meets the requirements set out in Paragraph 4 of the Commission Recommendation 2013/396/EU on collective redress mechanisms dated 11 June 2013. Commercial companies and law firms are, therefore, excluded as they do not meet these criteria.

As for consumers, collective actions by SMEs can only be brought for alleged violations by an enterprise of its contractual obligations or of specifically enumerated Belgian and European Rules. It can be expected that most collective actions brought by SMEs will be based on violations of (Belgian or EU) competition law or unfair market practices.

The group of SMEs will be composed pursuant to the same rules applicable to consumers (opt-in or opt-out).

The extension will be applicable to all cases introduced after the date of the entry into force of the act introducing the extension, provided that the alleged breach occurred after 1 September 2014.

Chapter 4

BRAZIL

Sérgio Pinheiro Marçal and Lucas Pinto Simão[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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

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

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

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

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

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

II THE YEAR IN REVIEW

In Brazil, 2017 was marked by: (1) an important judgment from the Federal Supreme Court on the standing of associations to bring class actions; (2) a settlement agreement on some of the largest class actions in Brazil; and (3) the rollout of incidental proceedings for resolution of same subject-matter lawsuits as the New Civil Procedure Code (Law 13,105 of 2015) came into force.

Making reference to case law review related to the standing of associations to bring class actions in representation of their members, the Federal Supreme Court decided on 10 May 2017 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'.[3] We will further elaborate on this decision, but this is still a bone of contention, and subsequent judgments – especially from the Superior Court of Justice – are expected to shed light on the extent of this Federal Supreme Court finding and whether its dictates are mandatory for all types of class actions.

On the second point, it is worth noting that multiple class actions were brought by holders of savings accounts between 1987 and 1991 for redress of losses from economic plans implemented by the Brazilian government in an attempt to fight hyperinflation during that period. After decades of debates, a settlement agreement was signed by several banks, consumer defence associations and the Public Prosecutor's Office (with the participation of the Brazilian Central Bank).

The opt-in settlement agreement is not binding on the individuals, and establishes a compensation for all those who brought individual actions or enforced civil or public class action awards within the legal deadlines. Regardless of their relations with signatory associations, all plaintiffs aggrieved by the Bresser, Summer or Collor II Plan will be compensated according to the settlement agreement. The overall amount is yet unknown, but is likely to exceed US$4 billion.[4]

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

In 2017, the Brazilian Justice Council[5] reported approximately 100 incidental proceedings for resolution of same subject matter lawsuits involving consumer law, tort, civil

3 Extraordinary Appeal 612043/PR, Reporting Justice Marco Aurélio, judgment of 10 May 2017, Federal Supreme Court.

4 https://www.conjur.com.br/2017-dez-12/acordo-planos-economicos-promete-pagar-honorarios-advogados.

5 http://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_l%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shDRGraficos.

procedure and other subjects. This new proceeding has been praised as a part of the Brazilian court precedents system based upon binding precedents, and intends to unclog Brazilian courts.

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

III PROCEDURE

i Types of action available

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

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

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

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

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

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

ii Commencing proceedings

With regard to the standing to file class actions, unlike what is found in US law, Brazilian lawmakers opted for expressly indicating who are the parties with standing to file a class action. Under Law 7,347 of 1985 (Article 5) and the Consumer Protection Code (Article 82), the parties with standing to bring a class action to defend the rights of citizens in court are: (1) the Public Prosecutor's Office; (2) the Public Defender's Office; (3) the federal government, states,

municipalities and federal district; (4) the entities and bodies of the direct or indirect public administration, even if with no separate legal identity, when specifically intended to defend diffuse and collective interests and rights; and (5) associations legally organised for at least one year, and whose institutional purposes include the defence of diffuse, collective and/or homogeneous individual rights. Further, the Public Prosecutor's Office must also intervene in class actions as an overseer of the law (when it is not a plaintiff in the class action).

In Brazil, there is generally no requirement for class-representative adequacy as to the parties with standing to file class actions, and Antonio Gidi notes that the standing to file a class action is concurrent, disjunctive and exclusive. It is concurrent because all parties with legal standing may seek collective relief for citizens in an independent manner. On the other hand, the legal standing is disjunctive, which is different from a complex standing, 'as any of the parties with joint standing to sue may file, alone, a class action with no need to form a joinder or else obtain authorisation from the other parties which also have standing to sue'. Such standing is also exclusive in that the parties with legal standing are expressly identified in prevailing law.[6]

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

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

It so happens that the matter was taken to the Full Bench of the Federal Supreme Court which, acknowledging the leading case status of this issue, held in Extraordinary Appeal 573.232/SC that the activity of associations in defending the interests of their members can take shape by representation only, not as substitute parties in the proceedings. It was thus declared that express authorisation should be obtained, whether individually or by a meeting resolution, for an association to file class actions. After such finding by the Federal Supreme Court, other Brazilian courts[7] sided with this opinion that an association could only bring a class action defending its members by way of representation in the proceedings (Article 5, XXI of the Federal Constitution) under prior express authorisation (either through an individual act or through a resolution made at a meeting, which measure is not satisfied merely via a 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

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

7 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.

date and listed on the complaint'.[8] This judgment has triggered discussions on whether the interpretation of Article 5, V of Law 7,347 of 1985 and Article 82, IV of the Consumer Protection Code would lead to the conclusion that the general statutory provision is not enough to legitimise the standing of associations in defence of the rights of their members, it being thus indispensable to obtain the prior express authorisation of such members.

iii Procedural rules

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

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

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

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

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

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

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

There is no jury and the judge will make a decision granting or denying the class action. Under Law 7,347 of 1985, this decision has immediate effects, and appeals usually cannot stay the applicability of such decision until a future favourable judgment by the Court of Appeals.

8 Extraordinary Appeal 612043/PR, Reporting Justice Marco Aurélio, judgment of 10 May 2017, Federal Supreme Court.

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

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

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

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

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

iv Damages and costs

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

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

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

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

v Settlement

In Brazil, unlike what is found in US law, there is no systematic regulation of settlements in class actions involving diffuse, collective or homogeneous individual rights. There are only sparse provisions in Article 5, Paragraph 6 of Law 7,347 of 1985 and in Article 107 of the Consumer Protection Code, but these provisions are clearly not enough, which ends up hindering the effective settlements involving class actions.

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

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

However, a significant portion of legal writings states that the terms of agreement and the consumer collective agreement do not operate as true forms of settlement since there is purportedly no actual disposal of rights under those instruments. Generally speaking, 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.'[9] Hence, according to such majority stand emerging from legal writings and court rulings, such settlements could only be reached with regard to the form, time, place and conditions for fulfilment of an obligation or redress – without ever entailing a disposal or waiver of substantive rights, though.

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

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

IV CROSS-BORDER ISSUES

Class actions are usually filed in Brazil to obtain redress on behalf of Brazilian citizens – but, in theory, they could also include foreign claimants. Nevertheless, unlike what happens in other jurisdictions, Brazilian law does not offer particularly favourable options for foreign claimants, and cross-border class actions are possible – but extremely rare in practice. Much to the contrary, in some cases, foreign claimants are even required to post bond when bringing suit in Brazil.

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

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

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

V OUTLOOK AND CONCLUSIONS

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

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

Chapter 5

COLOMBIA

Javier Tamayo Jaramillo[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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

Since the enactment of this law, 20 years have elapsed in which their vicissitudes have been evidenced, since despite the legislator and those enshrined in the Civil Code of 1887 – Articles 1005 and 2359 – only reached a real legislative level with the application of Law 472. Thus, the first years were characterised by the high expectations generated by its enactment, followed by a boom period and even the abuse of these actions, especially popular actions, owing to their excessive proclamation, overflowing with actors who pursued economic incentives that the law incorporated in favour of those who were triumphant. This experience now places us at a point where some laws that have been proclaimed have transformed the previous panorama to where we are now, where we have a more settled case law, although still in evolution.

Therefore, in the first part of this chapter, we will continue reviewing the incubation and evolution of popular and class actions, to later review its current projection and the procedures contemplated for their exercise and, finally, to reach conclusions about their application.

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

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

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

It is not necessary, then, to affirm that class actions pursue the protection of collective rights and interests, as it is apparent that they tend to protect individual rights. A different thing is that class actions are only aimed at seeking the compensation of individual damage of a group of victims, so that from the harmful event there is no damage to a right or a collective interest.

II THE YEAR IN REVIEW

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

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

Considering the above, Law 1285 of 2009[5] established the mechanism for the possible review of judgments and some injunctions, handed down by the courts pertaining to the contentious-administrative jurisdiction to the Council of State, both in popular and class

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

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

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

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

actions. This review seeks the unification of court rulings, as well as ensuring the effective protection of fundamental rights and the review of legality regarding the judgments of the administrative jurisdiction. However, it is noteworthy that this mechanism is not always effective because many of these procedures take years to decide, given the amount of matters to be resolved by the Council of State. In addition, the review is possible, not automatic, much less mandatory, and, finally, it only proceeds when it is proven that the judgment is contrary to what is normally decided by the courts in similar cases or when it is contrary to the established jurisprudence of the Council of State, which has led to the fact that few judgments have been subject to review.[6]

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

Rulings pronounced in popular or class actions that are processed by the civil jurisdiction are not susceptible to review. This is the reason why in this domain jurisprudence is diffuse, because of the lack of a mechanism for its unification, since it only exists for class actions through the cassation appeal before the Supreme Court of Justice.

To conclude this Section, it is significant to put forward that throughout these 20 years, the most relevant and frequently discussed issues in collective actions have been, among others, those related to the protection of the environment, the ruling on the pollution of the Bogotá River, judgment 01-479 of 25 August 2004, access of the handicapped and the services provided for these people in public places, the access to and provision of home public services and, finally, administrative morality in state contracting.

III PROCEDURE

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

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

i Types of action available

The Colombian legal system provides two types of collective actions, according to the object of protection pursued by each of them. Thus, if what is intended is the safeguarding and protection of collective interests and rights,[7] recourse should be made to a popular action;

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

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

whereas if the aim is the defence of the rights and interests of a plural number of people (i.e., a group), the procedural means to choose will be the class action. In this way, the determining differentiator will be the damage caused.

The damage that intangibly affects the quality of life of an entire community is a collective damage, and the preventive or restorative action must be exercised on behalf of the entire affected community through a popular action. In contrast, group damage affects a plural number of victims who suffer individual personal damage that, when suffered by a significant number of individuals, shape the group or massive damage, whose compensation can be claimed in the same judicial process, through a class action. In the case of mass or group damage, each of the affected victims could seek compensation for their damage through an individual claim; however, owing to the massive nature of the damage the law provides for class action as a theoretically more agile procedural mechanism for the protection of the interests of the affected group. We use the word 'theoretically', since later we will see how, in practice, claimants do not always obtain the aforementioned benefit provided for class actions.

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

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

8 Tamayo Jaramillo, Javier. *Las Acciones Populares y de Grupo en la Responsabilidad Civil*, 1st edition, pages 185–187, Baker & McKenzie, Diké, 2001.

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

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

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

Elements of the actions

In addition to the damage to the collective interest, for a popular action to be admissible the defendant must be potentially liable for the damage. This means that the principles of civil liability are applicable to popular actions, because they imply the verification of a contingent or already caused collective harm, a fact attributable to the defendant and a causal link between one and the other.

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

The expiration periods of both actions

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

In relation to class actions, Law 472, in Article 47, states that 'without prejudice of the individual action corresponding to the compensation of damages, the class action shall be promoted within two (2) years following the date in which the damage was caused or the injurious action that caused it ceased'. This Article commands that if two years have passed since the damage was caused or since the harmful action ceased and no class action has been commenced, the individual action of each member of the group can still be filed and will be valid in accordance with the terms of expiration and prescription conceived in the jurisdiction.

of Popayán, Civil Chamber, referred to a reasonable interpretation of the provisions that regulate popular actions in defence of consumers and concluded that there was contingent damage that could be cautioned through such action. Judgment 8 October 2002. *Mario Sagid Mosquera López v. Panamco Colombia SA*.

10 Article 11, Expiry action, Law 472 of 1998.

ii Commencing proceedings

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

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

In relation to class actions, Law 472, Article 48 establishes that any aggrieved party may initiate the action, but it also requires the plaintiff to identify a group of at least 20 affected people who meet the same conditions in a common cause that originated the individual damage for these natural or legal persons. 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 in name of the whole group, not only for the victims who granted power of attorney.[11]

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

Defining the class

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

In our opinion, the identification of the class should be established by the judge before admitting the claim, based on the criteria for the determination of the affected class set by the plaintiff. This judicial prerogative would be accomplished with its precise determination, without extending it to the fact that the judge could expand the number of plaintiffs or defendants.

The importance of the delimitation of the class is also that, if not done this way, the distribution of compensation before the judgment would be unmanageable and would make the compensation open to discussion by people who did not become part of the process and whose membership in the class action could be debatable. The non-determination of the class in case of an acquittal could also generate avoidance of the effects of *res judicata*. Finally,

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

12 Article 56, Law 472 of 1998.

an inadequate delimitation of the class could impede the settlements, as there would be no clarity as to who would have to be called to the settlement and there would not be sufficient guarantees for the defendant to ensure the closing of the event in a definitive manner.

iii Procedural rules

Effects of class exclusion

The exclusion of one of the members of the class the group is perfected with the expressed statement of the affected of his desire to be excluded, made within five days of the expiration of the term to answer the claim.

Effects of the judgment

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

Likewise, the acquittal has the effects of double jeopardy for all the members of the class, except for those who were expressly excluded in a timely manner. We consider this situation absurd and unjust for the victims, because those who did not expressly exclude themselves from the class and did not become part of the class action process see the violation of their right of defence, as they are linked by an unfavourable ruling in a lawsuit in which they did not even participate. We recognise that the Colombian legal system suffers from important shortcomings, when compared to the majority of foreign legal systems that enshrine the figure of the class action, in which the victims benefit from the condemnatory sentence proffered within the class action, but the acquittal only binds the plaintiffs who were individually informed of the existence of the process and were summoned to become parties in a timely manner.

The presiding judge

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

Applicable regulations

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

This normative compilation was replaced by the General Procedural Code, which today corresponds to the applicable legislation but, given its novelty, there are still claims being processed under the previous legislation. To this is we should add that, part of the jurisprudence and the doctrine have understood that popular and class actions known by the contentious-administrative jurisdiction, must apply as residual rules of the

Contentious-Administrative Code. The plurality of the mentioned laws, situates us in a scenario that can create confusion regarding the procedural norm applicable to a popular or class action; this may end up affecting the right of defence of the parties in the proceedings or it may create uncertainties in the procedure and bring about legal certainty.

iv Damages and costs

Cost recovery

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

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

The jury

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

Tort compensation

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

The compensation imposed in the ruling of a class action

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

v Settlement

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

In the case of popular action, Article 27 of the Law orders the holding of a compliance hearing, which is decreed *ex officio* by the judge, and to which the parties are obliged to

attend in order to subscribe a compliance agreement. In the compliance agreement, the parties discuss measures to protect the collective right or interest that has been threatened by the defendant, and if possible, accept the agreement. In case it has been approved, it is then signed and the judge reviews it and approves it through a judgment. If the trial judge considers that the agreement signed by the parties does not comply with the purposes of protection of the collective right, or that it does not comply with current regulations or that for any other reason it is not appropriate, he can also reject it through a judgment.

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

In relation to class actions, according to the applicable regulations, the early termination of the process could be done through a settlement hearing or a transaction between the parties, and by reference to the regulations of the General Procedural Code it could be said that it would also end the withdrawal of the class action lawsuit. Regarding each of the early termination mechanisms of the process, the following are of note.

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

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

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

IV CROSS-BORDER ISSUES

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

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

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

a not refer to property rights constituted in assets that were in Colombian territory at the time of indicating the process in which the sentence was issued;

b not oppose Colombian laws or provisions of public order, except procedural ones;

c be enforceable in accordance with the law of the country of origin and presented in a duly completed copy;

d not exclusively fall on a matter exclusive to Colombian judges;

e not concern an existing process or enforceable judgment by Colombian judges on the same matter; and

f meet the *exequatur* requirement.

V OUTLOOK AND CONCLUSIONS

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

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

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

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

Chapter 6

ENGLAND & WALES

Richard Swallow and Peter Wickham[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Group litigation has been available in the English[2] 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.[3] However, it is only in the past two years that true 'opt-out class actions',[4] as lawyers from the United States (US) would recognise them, have become available; and only then in the context of certain competition law claims. The English system, therefore, remains markedly different to more developed jurisdictions, but it is likely that future advances both in terms of civil procedure and the class action market more generally (e.g., third-party funding, development of the claimant bar) will result in a degree of convergence.

II THE YEAR IN REVIEW

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

i Opt-out class action proceedings

The very first cases under the new 'opt-out' class action procedure in competition cases have now been scrutinised by English courts, and the outcome of this judicial treatment is now described in greater detail.

1 Richard Swallow is a partner and Peter Wickham is an associate in the dispute resolution group at Slaughter and May. The authors would like to thank Charlotte Eynon for her assistance in producing this chapter.

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

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

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

Dorothy Gibson v. Pride Mobility Products Limited[5]

Pride Mobility is a distributor of mobility scooters that was found by the Office of Fair Trading (OFT) to have infringed the Competition Act 1998 (CA). Pride Mobility reached an agreement that several retailers 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. The Competition Appeal Tribunal (CAT) heard the Collective Proceedings (CP) application between 12 and 14 December 2016. On 31 March 2017, the CAT determined that proceedings should be adjourned on the grounds that the claimants had failed to identify a head of common issues, thereby failing to adequately establish a class. The claimants declined to attempt to reformulate the proposed class, and the claim was withdrawn. Despite falling at the first hurdle, England's first opt-out collective action does not necessarily indicate that the court will follow a narrow interpretation when determining class but instead suggests that on the particular facts, the court was sceptical as to commonality of interests. That said, as described in further detail below, it does appear that what limited jurisprudence there is may make identifying a very large class difficult, as a practical matter.

Walter Hugh Merricks CBE v. MasterCard Inc and others[6]

Filed on 8 September 2016 with the CAT, *MasterCard* was similarly a follow-on claim brought under the new 'opt-out' CP regime, following from the European Commission's finding that MasterCard had infringed EU competition law as a result of interchange fees on transactions between 1992 and 2007. The case was brought by the former Chief Ombudsman of the Financial Ombudsman Service and was valued by the claimants' lawyers at £14 billion, making it the largest claim heard in England to date. In July 2017, the CAT refused to grant a collective proceedings order (CPO) on the basis that expert evidence adduced at the certification stage failed to demonstrate a commonality of interest owing to the fact it could not be determined how much of the loss had been passed through to each proposed claimant. *MasterCard* is, therefore, the second of the CP cases tabled in England that has failed to proceed beyond the certification stage. Following the CAT's ruling, the claimant representative sought permission from the CAT to appeal to the Court of Appeal. However, the application was dismissed in September 2017 on the basis that there was no jurisdiction to appeal a decision to approve or refuse a CPO under Section 49 CA. The claimant representative subsequently sought – and obtained – permission to appeal from the Court of Appeal and at the same time filed an application to the Administrative Court of the High Court for a judicial review of the CAT's decision. The Court of Appeal has decided to set a hearing for both applications. Interestingly, the composition of the court will be two-fold; judges will sit both as the Court of Appeal and as the Administrative Court. At the time of writing, the court has not set a date for this hearing.

Although the challenges experienced in both *Pride Mobility* and *MasterCard* are in part because of the complexity of issues raised in the claim, the respective judgments do not suggest (at least at a theoretical level) an overly strict stance being adopted by the CAT.

5 *Dorothy Gibson v. Pride Mobility Products Limited* (Competition Appeal Tribunal, Case No. 1257/7/7/16), (*Pride Mobility*).

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

In particular, the CAT indicated that it did not require all significant issues to be deemed common issues for a claim to be suitable for a CPO, something that could be important in future litigation, and seems to contemplate large scale class actions. Nonetheless, how this plays out in practice in future cases is still to be determined. Arguably, the experiences of claims under the CP regime to date are illustrative of the safeguarding role CPO applications were intended to have in protecting defendants against frivolous and unmeritorious claims, as opposed to setting any more general precedent.

MasterCard also demonstrated the opportunities provided by third-party litigation funding, with over £40 million of funding having been made available to the claimants. This and similar actions would seem unfeasible without such an arrangement. Not only has this case helped elucidate the CAT's approach to opt-out CP actions (or opt-out actions) in what is a very new area of the law, but it may also be a precursor for subsequent large-scale class actions. Even the early stages of this action would have been unfeasible without such an arrangement.

Significant group litigation order actions

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

The RBS litigation,[7] brought by investors who incurred losses by subscribing for shares in RBS's 2008 rights issue, continues; however, there is now only a very small rump of the litigation in play following most claimant groups settling, as described in greater detail below. In RBS, it is alleged that the bank misrepresented its financial position in the rights issue prospectus; when the bank subsequently collapsed and was taken into public ownership, shareholders suffered aggregate losses valued in the billions of pounds. Individual claimants (of whom there were many thousands, ranging from individual retail investors to large pension funds) banded together in six different claimant groups, each advised by different solicitors and counsel. All claims were managed pursuant to a group litigation order (GLO) that was made on 17 September 2013. For reasons of proportionality and efficiency, the different claimant groups agreed between themselves to divide up the case and each focus on particular areas. The trial was listed to begin in March 2017, but in December 2016 it was announced that four claimant groups (representing larger and institutional investors) had settled their claims for a reported figure of approximately £800 million. Further claimant groups have subsequently settled, and, as matters stand, approximately 87 per cent of the claimants by value have entered into settlement agreements proposed by RBS.[8] Pursuant to a consent order issued by the High Court on 8 June 2017, all claims that had not been subject to an application for a further case management conference by 28 July 2017 were stayed. It is, therefore, very unlikely that the matter will continue to trial. Nevertheless, this case is a demonstration of how the group litigation regime promotes settlement between parties. It may also provide warnings to claimant groups regarding the strategy used in bringing such an action. Given that the different elements of the claim were divided among the claimant groups, once the first groups settled, significant pressure was placed on the remaining groups to do likewise.

There have also recently been three large GLO applications. First, an application was lodged with the High Court on 31 October 2016 against Tesco on behalf of over 100 institutional investors for approximately £100 million. The claim was in relation to Tesco's

7 *Re RBS (Rights Issue Litigation)* in claims entered in the Group Register (HC-2013-000484), (*RBS*).

8 According to a procedural order issued by the High Court on 8 June 2017 FL-2017-000001.

accounting scandal in September 2014, and the resulting alleged breaches of Section 90A Financial Services and Markets Act 2000 (FSMA). As matters stand, the claim is in the preliminary stages and the earliest date for trial is currently listed as 1 May 2020. The second was against Volkswagen and stemmed from the diesel engine emissions scandal. It was filed with the High Court at the beginning of January 2017 on behalf of a group of 10,000 Volkswagen owners seeking £30 million in collective damages.[9] Further marketing to potential claimants is continuing, and the claimant group has now increased to almost 60,000[10] of a potential 1.2 million motorists.[11] Seven claims under a GLO were also made against Lloyds Banking Group and five of its former directors on behalf of nearly 6,000 claimants.[12] The claimant groups argue that a number of omissions and misstatements were made to shareholders regarding Lloyd's acquisition of Halifax Bank of Scotland Plc and its participation in the government's recapitalisation scheme during the course of 2008 and 2009. The trial concluded in March 2018.

ii Litigation funding

There continues to be significant growth in the English litigation funding market. Historically, the funding of litigation by third parties with no interest in the cause of action (a practice known as maintenance) was prohibited. The provision of funding in return for a share of sums recovered (known as champerty) was, *a fortiori*, banned. Champerty and maintenance ceased to be criminal offences decades ago,[13] but it is only in the relatively recent past that reforms intended to facilitate access to justice have spurred the development of a litigation funding market. Substantive developments in securities and competition law assisted in the establishment of that market. Procedural changes, most notably the new Consumer Rights Act 2015 (CRA) collective proceedings regime,[14] are likely to accelerate growth in the sector. Professional litigation funders, including new market entrants from the US and Australia, now offer a diverse range of funding options for different types of litigant (or potential litigant) and access to deeper pools of investment capital.

III PROCEDURE

i Types of action available

The regimes available for English class or group actions broadly fall into two categories: the older opt-in procedures, and the more recent opt-out procedure.[15] As prescribed by these older procedures, the English courts have traditionally only heard opt-in actions, either by

9 www.vwemissionsaction.com/faqs-for-the-vw-emissions-action-legal-claim.

10 www.ft.com/content/1e50e9aa-02a7-11e8-9650-9c0ad2d7c5b5.

11 www.vwemissionsaction.com/faqs-for-the-vw-emissions-action-legal-claim.

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

13 Champerty was decriminalised by the Criminal Law Act 1967. Since then there have been efforts to provide appropriate mechanisms to increase access to justice, such as the introduction of CFAs and DBAs (see footnote 53).

14 Both *Pride Mobility* and *MasterCard*, current CPO applications with the CAT, are funded by third-party litigation funders.

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

representative actions or group litigation. These regimes have become and continue to be an established and integral part of modern English civil procedure. However, there have been major recent innovations in the form of amendments to the CA provided by the CRA. This introduced a new opt-out procedure, which established a 'true' US-style class action regime in English law for the first time, currently though only for private competition litigation.[16]

With regards to the older regimes, the Civil Procedure Rules[17] (CPR) set out both representative actions[18] and proceedings where GLOs are sought.[19] Representative actions and proceedings where GLOs are sought share a number of similarities. For instance, they are both opt-in regimes, require a representative or lead claimant, and unlike a CP, can be utilised for any type of action. Proceedings for GLOs, introduced more recently in 2000, have, however, become the more favourable of the two, due to the simpler procedure and lower standard of commonality required between the class members.

In contrast, the new opt-out regime applies at the moment solely to the competition sphere. Prior to this, there had been a specific opt-in procedure for private competition law claims, though this was deemed to have been too restrictive in scope.[20] Given the nature of competition law claims, namely where the loss to the individual is small but over a very wide class, the new regime seeks to provide the collective redress that is considered imperative for effective rectification. Efforts have been made to introduce similar collective redress mechanisms to other sectors. For example, an amendment to the Data Protection Bill sought to apply the opt-out class action regime to data breaches. This amendment, however, was rejected by the upper house of parliament on 22 November 2017. Despite its limited current application, and the lack of headway made at present in extending the scope of the regime, the new CRA regime remains of particular interest as it may possibly be a harbinger of future broader, or sector-specific, changes to class actions in England.

In all class or group actions, regardless of the procedural form they take, the court must seek to ensure that each case is dealt with justly and at proportionate cost. This is known as the 'overriding objective'.[21]

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

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

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

18 CPR 19.6.

19 CPR 19.10.

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

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

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.[22] 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[23] so long as the same interest requirement is met.[24]

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.[25] It was noted that the class must have a common interest or grievance and seek relief that is beneficial to all. It did not matter whether the class fluctuated, so long as at all points it was possible to determine class membership qualification. However, the attempt in this case to use the representative action as a proxy for an opt-out class action failed because of the inevitable conflicts within the claimant 'class' sought to be represented, which was drawn so widely that it was described by the court as fatally flawed. In particular, the court found that the same interest could not be said to be present as the sheer breadth of the class meant it was impossible to identify which members had the same interest. Furthermore, the overriding objective is important too in shaping its application. Concepts similar to proportionality can be distilled from the case law. Although the CPR appears to require an identical interest,[26] 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'.[27] In light of the requirements for the court to consider the overriding objective, particularly that the dispute is dealt with 'expeditiously and fairly',[28] the representative action regime continues to provide significant potential for effectively bringing a group action.

Group litigation orders

Proceedings that seek GLOs are an opt-in mechanism and requires the individual to have first brought his or her own claim in order to be entered upon the group register.[29] 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 on the other hand, where a defendant is liable to

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

23 *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.

24 CPR 19.6(1).

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

26 CPR 19.6.

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

28 CPR 1.1(2)(d).

29 CPR 19.11, PD 19B, paragraph 6.1A.

numerous claimants but each is separate as to liability and quantum. Where there are no such generic issues, 'nor generic issues of such materiality as to save costs in their determination',[30] 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'.[31] Nonetheless, the court has discretion in granting the order.[32] There is no guidance as to how this discretion is to be exercised,[33] though the overriding objective would still be applicable. Similarly, consideration must be given as well to whether a representative action would be more appropriate,[34] 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.[35] This is in part because the standard of commonality is lower; the interests do not for instance need to be identical.

There are no special requirements for a GLO application,[36] though the applicant should both consider the preliminary steps[37] and ensure that his or her application contains the prescribed general information.[38] 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.[39] Nevertheless, the court may give directions[40] 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 claimants must have been added to the group register. GLOs have not, however, proved especially popular to date. Since the introduction of the GLO procedure in 2000, there have so far only been fewer than 100 GLOs ordered. Whether the increased availability of funding for these types of claims will lead to an increase remains to be seen.

Collective proceedings order

The most significant recent change was the CRA that came into effect in October 2015. Schedule 8 introduced changes to the competition law class actions regime under Section 47A of the CA. While a CP is limited solely to competition actions before the CAT, it is notable for two reasons. First, it is currently the only opt-out class action regime in England, and second, it is a possible indicator of changes to come more broadly to English class actions. While claimants already have the right to bring collective actions[41] as detailed above, these were perceived as insufficient to address the harm caused to both direct and indirect purchasers.

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

30 *R v. The Number 8 Area Committee of the Legal Aid Board* [1994] P.I.Q.R. 476 at p. 480, per Popplewell J.
31 CPR 19.10.
32 CPR 19.11(1).
33 There is no guidance contained within CPR 19, nor the accompanying PDs.
34 PD 19B Paragraph 2.3(2).
35 This can be seen particularly in the recent actions brought under Section 90, FSMA.
36 The normal application procedure under CPR 23 should be used according to PD 19B Paragraph 3.1.
37 The preliminary steps are detailed at PD 19B Paragraph 2.
38 This information is contained at PD 19B Paragraph 3.2.
39 CPR 19.12(1)(a).
40 Pursuant to CPR 19.12(1)(b).
41 Under CPRs 19.6 and 19.11.

introduced under the Consumer Rights Act, 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 CPs can be either 'follow-on' or 'stand-alone'. A follow-on claim is one where a breach of competition law has already been determined by a court or authority such as the OFT or the 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 must therefore prove breach before the CAT as well.

Similar to proceedings for a GLO, a CP requires 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 representative, class definitions and whether it is to be on an opt-in or opt-out basis. Section 47B CA and Rule 79 of the CAT Rules 2015 detail the requirements that must be met for the CAT to make a CPO. Principally, the Tribunal must determine that 'they raise the same, similar or related issues of fact or law',[42] and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.[43] 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 CP's operation, reach and success.[44] The limited case law under the new regime fails to give definitive guidance on how the CAT will exercise its discretion. Nonetheless, as noted above, the judgments in the *Pride Mobility* hearing and *Mastercard* hearing indicate, at least in principle, that the CAT may be willing to adopt a relatively flexible approach to the eligibility and representative criterion, particularly regarding the delineation of classes (and sub-classes). However, this must be set against the fact that both of these cases failed to satisfy the hurdles identified by the CAT.

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

iii Procedural rules

Management

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

42 Section 47B(6), CA.

43 Rule 79(2), CAT Rules 2015.

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

the court may give directions stipulating the date by which further claims cannot be added to the group register without the court's permission.[45] However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.[46]

In contrast, 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'.[47] 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.[48] 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.[49] 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.[50]

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, with liability and quantum, these 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 CPs, 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 cases under the new CRA regime have reached.[51] 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,[52] they may not provide a good benchmark from which to assess the speed and potential efficiencies of such a group action mechanism.

Disclosure

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

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

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

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

48 Rule 74(6), CAT Rules and paragraph 6.37, CAT Guide.

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

50 Rule 85(4), CAT Rules.

51 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.

52 In 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.

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.[53]

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.

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.[54] There are also specific costs rules in the CPR for proceedings governed by GLOs. The default position is that group litigants are severally, and not jointly, liable for an equal proportion of the common costs.[55] 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, the risk is still a considerable factor in determining whether and how a class action is brought. Indeed, the arrangement of ATE insurance is often considered alongside, and of equal importance to, the litigation funding arrangements.[56] Specific to opt-out CPs, damages-based agreements[57]

53 Rule 63, CAT Rules.

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

55 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.

56 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.

57 Historically, all contingency fee arrangements (CFAs) were unlawful in English law. Changes began however when CFAs were introduced in the 1980s which allowed for a legal representative to be paid different amounts depending on the outcome of the case. DBAs were later introduced in 2013 and are allowed in certain civil actions. It is essentially a 'no win-no fee' agreement between a client and their legal representative, which will require the client to make a payment to the representative out of any damages awarded from the losing party up to the statutory cap. The amount will be calculated as a percentage of the damages received. A DBA only covers payments between a client and their legal representative and does not cover any liabilities for adverse costs to the other side were they to lose.

(DBA) are prohibited: there are no such restrictions for proceedings governed by GLOs or representative actions.[58] Therefore, for an opt-out CP to be successful, it will be increasingly likely that it will be dependent upon third-party funding being obtained.

Damages

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

With regard to damages for representative actions, the historic position was that the 'same interest' requirement excluded damages from being recoverable for the class.[59] However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.[60] 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).[61]

The provisions for damages in CP claims are, however, more detailed. Damages are ordinarily compensatory; exemplary (i.e., punitive) damages for CPs have been statutorily excluded.[62] 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 CP action and bring an individual claim. The CAT will calculate damages aggregately for the class or sub-class and will not undertake an assessment for the amount of damages recoverable by each represented person. Rules 92–93 of the CAT Rules 2015 stipulate that the CAT may give directions for the assessment, for instance a formula to quantify damages. Damages are ordinarily to be paid to the class representative for distribution.[63] If all of the damages are not claimed within the CAT's specified period, the CAT may order that undistributed damages are paid to the

58 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 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).

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

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

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

62 Section 47C(1), CA.

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

representative 'in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings'.[64] Any other remaining unpaid damages are to be paid to charity.[65]

The two CPO applications that have so far been brought, in particular *MasterCard* valued by the claimants at £14 billion, indicate the potentially significant damages that could be awarded. 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. However, this can still be a complex and expensive process and defendants may therefore consider it more economical to settle out of court.

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

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.[66] Once a collective proceedings order has been made and proceedings are authorised to continue on an opt-out basis, claims may only be settled by way of a collective

64 Section 47C(6), CA. Criticisms have been levied at such a system that requires not 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.

65 Section 47C(5), CA.

66 Section 49A, CA.

settlement approved 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 that intend to be bound by it. The CAT, however, may only make an order approving the settlement where it deems the terms to be 'just and reasonable'.[67] 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 of the UK who otherwise fell within the defined class and opted in.[68] CP opt-in 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 CP 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.[69] 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.[70] Nonetheless, certain other provisions may further promote settlement, for instance that any remaining unpaid damages are to be paid to charity.[71] 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. However, in class action cases, many claimants have traditionally looked to the US to pursue relief. The Supreme Court's decision in *Morrison v. National Australia Bank*,[72] which effectively barred securities actions without a US nexus,[73] has caused potential claimants, including institutional investors, to reappraise the situation. The advent of opt-in actions under the CA, which are open to claimants domiciled outside the UK, and the increasing availability of third-party litigation funding, in combination with the preexisting attractions of England as a forum, is likely to drive an increase in this kind of work in the English courts.

The impact of the June 2016 'Brexit' referendum result and the ongoing negotiations with the EU remains at the forefront of practitioners' minds. EU law has a significant role with regards to class actions: (1) the Recast Brussels Regulation contains a framework for

67 Section 49A(5), CA.

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

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

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

71 Section 47C(5), CA.

72 561 U.S. 247 (2010).

73 '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.

the allocation of intra-EU jurisdiction as well as provisions for the reciprocal enforcement of member state court judgments; and (2) a multitude of statutory claims, particularly in the area of securities law and financial regulation, are based on EU law.[74] While the specific implications of Brexit are currently difficult to predict, the British government's current proposal is to retain the existing legal framework, for at least a two year minimum period, following withdrawal from the EU in March 2019. Thereafter, Parliament will have an opportunity to reassess legislation on an individual basis. The avowed aim is continuity and stability, and it may be a number of years before any change in this area materialises. By way of practical example, even after the UK's exit from the EU, key tenets of the EU competition regime will remain in effect because they are contained within the CA, a freestanding UK statute. Breaches of EU competition law in remaining EU Member States will remain actionable in England where an English court is willing to accept jurisdiction over a defendant. The law applicable to such disputes would be determined either according to rules analogous to the current regime[75] or by reference to the formerly applicable, and substantively similar, UK rules.[76] Thus, the outlook for the class action market in England remains positive, though it will still be an area to monitor as exit negotiations continue.

V OUTLOOK AND CONCLUSIONS

As discussed above, any Brexit deal is something that will be of particular interest to English class action litigators. However, there are also a number of other forecasted developments to track in 2018 and onwards.

Beginning with CPs, the outcome of the first CPO applications, which have failed to proceed beyond the certification stage, have done little to shed light on the willingness of the CAT to approve opt-out proceedings and how the CAT will shape the future of the CP regime. On a principle level at least, there may be cause to believe that the CAT may adopt a flexible approach to the opt-out procedure, which is promising for the future of the CRA regime as a means of obtaining collective redress. Such flexibility is most aptly demonstrated by the CAT's approach in relation to eligibility whereby the CAT has indicated that not all significant issues are required to be common issues for a claim to be suitable for a CPO. However, further judicial consideration of CPs will be required before the long-term implications and potential success of the UK class actions regime can be fully understood.

There is some recognition that not all significant issues in a claim must be common interests for a claim to be suitable for collective proceedings. In both *Pride Mobility* and *MasterCard*, it is possible to deduce a claimant-friendly approach to the CP process. The apparent flexibility adopted in relation to issues of eligibility whereby the CAT has indicated that not all significant issues are required to be common issues and representative criterion, alongside the willingness of the CAT to allow third-party funding of CPs, is promising for the future of the CRA regime as a means of obtaining collective redress. Further judicial consideration of CPs is required before the long-term implications and potential success of the UK class actions regime can be understood.

There has also been considerable fervour regarding the growth of third-party litigation funding. While the home of such funding has been traditionally regarded as the US, the

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

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

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

growth of the UK litigation funding market has been notable. The past year saw continued expansion of law-focused finance firms in London. Whether this continues, and how UK finance firms' acquisitions fare, will be particularly important for an uptake in class actions.

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

Chapter 7

FRANCE

Erwan Poisson and Julie Metois[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Before 2014, class actions, as understood in the United States and other common law jurisdictions, did not exist in France. However, several mechanisms already enabled claimants to act jointly, and still exist to date under French law:

a some procedural mechanisms enable an aggregation of parties into a single procedure (e.g., joinder, consolidation and voluntary intervention);[2]

b legal action can also be taken by associations representing their members for a claim as to a collective loss suffered by the group as a whole, and not by each individual;[3]

c some certified associations can initiate proceedings in order to obtain compensation for losses suffered by individuals, but only if they are expressly mandated by the latter, and without any real possibility to solicit victims, for them to join the action;[4] and

d similarly, labour unions are entitled to collectively bring a claim before courts specialised in labour law-related matters, on behalf of employees who are subject to dismissal on economic grounds.[5]

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2 Joinder: several plaintiffs can bring a single claim and be represented by one counsel, when their claims arise from the same cause, or when there is a common question of law or facts. However, their case is then examined by courts as a standard case, and the assessment of the loss suffered is examined, and remedies granted, on an individual basis; consolidation: when several claims have been brought separately, but are of a similar nature, courts can, if it is in the interest of justice to rule upon them jointly, consolidate these claims, but the claims, the loss suffered, and the damages to be granted are examined on an individual basis; voluntary intervention: a third party is able to intervene in pending proceedings, when his or her claims have a strong link with the ongoing proceedings, but, again, courts assess the claims on an individual basis.

3 Action taken in a collective interest: certain authorised associations are able to pursue lawsuits in the collective interest of the members they represent. As a result of initiating such an action, associations can claim damages for a collective loss, but not for all individual losses suffered. For instance, actions can be taken with respect to environmental issues, or public health issues.

4 Joint representative action: approved associations are able to sue on behalf of several individual who have suffered a personal loss with the same origin, and resulting from the actions of the same professional, in relation to consumer law (L. 422-1 of the French Consumer Code), investment law (L. 452-2, Section 1 of the French Monetary and Financial Code) and environmental law (L. 142-3 of the French Environmental Code).

5 Article L. 1235-8, Labour Code.

However, despite these various mechanisms, the implementation of class action proceedings has long been debated among French scholars and practitioners, as well as before the French parliament. As a result, starting from 2014, various class action mechanisms were introduced in the French legal system:

a on 17 March 2014, Act No. 2014-344 was adopted by the French parliament,[6] and implemented the first class action mechanism in France, referred to as 'group action'.[7] This mechanism was then applicable only to disputes arising in consumer law[8] and competition law;

b on 26 January 2016, Act No. 2016-41 extended the domain for group actions to health issues;[9]

c on 18 November 2016, Act No. 2016-1547 further extended group actions to discrimination law, environmental law and data protection law;[10] and

d Act No. 2017-86, which was adopted by the French parliament in January 2017, had created, in its Article 217, a financing fund for group actions, which would have been funded by an increase in criminal fines imposed by criminal courts in the context of group actions. However, on 26 January 2017, the French Constitutional Court ruled that such a provision, which established a difference between claimants before civil and criminal courts, was contrary to the principle of equality before the law. The Court thus invalidated these provisions, which are no longer applicable.[11]

Pursuant to these various provisions, several specific types of group action proceedings now coexist under French law. However, they are essentially similar, and in particular, the French group action type can best be described as an improved opt-in mechanism: after a judicial decision is rendered on the defendant's liability, claimants may join proceedings to seek compensation. However, with respect to consumer law, there is a 'simplified group action', which is closer to an opt-out type (see Section III.iii).

Under French law, group actions cannot be initiated by individuals or a group of individuals, as such, but only by certified associations, the aim of which is related to the legal action, or given groups such as labour unions (for further detail, see Section III.ii).

6 Act No. 2014-344, 17 March 2014 (together with its implementing decree No. 2014-1081 dated 24 September 2014 and its circular NOR: JUSC1421594C of 26 September 2014).

7 The authors have chosen to keep this phrase to describe French 'class actions' in this article, as French group actions are quite different from common law 'class actions'.

8 Under French consumer law, a professional is a person, a natural or a legal, public or private, acting on its own behalf or through an agent, who enters into commercial, industrial, artisanal, or liberal activities. In this regard, it should be noted that the consumer act introduced a preliminary article in the French Consumer Code, which defines a consumer as 'Any individual who acts without connection with his or her commercial, industrial, artisanal or professional activities'.

9 Act No. 2016-41, 26 January 2016.

10 Act No. 2016-1547, 18 November 2016.

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

In principle, group actions are of the competence of the Civil High Court.[12] However, when public entities or private entities in charge of a public mission are involved in the dispute, the administrative judge will be competent, and administrative procedural rules will apply.[13]

To the best of our knowledge, as of February 2018, around 10 group action proceedings are ongoing in France in relation to various areas of law (to housing issues, banking sector, health issues and discrimination law).

II THE YEAR IN REVIEW

i New legal provisions

Compared to last year, there have not been many new legal provisions in the past months. Since the previous edition of this chapter, Decree No. 2017-888 dated 6 June 2017 related to Act No. 2016-1547 further extending group actions to discrimination law, environmental law and data protection law was enacted. Moreover, some parliament members are currently seeking to amend a draft bill in order to extend group actions to losses suffered in data protection matters.[14]

ii Case law and ongoing proceedings

According to a report from the French Senate dated 13 February 2017, nine group actions have been initiated in France since 2014. Of these, one case, opposing two authorised associations to a social landlord, has been settled, with tenants being reimbursed fees they had been charged in relation to the CCTV in the elevators.[15]

As to the eight other actions, to the best of our knowledge, proceedings are still ongoing:

a a first group of disputes sees consumers' associations opposing real estate companies or housing entities.[16] In the most advanced of these cases, the consumers' association argued that the penalty clause inserted in the lease contracts, which could be triggered by the company in the event of a delayed payment, was unfair and, consequently, sought compensation for the damage allegedly suffered by consumers.[17] On 27 January 2016, the Paris High Court held that the action was admissible but dismissed the claim since it considered that there was no evidence that the company had failed to fulfil its contractual or statutory obligations.[18] Claimants filed an appeal against this judgment. On 9 November 2017, the Paris Court of Appeal overturned the first instance ruling

12 Article L 211-9-2 of the Judicial Organisation Code.

13 In the French justice system, there exists a key distinction between the 'judicial order' and the 'administrative order', the former having jurisdiction over disputes involving a public entity and the latter being in charge of disputes involving natural and legal persons.

14 National Assembly website, Société : protection des données personnelles, Travaux préparatoires, http://www.assemblee-nationale.fr/15/dossiers/donnees_personnelles_protection.asp.

15 *Syndicat du logement et de la consommation/Confédération syndicale des familles (slc-csf) v. Paris habitat – OPH .*

16 *UFC Que Choisir/Foncia; Familles Rurales/Manoir de Ker An Poul.*

17 *Confédération Nationale du Logement v. Immobilière 3F.*

18 Tribunal de Grande Instance de Paris, 27 January 2016, No. 15/00835.

and considered that the group action was inadmissible because the lease contracts did not fall under the scope of the group action regime.[19] Claimants filed a further appeal before the French Supreme Court, which is ongoing.

b the second type of group actions see associations opposing banking and financial institutions. The first case concerns a consumer association against an insurance company with respect to the interest rate stipulated in a life insurance contract.[20] To the best of our knowledge, this dispute has not yet been ruled upon on the merits since the defendant raised a procedural issue on the validity of the claimant's writ of summons, but this argument was dismissed in appeal.[21] The two other disputes concern a bank against consumers' associations in relation to financial products.[22] In the first dispute, the consumers' association claimed that each consumer should be reimbursed triple its investment in an UCIT or, at least 100 per cent of their initial investment because of the misleading nature of the UCIT's brochure. On 20 December 2017, the Paris High Court declared the action admissible but dismissed the main claim of the consumers' association. Moreover, it rejected the request for reimbursement of the investment because it considered the consumer's association did not demonstrate that the investors suffered harm because of the bank's fault (relating to management fees).[23] The consumer's association filed an appeal against this decision. In the last dispute opposing a bank to a consumer association, the Paris High Court stayed the proceedings until a criminal decision is rendered.[24]

It should be noted that there are also two group actions opposing respectively a consumer association against a telecommunication company and a car manufacturer.[25]

Interestingly enough, new group actions were recently initiated in specific areas. Two new health-related group actions were recently brought in the courts: one against Sanofi, in relation to Depakine, in early 2017, and one against Merck, in relation to Levothyrox, in early 2018.[26] Moreover, one group action in relation to discrimination law could be started in the upcoming weeks.[27]

III PROCEDURE

By way of an introduction, it is worth noting that procedural rules governing group actions are disseminated in various texts, but can mainly be found (1) in the Consumer Code; (2) in Act No. 2016-1547 dated 18 November 2016; and (3) in the Administrative Justice Code (the contents of which are almost identical to that of Act No. 2016-1547).[28]

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

20 *CLCV – Consommation Logement et Cadre de vie/Axa France Vie et AGIPI*.

21 Court of Appeal of Versailles, 3 November 2016, No. 16/00463.

22 *UFC Que Choisir/BNP*; *CLCV – Consommation Logement* et *Cadre de vie/BNP Paribas Personal Finance.*

23 Tribunal de Grande Instance de Paris, 20 December 2017, No. 16/13225.

24 Tribunal de Grande Instance de Paris, 8 November 2017, No. 17/01643.

25 *Familles Rurales/SFR; CLCV – Consommation Logement* et *Cadre de vie /BMW Motorrad France.*

26 Sanofi visé par la première action de groupe en matière de santé, *Le Monde*, 13 December 2016; Le procès de l'action collective Levothyrox aura lieu le 1er octobre 2018, *Le Monde*, 19 December 2017.

27 La première action de groupe sur la discrimination syndicale arrive en justice, *Les Echos*, 19 February 2018.

28 Chapter X, Title VII, Book VII, Administrative Justice Code.

i Types of action available

Under French law, group actions can be initiated when various persons, placed in a similar or identical situation, suffer harm, as a result of one person's breach of contractual or statutory obligations (although with respect to consumer law, the harm can be caused by various professionals[29]).[30] When these criteria are met, group action can be initiated in order to get compensation for individual losses suffered.

Interestingly, under French law, group actions can also aim at getting a decision ordering a breach to be put to an end, most often simultaneously with the legal action to get compensation. For data protection issues, it is, in fact, the only type of decision that can be obtained.[31] However, with respect to public health issues as well as consumer law, only damages can be claimed.[32]

ii Commencing proceedings

Only specific groups and associations can initiate proceedings, namely:

a for consumer law and competition law, only approved associations may initiate group actions, namely 15 associations for the time being;[33]

b for discrimination law, only given groups may commence group actions, when their stated purpose is either (1) to protect employees (e.g., labour unions); (2) to fight against discrimination; or (3) is related to disabilities, provided they have existed for at least five years;[34]

c for environmental law, only certified environment protection associations may initiate group actions, as well as associations the aim of which is to defend victims of physical injuries or the economic interests of its members;[35]

d for health issues, only certified associations for users of the health system can initiate proceedings, provided that they do not commercialise health products or cosmetics;[36] and

e for data protection issues, only (1) associations the purpose of which is to protect personal data and privacy, and with at least five years' existence; (2) certified consumers associations; or (3) labour unions can initiate group actions proceedings.[37]

Before initiating a group action, these entities may participate in a mediation process (see Section III.v).

Furthermore, these authorised associations have to serve a formal notice to put an end to the breach at stake, including with respect to consumer law. Claimants will then have to wait for four months after they serve the notice, before being able to refer the case to the

29 Article L. 623-1, Consumer Code.

30 Article 62, Act No. 2016-1547 dated 18 November 2016.

31 Article 43 *ter*, Act No. 78-17, 6 January 1978.

32 Article L. 1143-2 of the French Public Health Code; Article L.623-1, Consumer Code.

33 Article L. 623-1, Consumer Code; list of certified associations available at: www.economie.gouv.fr/dgccrf/Liste-et-coordonnees-des-associations-nationales.

34 Act No. 2008-496, 27 May 2008, Article 10; Labour Code, Article L. 1134-7; Administrative Justice Code, Article L. 77-11-2.

35 Article L. 142-3-1, Environmental Code.

36 Article L. 1143-2, Public Health Code.

37 Article 43 *ter*, Act No. 78-17, 6 January 1978.

courts.[38] This is not, however, the case with respect to public health issues, where no prior notice needs to be served.[39] With respect to discrimination issues, starting from the initial demand to put an end to the situation, a specific process will be initiated, and the claimants will only be able to initiate proceedings after a six-month period.[40]

Concerning competition law, group actions can only be commenced after a final decision has been rendered on the defendant's breaches of competition law.[41]

With respect to limitation periods, there are no specific rules for group actions, and limitation periods thus depend on the nature of the claim, as well as their domain. However, the initiation of a group action will suspend the limitation period with respect to individual claims. This limitation period will resume for at least six months after a judicial decision is rendered, and is final and enforceable (not appealable either before the Court of Appeal or the Court of Cassation), or after the settlement is authorised by the judge (see Section III.v).[42]

French group action type can best be described as an improved opt-in mechanism. When proceedings are initiated, there is no need for the authorised entity to define a given class. The judge examines the case submitted by the authorised entity, and renders a decision, mostly on the admissibility of the claim and the principle of the defendant's liability. In this decision, the judge also defines the very group, in giving criterion for litigants to join the group, as well as the types of losses that can be compensated, and the deadline for possible claimants to join the group.[43] However, with respect to consumer law, French law also provides for a simplified group action mechanism, which is of an opt-out type (see Section III.iii).

iii Procedural rules

As set out above, under French law, group actions can aim to claim damages, or get an injunction to put an end to a breach of contractual or legal obligations, or both (see Section III.i). Although these types of actions are most often simultaneous, for the sake of clarity, we will distinguish between these two types of proceedings.

Claiming damages

When the group action aims to claim damages, the judge examines the case, and decides whether or not the summoned company should be held liable. If so, the judge sets out the compensation scheme, which includes a definition of the 'group' of victims entitled to compensation, the amount of damages that can be claimed, the types of losses that can be repaired, as well as the time period within which victims have to come forward if they want to join proceedings. The judge also determines how the judgment should be published, so as to enable victims to come forward. Costs incurred in relation to such publications are born by the defendant.[44]

After this initial decision on the very principle of liability, a second phase starts, which aims to compensate individual losses. Then, as set out below (see Section III.v), when the

38 Article 64 and 85, Act No. 2016-1547, 18 November 2016.
39 Article L. 1143-2, Public Health Code.
40 Article L. 1134-9, Labour Code.
41 Article L. 623-24, Consumer Code.
42 Article 77, Act No. 2016-1547, 18 November 2016; Article 623-27, Consumer Code.
43 Article 66, Act No. 2016-1547, 18 November 2016; Article L623-4, Consumer Code.
44 Article 67, Act No. 2016-1547, 18 November 2016; Article L. 623-4, Consumer Code.

claimants request it, the judge may order that a negotiation be opened between the authorised entity, on behalf of all individual claimants, and the defendants. This is, however, not possible with respect to public health issues, consumer law and labour law.

Alternatively, individual claims for damages are sent to the defendant, either directly or through the authorised entity. The defendant then compensates losses incurred, within the framework defined by the judge in the initial decision.[45] Should the defendant not compensate claimants, the latter can then refer the matter to the judge, to get a decision ordering compensation.[46]

The final decision by the judge is binding with respect to victims who have received compensation, with respect to the particular losses compensated. A new group action cannot be initiated on the very same losses. However, individuals can still initiate proceedings if (1) they did not participate in the group action; or if (2) they suffered other losses that have not been compensated in the context of the group action.

Furthermore, it is worth noting that with respect to consumer law, a 'simplified' group action can be used, when consumers are easily identifiable and when they have suffered an equal or very similar loss, while they were in the same situation. When an authorised association initiates proceedings, the judge assesses the defendant's liability, and can order the latter to directly indemnify consumers. These proceedings can, in a way, be considered as closer to an opt-out type system, given that consumers do not have to consent to proceedings being brought against a professional. However, after the judge renders a decision on compensation, and when the professional is ordered to directly compensate consumers, the former have to formally accept compensation within the time limit set by the judge, to effectively receive damages.[47]

Getting an order to put an end to a breach

When the group action aims at getting an order that a breach be put to an end, the authorised entity can request that the judge orders the defendant to put an end to a breach of contractual or statutory obligations. The judge will then set a deadline for a given behaviour to stop, and will also be able to order daily penalties to be paid by the defendant, should it not obey the injunction.[48]

iv Damages and costs

Firstly, it is worth noting that under French law, there is no possibility to claim punitive damages, such that companies will only have to compensate losses suffered, but will not be exposed to punitive damages.

Furthermore, it is worth noting that only certain types of damages can be claimed, depending on the domain at stake:

a with respect to consumer law and competition law, only economic losses can be compensated, not moral harm or personal injuries.[49] When appropriate, the judge can order reparation in kind;[50]

45 Article 70, Act No. 2016-1547, 18 November 2016; Article L. 623-18, Consumer Code.

46 Article 71, Act No. 2016-1547, 18 November 2016; Article L. 623-20, Consumer Code.

47 Articles L. 623-14 to L. 623-17, Consumer Code.

48 Article 65, Act No. 2016-1547, 18 November 2016.

49 Article L. 423-1, Consumer Code.

50 Article L. 623-6, Consumer Code.

b with respect to public health issues, a group action can be initiated in order to seek compensation for personal injuries (economic and non-economic losses resulting from these injuries);[51]

c with respect to environmental law, a group action can be initiated in order to seek compensation for personal and economic losses;[52]

d with respect to data protection issues, damages cannot be claimed;[53] and

e with respect to discrimination, damages for personal and economic losses can be claimed.[54]

In any event, as set out above, the judge, in the initial decision on the admissibility of the claim, and the defendant's liability, will define the framework within which claimants may receive damages and the types of losses to be compensated (see Section III.iii).

v Settlement

Settlements are encouraged under French law, before the initiation of a judicial group action, as well as during the compensation phase of group action proceedings.

Before any judicial action, it is possible for the association to participate in a mediation process with the other party.[55] If an agreement is reached, it will then have to be authorised by the judge, who verifies that the agreement preserves the interests of all parties and future claimants, before rendering an enforcement decision.[56] The agreement is then published such that all individuals who could be entitled to compensation on its basis can seek it.[57] As a consequence, a new group action on the same breach, to claim the same damages, will automatically be dismissed.[58]

Furthermore, after a judgment on the defendant's liability is rendered, and if the request is made by the claimant, the judge may decide that parties shall enter a negotiation process in order to settle damages (note that this is not possible with respect to discrimination disputes governed by the Labour Code,[59] or to public health issues and consumer law). The judge will then determine the framework for the negotiation and in particular, its conditions and timing. If all the individual parties agree, the judge will then authorise the settlement agreement; if not, the judge will send parties back to negotiation for an additional two months. After two months, if an agreement has still not been reached, the judge will be responsible for the liquidation of remaining damages. If a party has resisted the conclusion of an agreement in an improper or dilatory manner, the judge may order the payment of a civil fine of €50,000.[60]

51 Article L. 1143-2 of the French Public Health Code.
52 Article L. 142-3-1, Environmental Code.
53 Article 43 *ter*, Act No. 78-17, 6 January 1978.
54 Articles 87 and 88, Act No. 2016-1547, 18 November 2016.
55 Article 75, Act No. 2016-1547, 18 November 2016.
56 Article 76, Act No. 2016-1547, 18 November 2016.
57 Idem.
58 Article 78, Act No. 2016-1547, 18 November 2016.
59 Article 1134-10, Labour Code.
60 Article 73, Act No. 2016-1547, 18 November 2016.

IV CROSS-BORDER ISSUES

It should be noted that some difficulties may arise in relation to a request before French courts for recognition and enforcement of a decision rendered abroad in the context of a class action.[61] Indeed, to be enforced in France, a foreign judgment has to be recognised by way of specific enforcement proceedings before French courts.[62] For the foreign decision to be enforced in France, three conditions must be met:

a the foreign court must have had jurisdiction over the claim; that is, there must be a 'characterised link' between the case and the state where the judgment was rendered;

b the judgment rendered must be consistent with principles of French international public policy; and

c there must have been no fraud, that is, no attempt to select a forum in order to escape the application of the law that would have been applied by a French court.[63]

For some, it is doubtful that a foreign class action judgment would in fact be recognised and enforced in France, given that some of the above-mentioned criteria might not be met. Indeed, in the case of a foreign class action judgment based on an opt-out mechanism, it might be considered contrary to French law that some of the parties to the judgment may have been denied the right to opt-out after a specific deadline.[64] To the best of our knowledge, there is no published case law on this matter yet.

Then, the recognition and enforcement of a foreign class action decision could depend on whether or not there are enough elements to constitute a 'characterised link' between the foreign jurisdiction and the dispute at stake. However, this question could be viewed as merely theoretical, since companies that are sued in class action proceedings tend to have assets in a number of countries, thus enabling claimants to choose a country other than France to enforce the final judgment.

V OUTLOOK AND CONCLUSIONS

As of yet, and due to the recent nature of group action proceedings, one finds it difficult to take a step back and reflect on them. From a purely legal perspective, one can note that the existing French legal architecture with respect to group actions is quite fragmented, and thus does not stand out as a particularly coherent and consistent piece of legislation. Furthermore, group actions are only limited to given domains, and cannot be seen as a general procedural mechanism.[65]

61 See Niboyet, Action de groupe et droit international privé, *Revue Lamy Droit Civil* 2006, No. 32; Lemontey and Michon, Les « class actions » américaines et leur éventuelle reconnaissance en France, *Journal du droit international (Clunet)* No. 2, April 2009, var. 2; Kafir-Cherrat, La Class action s'approche : à propos de la reconnaissance en Belgique des class actions settlement américains, *Journal du droit international (Clunet)* No. 1, January 2018, var. 1.

62 A specific regime applies to rulings rendered by Member States of the European Union (Brussels Recast, Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

63 French Supreme Court, Civil Chamber 1, Cornelissen c. Avianca Inc. e. a., February 20, 2007, commented by L d'Avout et S Bollée in Dalloz 2007, p. 1115.

64 See M-L Niboyet, G Geouffre de la Pradelle, Droit international privé, L.G.D.J., 2015, 5e éd., spéc. No. 628.

65 Le flop des « class actions » à la française, *Le Monde*, 17 February 2018.

However, while the very notion of group action was long opposed by many French scholars and practitioners, it has now fully entered the French legal system, and authorised associations have decided to seize this powerful legal tool, as evidenced by the increasing number of cases already brought before French courts. The coming years will thus be particularly meaningful as to the efficiency of this French group action mechanism.

Lastly, another key issue for the future will undoubtedly be that of 'forum shopping'. Indeed, it can be considered that French group actions are less favourable to victims than other class action mechanisms, such as the US class action. Effectively, French proceedings do not include elements such as a jury, a discovery phase, punitive damages, or contingency fee agreements, which can all be very favourable to the victims. One can thus wonder if consumers will not tend to initiate their group action proceedings in countries other than France.

Chapter 8

GERMANY

Henning Bälz[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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

Nevertheless, German civil law and civil law procedure provide for certain means of obtaining collective redress: several parties can jointly commence a lawsuit. Alternatively, potential claimants can assign their claims to one single plaintiff who asserts multiple claims on their behalf. If several lawsuits on the same subject matter are pending, the court may select a model case to decide on factual or legal issues that the lawsuits have in common. Finally, certain institutions, such as consumer protection organisations, are able to legally pursue the enforcement of laws that serve the protection of others. Each of these measures partly resembles class actions in terms of their procedural objective, but none of them qualifies as a class action in the formal sense. In addition, all of them have specific drawbacks, which decrease their efficiency compared to class actions.

II THE YEAR IN REVIEW

In recent years, the debate about class actions in Germany has gained significant momentum. It has been fuelled in particular by 'Dieselgate' (i.e., the revelations on the alleged manipulation of diesel emissions tests by Volkswagen). This matter demonstrated to a larger audience the striking differences between the United States and Germany when it comes to collective redress. The fact that roughly 500,000 American plaintiffs were able to recover damages from VW in one single, comparably short court proceeding, whereas German plaintiffs are struggling individually to enforce their alleged claims, has been perceived as unjust by parts of the German public.[2]

In Germany, owing to the lack of class actions, car owners who are potentially eligible for claims have to file suit individually. According to press reports, about 7,000 of them have

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

done so in the competent local courts scattered all over Germany.[3] These courts have come to different legal conclusions: whereas some plaintiffs have prevailed, others, despite having the same cause of action, have not. For example, certain courts denied a car owner the requested damages on the basis that the emissions systems could be fixed,[4] whereas others held that the relevant plaintiff had been defrauded and could claim the value of his car as damages.[5] Other potential plaintiffs may have been discouraged from bringing proceedings at all considering that they had to act on their own at the risk of paying litigation costs and carrying the burden of fighting a lawsuit against a large corporation. Whether and to what extent a uniform assessment of the relevant legal issues will eventually be achieved is not yet clear. So far there has been no sign that differing judgments will be aligned in appeal proceedings. In light of the uncertainties of a lengthy proceeding and the often limited amount at stake, parties have been eager to settle. Over the past year, very few decisions by courts of appeal have been rendered in this matter. The decisions available often concern only singular legal issues and are, therefore, of limited use. Moreover, the courts of appeal have shown no uniform approach to the matters before them. Contradicting decisions have been the result and are likely to continue in the future. It is quite probable that claims of potential claimants will have become time-barred before legal certainty is obtained.

The German branch of a US law firm sought to test the limitations of German civil procedure. It made headlines by commencing a lawsuit before the District Court of Braunschweig on behalf of more than 15,000 car owners in November 2017, claiming over €350 million in damages. For this purpose, the law firm is cooperating with a limited liability company called 'financialright GmbH', known under the brand name 'myRight'. The company is using the opportunity to bundle claims through fiduciary assignment. Car owners assign their potential claims to myRight, which then asserts these claims in court. In the event of success, myRight receives a payment, more precisely a fee of 35 per cent of the realised amount. It remains to be seen how the court will deal with this multitude of cases. Technically, every single claim transferred to myRight must be ruled on by the court individually.

Under the public pressure triggered by these observations, the political parties likely to form the next German government have reached an agreement in principle on the introduction of model case proceedings to simplify the judicial enforcement of consumer rights against companies. The legislative proposal may, in some respects, come close to the effects of a class action. In particular, it seeks to enable and encourage potential plaintiffs to recover low-value damages in cases where they are often deterred by disproportionately high litigation costs.

Also in the realm of Dieselgate, a separate group of plaintiffs commenced lawsuits against VW and Porsche, emulating the effects of a class action. Shareholders of the two corporations brought actions alleging that VW and Porsche did not inform them in due course about the ramifications of the emissions matter. They are making use of an instrument exclusively available to plaintiffs who sustained damages on account of false or misleading

3 *Spiegel Online*, '15.000 weitere Diesel-Kunden klagen gegen VW', 6 November 2017,

4 District Court of Dortmund, judgment of 31 October 2015, reference number 7 O 349/15, BeckRS 2016, 113626.

5 District Court of Hildesheim, judgment of 17 January 2017, reference number 3 O 139/16, ZIP 2017, 332.

capital market information. The Capital Markets Model Case Act (KapMuG) allows courts to select a model case, decide common issues of fact and law, and thereby facilitate individual lawsuits brought by shareholders.

III PROCEDURE

As mentioned above, class actions as such are not available under German law. There are, however, certain means of collective redress available that, while they are limited, partly resemble the objective of class actions. They include (1) the joinder of parties, (2) the bundling of claims, (3) model case proceedings, and (4) lawsuits brought on behalf of others by associations or interest groups.

i Joinder of parties

Several litigants may, or in certain cases must, sue or be sued as joined parties. An option to sue jointly exists in three scenarios: (1) a plurality of plaintiffs form a community of interest with regard to the matter in dispute, the most important example being joint property; (2) a plurality of plaintiffs is entitled or obligated to the same factual and legal cause, for example, if several plaintiffs are party to the same contract; or (3) similar claims or obligations form the subject matter in dispute and such claims are based on an essentially similar factual and legal cause. The latter provision could be relied on by car owners who assert claims for elevated emissions. For purposes of procedural economy, the courts tend to interpret the aforementioned requirements liberally insofar that the mere suitability of a joint proceeding and decision-making is considered sufficient to justify a joinder of parties.

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

In short, there is little incentive for plaintiffs to resort to a joinder of parties in order to bring similar claims against one defendant. While in theory the number of plaintiffs who can join a lawsuit is not limited, joint proceedings run the risk of becoming uneconomic with a rising number of plaintiffs. Every plaintiff has to appear in front of the court, must be heard and make his or her case individually. Unlike in class actions, it is not possible for plaintiffs to appear on behalf of other potential plaintiffs who claim to have suffered the same grievance.

ii 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 aforementioned law firm chose this approach to assist car owners in asserting their potential claims.

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

A further drawback is that in order to be valid, the assignment of claims must comply with the requirements of the Legal Services Act (RDG). This Act regulates the provision of legal out-of-court services by non-lawyers. Institutions like consumer organisations and other associations as well as individuals are entitled to provide such services only if they are registered in the legal services register. The registration process sets out high standards on proof of personal suitability and reliability. In addition, theoretical and practical knowledge and a professional liability insurance covering at least €250,000 are required. The European Court of Justice recently added another disincentive to the bundling of claims. The court ruled that a consumer who asserts claims assigned to him or her by other consumers may not rely on Article 18 of the Brussels Ia Regulation. This means the consumer is barred from commencing a lawsuit on behalf of other consumers in the courts of his or her place of domicile.[6]

iii Model case proceedings

Introduction and overview

A method available under German procedural law that partly resembles class actions is the model case proceeding. In particular, it is a common feature of both model case proceedings and class actions that factual and legal questions are decided in a single trial commenced by one plaintiff on behalf of others claiming the same cause of action. The most striking difference is that model case proceedings do not directly award plaintiffs a remedy, but aim at facilitating the consequent pursuit of individual claims. A model case proceeding is generally conducted in three steps. First, a court determines a model case out of a multitude of similar pending proceedings and suspends the other cases. The court then decides the model case in

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

a second step. In a third and final step, the suspended cases are decided individually on the basis of the model judgment, which is binding with regard to the factual and legal questions that the cases have in common.

Capital Markets Model Case Act

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

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

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

In the second stage, the higher regional court appoints a model case plaintiff. The selection is generally left to the discretion of the court. However, the court must take into account (1) the suitability of the plaintiff litigating the case compared to the other plaintiffs, (2) an agreement of the plaintiffs regarding the appointment, and (3) the amounts claimed by each plaintiff. The remaining plaintiffs may take part in the proceeding as third parties with limited rights. As such they are entitled to avail themselves of means of contestation or defence independently. In contrast, there is no model case defendant. Instead all defendants of the initial proceedings are considered defendants in the model proceeding.

Subsequently, the case is published in the litigation register of the Federal Gazette once again. Within six months of the publication, third parties have the opportunity to register their claims before the competent higher regional court. While the parties registering must

be represented by a lawyer, they do not become involved in the model case. The registration rather serves the purpose of suspending the limitation period of the claim so that the registered party may wait and contemplate whether a future action is suitable.

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

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

As for the aforementioned *Telekom* trials, both model case proceedings were concluded by the Higher Regional Court of Frankfurt in 2012[7] and 2013,[8] which found that the Telekom prospectus had not been misleading. The plaintiffs appealed both decisions. At the end of 2016, the Federal Court of Justice approved the decision concerning the flotation of 1999.[9] In 2014, the Federal Court held that there was a prospectus error regarding the flotation of 2000 and remanded the case to the Higher Regional Court of Frankfurt for the determination of causality and fault.[10] The Higher Regional Court of Frankfurt then confirmed the responsibility of Telekom for the misleading prospectus and ruled that the causality between the prospectus and the decisions made by the investors had to be determined individually by the competent trial court.[11] Telekom appealed the decision and the case is now pending in front of the Federal Court of Justice again.[12] It is thus unlikely that a final decision will be rendered anytime soon. The mere fact that the KapMuG has not provided any relief to plaintiffs 18 years after the incurrence of the alleged damage shows that it has not lived up to the expectations many had for it. This is, among other things, because of the fact that the relevant cases are not conducted by one or more plaintiffs on behalf of others in one single trial, but that there are essentially two trials, the individual and the model case proceedings – each with the possibility of appeal.

As mentioned above, two model case trials have recently been commenced against Volkswagen AG and Porsche SE. One-hundred-and-seventy shareholders filed suits against VW for damages totalling an amount in dispute of approximately €4 billion. The model

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

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

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

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

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

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

proceeding is pending in front of the Higher Regional Court of Braunschweig. The court has scheduled several hearings throughout 2018.[13] The proceeding against Porsche is pending in the courts in Stuttgart.[14] It is still in its early stages.

Proposal on model action for a declaratory judgment

As shown above, the scope of the KapMuG is limited. It does not provide relief in regular consumer actions that are not related to capital market information. The political parties likely to form the next German government have, therefore, reached an agreement in principle on the introduction of a model action aimed at a declaratory judgment with a wider scope of application. The legislative undertaking was triggered mainly by the allegations against VW concerning the manipulation of emission tests.

It is likely that the implementation of the agreed-upon approach will resemble a *Musterfeststellungsklage*: a bill for a 'model case declaratory action' published by the Federal Ministry of Justice in July 2017. According to the bill, consumer protection associations would be entitled to commence an action for a declaratory judgment. The court would decide on legal and factual issues common to the claims of at least 50 consumers. Only the aforementioned consumer protection association would become party to the proceedings. After an action is filed, it would be published in a litigation register. Affected consumers would be able to register electronically without having to retain the services of an attorney, thereby safeguarding their potential claims against statutory limitations.

The proceeding would either end by declaratory judgment or settlement. Once a judgment was issued, and unlike in class actions under US law, plaintiffs would have to pursue their potential claims in separate lawsuits. However, they would be able to rely on the declaratory judgment of the model case proceeding, to which the courts dealing with the individual claims would be bound. In case of a settlement between the parties, the mechanism of the KapMuG would apply to the extent that the concerned parties would have to decide within a month whether or not to participate in the settlement. A settlement would become effective only if less than 30 per cent of the registered stakeholders were to declare their withdrawal.

Presumably having in mind that the claims by consumers in the VW emissions matter may become time-barred at the end of 2018, the coalition parties have vowed that the new law should come into force on 1 November 2018.

iv Association or interest group complaints

Act on Actions for Injunctions

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

The UKlaG allows certain 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 in cases in which general terms and conditions are considered to be invalid or a law

13 Higher Regional Court of Braunschweig, court ruling of 5 August 2016, reference No. 5 OH 62/16, WM 2016, 2019.

14 District Court of Stuttgart, court ruling from 28 February 2017 reference No. 22 AR 1/17 Kap.

aimed at the protection of consumers (interpreted in a broad sense) is infringed. The latter includes, for instance, provisions in the Civil Code regarding distance contracts, purchase contracts for consumer goods or payment services contracts. Moreover, the German legislator decided in 2016 to include specific data protection laws.

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 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.

Class action judgments by foreign courts are largely recognised in Germany. Issues may only arise if the recognition would violate public policy. The fact that the foreign proceeding was a class action does not as such conflict with German public policy. It is widely assumed, however, that enforcement of a class action may violate public policy if a party domiciled in Germany did not have the possibility to opt out of the action.[15] Enforcement of foreign judgments is also likely to violate public policy if a class action judgment awards punitive or treble damages.[16]

V OUTLOOK AND CONCLUSIONS

Means of collective redress are comparably insignificant in Germany, in particular when compared to the significance of class actions in other countries such as the United States. Attempts to circumvent the absence of class actions in Germany by resorting to a joinder of parties or the bundling of claims tend to be uneconomic because in these cases every single claim needs to be assessed and decided on separately. It is widely held that the model case proceedings that have been introduced in certain areas to fill the gap have not lived up to expectations. The fact that even in these cases individual and model proceedings have to be performed in parallel or subsequently, each with the possibility of appeal, has led to exceptionally long trials. Providing consumer protection organisations with the possibility of taking action against improper general terms and conditions and other violations against consumer protection laws may have an effect on ensuring consumer protection, but does not provide relief to the individual consumer.

Currently, the German lawmaker is walking a thin red line. On the one hand, recent events fuelled the discussion that German law should facilitate collective redress in particular, as it is considered to be a burden for individuals or small or mid-sized businesses to pursue

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

16 Federal Court of Justice, judgment of 4 June 1992, reference number IX ZR 149/91, BGHZ 118, 312.

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.[17] In its efforts to change the law, the German government has, therefore, taken a rather cautious approach to the matter. The significant differences to the prominent example of the United States may also be explained by a difference in legal philosophy. It appears that in common law, class actions not only serve the purpose of simplifying private legal enforcement, but also the purpose of deterring companies from breaking contractual or legal obligations. This approach is rather alien to German civil law.

The introduction of the aforementioned model action for consumers seems to be a compromise that is currently likely to become law. The proposal illustrates the hesitation of German lawmakers to allow for a fully fledged class action on the one hand and the necessity to heed the popular demand for facilitating collective redress for consumers on the other. The concept has the potential to improve the legal situation of consumers. At the same time, scepticism is justified as to whether the model actions for consumers will prove more effective than the ones foreseen by the KapMuG. It is too early for a final assessment. Given the uncertainties surrounding the political process, it is difficult to predict what exact form the law will take and, even more so, whether the intended effect of this new type of action will be achieved.

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

Chapter 9

HONG KONG

Mark Hughes and Kevin Warburton[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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

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

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

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

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

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

the LRC released its Report on Class Actions (the LRC Report) in which it considered the multiparty litigation models adopted by various jurisdictions, including Australia, Canada, England and Wales, and the United States. The LRC recommended that Hong Kong introduce a multiparty litigation model that used an 'opt-out' approach. In other words, once the court certifies a case is suitable for a class action suit, the members of the class would be automatically bound by the outcome, save and except for those actions involving a foreign plaintiff, in which case an 'opt-in' approach should be used instead.

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

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

II THE YEAR IN REVIEW

As mentioned above, the implementation of a class action regime in Hong Kong has stalled of late. In May 2012, the DOJ set up a cross-sector working group chaired by the Solicitor General (and an associated subcommittee) to study the LRC's class action proposals and to make recommendations to the Hong Kong government. To date, the working group has held over 20 meetings but has yet to give its recommendation.

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 discovery in 2015 that drinking water in certain public housing estates was contaminated by heavy metals, a member of Hong Kong's Legislative Council wrote to the local media to suggest that a class action model would have been the most effective procedure for resolving claims from numerous affected occupants against the Housing Authority and responsible contractors.[7]

The introduction of a class action regime has also been linked to Hong Kong's recent push to safeguard against anticompetitive practices. They were seen as positive developments aimed at promoting a fairer economy.[8] While the Competition Ordinance has been in effect since late December 2015, the class action reform proposal continues to stall at the consultation stage. It remains a missed opportunity that the two complementary mechanisms are still not able to operate in tandem so as to allow victims of anticompetitive practices collective redress through a class action procedure.

There were no significant developments in 2017 for reforming Hong Kong's class action regime.

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

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

III PROCEDURE

i Types of action available

Representative plaintiff

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

The crucial element in considering whether RHC Order 15, Rule 12 has been satisfied is whether the representative plaintiff has the 'same interest' as the other plaintiffs. The Hong Kong courts have identified a 'three-fold test' to assess whether the 'same interest' threshold is met: (1) common interest; (2) common grievance; and (3) seeking a remedy that is beneficial to all.[9]

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.[10] 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.[11] 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.[12]

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'.[13]

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.[14] 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.[15] The 'same contract' requirement is also no longer a prerequisite to commencing representative proceedings.[16] The impediment of a defendant raising separate defences against different class members is also no longer a bar to bringing representative proceedings.[17]

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

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

11 Ibid, at 1039–1040.

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

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

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

15 Ibid, at 255.

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

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

If a representative plaintiff discontinues his or her individual claim for any reason, the court may add or substitute him or her with any person in the represented class. To avoid the claim being time-barred if the addition or substitution occurs after the limitation period for the relevant claim has expired, the new plaintiff is treated as being the representative plaintiff at the date of the original writ.[18]

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.[19]

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.[20] The representative plaintiff's writ must clearly and precisely define the 'class' being represented.[21] The court must also be satisfied that the 'same interest' test has been met. The court will continually review whether the 'same interest' test is met as the case develops and may order the representative proceedings be dismissed if it is not.[22]

A representative plaintiff action is suitable if there is a large number of plaintiffs with the same interest. If there are only a few members in the defined class, then, in the absence of any other acceptable justification, the court may order that all members be added as plaintiffs to the action instead.[23] There is no set number required, but a class that consists of five or fewer members is unlikely to suffice.[24]

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.[25]

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

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

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

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

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

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

24 *Re Braybrook* [1916] WN 74.

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

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.[26] The representative application would usually be heard before a master, as opposed to a judge.

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

The court retains the ultimate discretion in selecting the representative and will make a representation order to those it considers most proper, even if it is inconsistent with the choice made by the plaintiffs and defendants.[27] 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.[28]

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.[29] This also applies to judgments in default as well as judgments delivered after trial. However, an individual bound by the judgment in default could apply to be added to the action and then apply for the judgment in default to be set aside. In contrast, a judgment properly rendered at trial can only be challenged by the represented member on appeal.

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

v Procedural rules

Enforcement

Leave of the court is required to enforce a judgment against an individual who is not a party to the proceedings but who is a member being represented. The application for leave will be made by way of summons before a master and must be served personally on the individual against whom the judgment is to be enforced.[30]

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

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

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

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

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

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

Size of the class

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

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 having the representative action be binding on all represented members such that, once that judgment is obtained, represented members are estopped from re-litigating common elements in their own proceedings.

Liability and quantum

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

Damages and costs

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

Hong Kong still maintains the common law offences of champerty and maintenance. This position has been reaffirmed by the highest court in Hong Kong, the Court of Final Appeal.[31] Therefore, success fee arrangements for recovery of costs, such as conditional or contingency fees, are not permitted except under three limited exceptions, namely where: (1) a person may have a legitimate common interest in the outcome of the litigation to sufficiently justify him supporting the litigation; (2) it is in the interests of promoting access to justice to fund a plaintiff who would otherwise be unable to pursue litigation owing to a lack of funds; and (3) funding is provided to a liquidator to pursue litigation that may improve the return to creditors.[32] 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 a case and, prior to the rendering of the court's judgment, may choose to settle and discontinue his or her action. In such an event, the rights of the represented members are not extinguished and they may commence proceedings in their own name. The court can also add or substitute an unnamed member of the class as the plaintiff of the action, who will be treated as being brought in at the date of the original writ.

IV CROSS-BORDER ISSUES

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

V OUTLOOK AND CONCLUSIONS

Hong Kong's representative proceedings system remains an underutilised mechanism for plaintiffs pursuing class-action-type claims. As the Chief Justice's Working Party on Civil Justice Reform Interim Report and Consultative Paper note, there are still many 'self-evident' limitations under the existing system. First, the current system is still comparatively restrictive when it comes to defining 'same interest'. Second, even if a judgment is rendered

31 *Unruh v. Seeberger* [2007] 2 HKLRD 414.

32 Ibid. See also *Re Cyberworks Audio Video Technology Limited* [2010] 2 HKLRD 1137.

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 of 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.[33]

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

The LRC's recommendations represent a positive step forward in the effort to reform the current class action regime in Hong Kong. However, the pace of reform is far from quick and Hong Kong is still some way off benefiting from a class actions regime that adequately addresses the needs of large-scale, cross-border multiparty litigation. The Panel on the Administration of Justice and Legal Services of the Legislative Council will review the work progress of introducing the class action regime within the 2017–2018 legislative session. It is, therefore, hoped that the working group and subcommittee will be able to make recommendations in light of the LRC's class action proposals in the near future and the DOJ will map out the process of drafting legislation to reform and update Hong Kong's class action regime.

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

Chapter 10

IRELAND

Sharon Daly and April McClements[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

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

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

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

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

The Law Reform Commission has previously recommended (as part of its Report on Multi-Party Litigation in 2005), that a formal opt-in procedure be introduced. However, such a structure is yet to be implemented.

The question of shareholders or unitholders in collective investment vehicles having jurisdiction individually and collectively through representative actions was considered in

1 Sharon Daly and April McClements are partners at Matheson. The authors would like to thank Valerie Sexton for her contribution to this chapter.

2 Rules of the Superior Courts Order 15 Rule 9.

3 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

4 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

the *Thema Shareholder* litigation in Ireland. The court held that the correct plaintiff was the company and dismissed the actions brought by the shareholders. It did so on a number of grounds, including the rule in *Foss v. Harbottle*. A copy of the ruling is available on courts.ie.

II THE YEAR IN REVIEW

Litigation funding is often considered in the context of multiparty litigation. As the law currently stands in Ireland, professional third-party funding is prohibited on the basis that it offends the rules of maintenance and champerty that exist under the Maintenance and Embracery Act (Ireland) 1634. While professional third-party funding arrangements are unlawful in this jurisdiction, the Irish courts have found that third parties who 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 preexisting legitimate interest in the litigation.

The impact of the 1634 Act was considered by the High Court in Ireland in a number of cases between 2013 and 2015 and was considered again in 2016 in the context of the legality of professional third-party litigation funding in the case of *Persona Digital Telephony Ltd & Another v. Minister for Public Enterprise & Other*. In that case an application was made to assess the legality of a third-party funding agreement. The plaintiff, Persona Digital Telephony Limited, was unable to fund the proceedings. A professional third-party funder from the UK was prepared to enter into a litigation funding arrangement. The plaintiff sought a declaration from the High Court that the litigation funding arrangement did not constitute an abuse of process or contravene the rules on maintenance and champerty.

While the High Court had some sympathy for the plaintiff, it affirmed that both maintenance and champerty are part of Irish law and are torts and criminal offences. The High Court found that to permit a litigation funding arrangement by a third party with no legitimate interest in the proceedings would necessitate a change in legislation and this could not be done by the High Court. This decision was unexpected, given some *obiter dicta* comments from the High Court in a judgment approving ATE insurance to the effect that the laws have to be interpreted in the context of modern social realities (*Greenclean Waste Management Ltd v. Leahy* [2014] IEHC 314). Further, the High Court in *SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, Optimal Investment Services, SA and Banco Santander, SA* indicated that litigation funding could be deemed by the court to be legitimate in future as reflecting 'modern social realities'. The plaintiff, Persona Digital Telephony Limited, appealed the decision of the High Court.

Given the issues of public importance raised in the case, the Supreme Court allowed the plaintiff to bypass, or 'leapfrog', the Court of Appeal in order to have the appeal heard directly by the Supreme Court itself. The decision of the Supreme Court was handed down in May 2017. In dismissing the appeal and finding that the third-party litigation funding was unlawful (where none of the exceptions apply), Denham CJ stated that it would not be appropriate for the Supreme Court to develop the common law on champerty, pointing out that it is a 'complex multifaceted issue, more suited to a full legislative analysis'. The Chief Justice emphasised that the third party funder in this case had 'no connection with the plaintiffs, apart from an agreement to fund their proceedings', distinguishing it from the recent decision of *Thema International Fund v. HSBC Institutional Trust Services (Ireland)*

Limited [2011] 3 I.R. 654, in which the court recognised that it is lawful for a party with a legitimate interest in the litigation to fund the litigation of another party and a creditor or shareholder may have such a legitimate interest.

Therefore, the Supreme Court has confirmed that third-party funding is unlawful in Ireland by reason of the Maintenance & Embracery Act (Ireland) 1634, which remains the law in Ireland, so 'a person who assists another's proceedings without a *bona fide* independent interest acts unlawfully'. The courts have clearly indicated that it is a matter for the legislature rather than the courts to develop the law in this area. However, in his Supreme Court judgment in the *Persona Digital* case, Clarke J left open the possibility of the courts, in their role as guardians of the Constitution, reconsidering the position in circumstances where there is a breach of the constitutional right of access to the courts and 'no action' has 'been taken by either the legislature or the government to alleviate the situation'. In the meantime, however, it is clear that third-party funding from a third party with no legitimate interest in the litigation to progress a claim in Ireland remains off limits unless and until the legislature addresses this issue.

The decision in *SPV Osus Ltd*, referred to above, which addressed the issue of maintenance and champerty – but not in the context of litigation funding, came before the Court of Appeal in January 2017 for consideration of the related issue of litigation trafficking. In this case a fund, Optimal Strategic US Equity Ltd (SUS) was entitled to make a claim in the US bankruptcy proceedings of Bernard Madoff. In order to allow investors in the fund to trade their share in the bankruptcy claim (which is allowed in the US), SUS set up a special-purpose vehicle SPV OSUS Ltd (SPV) and assigned the bankruptcy claim to it. The majority of the original investors in SUS swapped their shares for shares in SPV and then traded the shares in SPV to distressed debt hedge funds. SPV then issued proceedings in Ireland against the custodian to the fund claiming an entitlement to the net asset value of the investments of SUS as at 30 November 2008.

The custodian challenged the standing of SPV to bring proceedings on the basis that the assignment was contrary to public policy, and should not be enforced for reasons of maintenance and champerty. The High Court upheld the custodian's application and dismissed the action, holding that the transaction was void, contrary to public policy, and constituted trafficking in litigation.

The Court of Appeal gave judgment on 2 March 2017 upholding the ruling of the High Court in full and dismissing the claim as trafficking in litigation. The 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. The Court further ruled that there was no requirement to prove an improper motive under the principles of maintenance and champerty.

The judgment of the Court of Appeal acknowledged that public policy has to move with the times, and that commercial practices, which change with the times, must be taken into account. The plaintiff was granted leave to appeal to the Supreme Court. The Supreme Court hearing of the appeal was heard in February 2018 and, at the time of writing, the judgment of the Supreme Court is awaited.

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 preexisting relationship with the main party, or where the class is relatively small. Because of this, the more common approach to multiparty litigation in Ireland is usually the test case.

A test case can arise where numerous separate claims arise out of the same circumstances. By way of example, in 2008 the Commercial Court was faced with more than 50 individual shareholder claims related to the fraudulent investment operations run by Bernard Madoff. The Commercial Court exercised its inherent jurisdiction in deciding to take forward a small number of cases initially, as test cases. In this instance, it was decided that two cases by shareholders and two cases by funds would be heard sequentially as a first step and the Court stayed the other claims pending the resolution of the four test cases.

A similar approach was adopted by the Irish Commercial Court in relation to claims for the mis-selling of financial products that were initiated by over 200 claimants against ACC Bank in 2010. Five claimants' cases were heard as test cases and the remaining claimants agreed that 'the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings.'

i Types of action available

In order to bring a representative action there must be 'a common interest, a common grievance and relief in its nature beneficial to all.'[5] 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.[6]

Test cases are not limited to any particular types of action. However, in practice these procedures are typically utilised in tort actions where a negligent act or misrepresentation has affected a number of people who wish to have their rights vindicated. For example, claims for the mis-selling of financial products will often involve an allegation that the financial service provider committed the torts of misrepresentation or negligent misstatement.

The following limitation periods apply to the various causes of action:

a tort claims: six years from the date of accrual of the cause of action;

b contract law: six years from the date of breach;

c claims for liquidated sums: six years from the date the sum became due;

5 *Duke of Bedford v. Ellis*.

6 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

d personal injuries under negligence, nuisance or breach of duty: two years from the date of the cause of action accruing or the date the claimant first had knowledge, if later;
e land recovery: 12 years from accrual of the right of action;
f maritime and airline cases: two years from the date of accrual of the cause of action;
g defamation: one year from the date of accrual of the cause of action; and
h judicial review: the claim must be brought promptly and in any event within three months of the date of the cause of action (the court can extend this period if there is a good reason).

The period during which mediation takes place in a cross-border dispute to which the Mediation Directive applies is excluded from the calculation of the limitation periods.

The Law Reform Commission's Report on Limitation of Actions 2011 discusses the limitation of all actions (although property claims are excluded). The Law Reform Commission recommended the introduction of a limitation period of two years, to run from the date of knowledge of the claimant for 'common law actions' (breach of duty, negligence, contract and nuisance). The 'date of knowledge' is the date from which the claimant knew or ought to have known of the cause of action and 'knowledge' includes both actual and constructive knowledge. Interestingly, an 'ultimate' limitation period of 15 years was also recommended. It was proposed that this would run from the date of the act or omission giving rise to the cause of action and there would be statutory discretion to extend this limitation period. It should be noted, however, that the proposals put forward by the Law Reform Commission are not binding and to date none have been implemented.

It is anticipated that the Financial Services and Pensions Ombudsman Bill 2016 will be enacted in 2017. Of particular significance for regulated financial service providers is that the Bill proposes to revise the limitation period for bringing complaints to the Financial Services Ombudsman (FSO) in certain circumstances. Currently, the FSO has no jurisdiction to investigate complaints where the conduct complained of occurred more than six years before the complaint is made. The FSO has no discretion to extend this limitation period. The new time limit proposed extends the limitation period for consumer complaints 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 proposed 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; and
b the date on which that consumer ought to have become aware of that act or conduct.

For other short-term financial services, the limitation period of six years is unchanged.

It must be anticipated that multiparty litigation, by way of complaints made to the FSO, could arise as a result of the change to the limitation period.

ii Commencing proceedings

In order 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 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.

In order 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.[7] 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.

In order to commence proceedings by way of a test case, each party must institute its own case and then one party becomes the benchmark by which the remaining cases are resolved. Importantly, however, each case is judged on its own merits (by a judge alone) and the fact that causation is proved in the context of one case does not necessarily guarantee the same outcome in all subsequent cases unless the facts, liability issues and causation are identical. The Irish courts take great pains to ensure that each case is judged on its own merits, and this is seen to benefit defendants, as plaintiffs are put to the expense of having to fully prove their case despite the fact that numerous similar (but not necessarily identical) cases may have already been determined. In reality, however, if there has been a negative finding against a defendant in a test case and liability has been established, where there are numerous similar cases yet to be heard, a defendant (or its insurers) will attempt to settle the outstanding claims unless they can be distinguished in terms of liability, causation or fact from the test case.

iii Procedural rules

The average length of proceedings in the High Court (from issue to disposal), is two years approximately. This can vary, however, depending on the complexity and urgency of the case.

The High Court has a separate commercial division, known as the Commercial Court. This specialist court has extremely stringent case management procedures in place and judgment is generally delivered quite promptly. According to the Commercial Court's own statistics, 90 per cent of cases that come before it are concluded within one year.

iv Damages and costs

In representative actions, the plaintiff is entitled only to declaratory and injunctive relief.[8]

The test case plaintiff will have their award of damages judged on the merits of their individual case.

Damages can be compensatory or punitive, for example:

a general damages: compensation for loss with no quantifiable value, such as pain and suffering;

7 Rules of the Superior Courts Order 4 r 9.

8 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

b special damages: compensation for precise financial loss, such as damage to property;
c punitive (exemplary) damages: awarded to punish the behaviour of a defendant (rarely awarded); and
d nominal damages: awarded where the claimant has been wronged but has not suffered financial loss.

The level of damages that may be awarded is determined by the court before which the action is brought; claims up to a value of €15,000 are dealt with by the District Court, while the Circuit Court deals with claims with a value between €15,000 and €75,000 (the upper limit is €60,000 for personal injuries cases). Any claim with a value in excess of €75,000 is heard by the High Court, which has an unlimited monetary jurisdiction. Choosing the correct court is a particularly important step for a claimant as one can be penalised as to costs by a court, where they receive an award of damages that does not meet that court's jurisdictional threshold. Provided that court is also of the opinion that the action could have been taken in a lower court, it is permitted to award the typical costs of the lower court action.

As noted previously, subsequent litigation following a test case is often settled on the basis of the test case outcome and, in such circumstances, an award of damages does not fall to be considered by the court.

While there are no specific costs rules applicable to multiparty litigation, costs 'follow the event'[9] in this jurisdiction (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.

Multi-plaintiff litigation can also arise in the form of complaints made to the Financial Services Ombudsman (FSO). The FSO is a quasi-judicial body tasked with resolving disputes outside of litigation. While parties to complaints to the FSO are permitted to be legally represented at each stage of the complaints process, the costs of such representation are a matter for the party who incurs the costs to bear himself or herself and the FSO 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.

9 Rules of the Superior Courts Order 99 Rule 1 (4).

Although not bound by the result, the test case has an effect by virtue of the doctrine of precedent. Therefore, the benefits of the original ruling may be extended to cases involving factual situations identical to those of the test case. As a result of this, subsequent litigation is often settled on the basis of the test case outcome.

Where multiparty litigation is brought by way of a representative action, since representation extends to all aspects of the legal proceedings, including settlement, the representative has autonomy over the way in which the litigation is conducted, subject to the expectation that he or she will act in the interests of the class. Generally any judgment or order in the action will bind all persons represented at the direction of the court. Representative actions therefore presuppose a level of confidence between the representative and the members of the class.[10]

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.[11]

IV CROSS-BORDER ISSUES

The European Commission has previously recommended that all Member States adopt collective redress schemes, for both injunctive and compensatory relief. This Recommendation was published on 11 June 2013 and deals with 'mass harm situations'. 'Mass harm situations' 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 is not binding, it can be applied to shape future legislation in the area.

When it comes to forum shopping, Ireland may be seen as a less attractive option for class actions due to the lack of a legal framework facilitating class actions; however, in numerous *forum non conveniens* challenges to jurisdiction in New York and Florida, the US courts have dismissed US class actions in favour of Ireland.

V OUTLOOK AND CONCLUSIONS

More than 10 years has now passed since the Law Reform Commission recommended that a formal procedural structure be put in place to deal with multiparty litigation; however, this recommendation has yet to be implemented and does not form part of the government's current legislative programme. 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.

10 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

11 Rules of the Superior Courts Order 22 Rule 10.

Multiparty litigation and litigation funding are issues that go hand in hand as plaintiff lawyers claim that the absence of rules permitting litigation funding restrict their clients ability to obtain access to justice. The law on litigation funding in Ireland has been subject to considerable clarification in recent years; however, following the Supreme Court's recent decision in the *Persona Digital* case, confirming that third-party litigation funding remains unlawful, it is clear that any further development of the law in this area will require legislative reform. The Contempt of Court Bill was published in late 2017 and included provisions to abolish the offences of maintenance and champerty. However, the Bill does not appear on the government's legislative agenda for spring and summer 2018, so it remains to be seen whether that Bill will be progressed.

Chapter 11

ISRAEL

Hagai Doron and Uriel Prinz[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Israel's class action law allows any individual, as well as qualified non-profit organisations and government commissions, to file a claim on behalf of a group of people who may not have requested any such claim, and who may not even be aware of the fact that a claim is being managed on their behalf. Should the class action be approved, its result (if settled or dismissed) is likely to impair the rights of those claimants in whose name it is brought. Class actions may also constitute an injury to the procedural rights of defendants, who are forced to deal with claims which, whether justified or not, may be of unusual scope and risk.

Despite these and other considerable difficulties, the class action is an important tool that forms an integral part of the Israeli legal system, serving as a bulwark to balance the interests of the individual against corporations that interact with the public on a large-scale basis. The Class Actions Law, 2006 (the Law) is a detailed statute governing all class action claims in Israel, which seeks to strike the necessary balance between the competing interests, rights, and policy considerations at stake in the class action proceeding.[2] 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.[3]

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 1,500

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1 Hagai Doron and Uriel Prinz are partners at S Horowitz & Co. The authors express their gratitude to David Silber for his assistance in preparing this chapter. This chapter is accurate as of May 2017.

2 The Class Actions Law, 2006, 2054 S.H. 264 (12 March 2006).

3 Introduction, commentary to the Class Actions Bill, 2006, 234 H.Ch. 256, 257 (26 January 2006). Regarding the Law as substantial public policy, rather than a purely procedural statute, see (Supreme Court Justice) Esther Chayut, 'Class Actions as a Tool for Public Civil Enforcement' (in Hebrew), 19 Mishpat Va'asakim 935, 942–943 (August 2016).

motions for 2016.[4] By number, nearly 70 per cent of the motions filed are related to consumer products, with insurance-related and banking-related claims corresponding to an additional 6 per cent and 3 per cent, respectively, and 2 per cent or less related to breaches of securities and competition law.[5] By amount, however, insurance, banking, securities, and competition claims collectively accounted for five of the top 10 judgments and approved settlements for 2016, accounting for 400 million Israeli new shekels of the aggregate 523 million Israeli new shekels awarded to the top 10.[6]

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). In the past year, a district court considering a motion for approval of a class action rejected a proposed settlement whose amount, in the court's judgment, did not adequately reflect the claim's 'potential'. The court went further and concomitantly granted approval for the class action itself to proceed, and furthermore examined the question of whether representative counsel should be replaced in light of its support of the 'insufficient' settlement.[7] The court cited the growing concern that once class agents become aligned with defendants by requesting court approval for a settlement or withdrawal of claims, the dissolution of the adversarial relationship requires a court to step into the breach in order to defend the interests of class members and the public cause.[8] 2016 also saw the first comprehensive amendment to the Law, including an expansion of the scope of non-profit organisations' standing to bring and participate in class actions, a significant expansion for motions of 'opposition' to proposed settlements (including potential monetary reward for organisations and individuals whose oppositions further the benefit of class members), court supervision of approved settlements (including withholding of class agents' fees until the settlement is fully implemented), and the establishment of a statutory fund to distribute the proceeds of 'fluid class recovery' to relevant public causes.[9]

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

4 Keren Vinshal-Margal and Alon Kalament, 'The Class Actions Law in Practice in Israel – an Empirical Perspective' (in Hebrew), 45 Mishpatim 709,725 (2016) and Asaf Fink, 'The Seventh Annual Conference for Class Actions 3 January 2017, Research Summary for 2017' (in Hebrew), available at http://knowit.org.il/Uploads/Documents/gili.pdf (accessed 3 April 2017).

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

6 Based on statistics reported by Fink, footnote 4.

7 Cls. Act. (Central) 30028-04-11 *Yitzhaki v. Migdal Insurance Company et al* (published Nevo, 21 November 2016).

8 Ibid, at [63] to [68].

9 The Class Actions Law (Amendment No. 10), 2016, 2567 S.H. 1079 (27 July 2016) (Amendment 10).

falls within a statutory list of enumerated causes; it should be noted, however, that as a rule, these causes are broadly worded. Some of the causes that may be of interest to international corporations include: claims against manufacturers, distributors and service providers including product liability claims and various claims against internet platform providers; claims against insurance providers and agents; antitrust claims, including 'follow-ons'; claims related to corporate securities or trading platforms; claims related to environmental damages or nuisances; and claims related to the 'anti-spam' amendment to the Communications Law (Telecommunications and Broadcasts) 1982.

A class action suit requires prior approval of the court, in a preliminary proceeding known as a 'motion for approval of a class action'. A court may, at its discretion, approve a class action if it falls within the ambit of the enumerated causes, and all of the following elements are present:

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

Class actions do not have a special statute of limitations. In nearly all circumstances relevant to this note, the period provided by Israel's general statute of limitations applies, which is seven years from the time when the grounds for the claim arose, or would have become known to a reasonably diligent injured party. The Law includes a saving clause such that claims whose statute of limitations would otherwise have run in the course of a class action proceeding will survive for an additional year from the date that a motion for approval was denied or dismissed, or from the date that the claimant was removed from the class.

ii Commencing proceedings

A motion for approval of a class action may be commenced by either a person possessing a cause of action that raises the question in law or fact common to the group, one of the government commissions listed in the Law's appendix, or a qualified non-profit organisation whose purposes include the public cause advanced by the class action. In practice, approximately 99 per cent of motions for approval of class action are commenced by a private member of the group.[10] At least one Supreme Court Justice has expressed the sentiment that standing in a class action should be granted liberally and with heightened flexibility, in order to better promote the public cause.[11] In practice, 'entrepreneurial' lawyers may take an active role in the formation of the claim, and the Supreme Court has said, in obiter, that in light of the public interest of promoting 'civil enforcement', the mere fact that a lawyer may take a leading role and even recruit a representative plaintiff to advance the claim does not, in and of itself, disqualify the lawyer or the representative plaintiff.[12] Furthermore, the Law mandates

10 Vinshal-Margal and Kalament, footnote 4, p. 730.

11 Chayut, footnote 3, p. 945,

12 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

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.[13]

The default mechanism for a class action is 'opt out', meaning that upon approval of a motion for a class action, all individuals meeting the definition of the group as approved will be judged as members of the group and bound by the outcome of the proceedings, unless they file an objection within the required time period (the default period is 45 days from publication of the decision to approve the motion). In special circumstances, the court may, in its discretion, rule that the action be conducted on an 'opt-in' basis, which means that the proceeding will relate only to those class members who request to be included. In either case, the procedural and substantive provisions of the Law will apply.

The class must be defined, initially, by the party bringing the motion for approval. In the course of hearing the motion, however, the court has substantial discretion to alter or redefine the class, or create sub-classes and appoint representative plaintiffs and attorneys for each sub-class. Ultimately, the final definition of the class will be set forth in the court's ruling to approve the class action. There is nothing in the Law to exclude foreign claimants from being included in a class; however, several cross-border jurisdiction questions may arise in cases with foreign elements, as will be 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. 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 2016, the fund reported that 1,758,440 Israeli new shekels had been approved for 48 funding requests, for an average of approximately US$10,000 per request.

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while the concurring opinion in *Prinir (I)* had expressed the reservation that allowing such claims would be tantamount to promoting an 'industry' of lawyering cases of questionable value, since the allegation that counsel had 'recruited' plaintiffs in bad faith had not been proved in the lower court, an additional hearing to resolve issues argued in obiter was not justified. Nonetheless, the *Prinir (I)* majority obiter has recently been cited favourably in the District Court of the Central District in Cls. Act. (Central) 5286-08-07 *Freibrun v. Boulus Gad Tourism and Hotels Ltd* (published Nevo, 31 March 2017).

13 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.

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.[14] The representative plaintiff must provide a preliminary evidentiary basis that sufficiently demonstrates a reasonable chance of success on the merits.[15] 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 has directly responded to the bifurcation dilemma in *The Phoenix v. Amosi*,[16] in which three insurance companies (as defendants joined into a single class action) contended that their alleged underpayment of personal accident insurance benefits was justified by the rules of contractual construction applicable to similarly phrased policy wordings. The court held that the very fact that the defendants had placed reliance upon an inferred reference not mentioned in the plain language of the policy wordings was sufficient, in and of itself, to determine that the plaintiffs' interpretation of the policy had a 'reasonable chance' of success in the claim. The court established that the guiding rationale of the 'reasonable chance' requirement was to strike a balance between protection of class action defendants from the collateral damage caused by spurious claims on the one hand, and the public interest of encouraging worthy class actions on the other hand.

The court in *The Phoenix* did not expressly retreat from the previous case law that had clearly established the need for a plaintiff to provide preliminary evidence to support the claim's 'reasonable chance' of success, and acknowledged that certain complex cases might even require preliminary legal or factual findings on the merits. On the other hand, the court warned against a bifurcation that would require 'duplicate proceedings' that place undue obstacles before plaintiffs, and potentially increase the collateral cost for defendants. In light of the above, the lead opinion held, *inter alia* (and in obiter), that where plaintiffs sought an identical remedy on several alternative grounds, it was sufficient to find that just one of the grounds had a 'reasonable chance' for success in order to allow the entire claim to proceed as a class action.[17]

Upon the court issuing approval for a class action, the representative plaintiff's proposed statement of claims 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

14 Lv.Civ.App. 729/04 *State of Israel v. Kav Machshavah* (published Nevo, 26 April 2010).

15 Lv.Admin.App. 3284/10 *Municipality of Tel Aviv v. Ressler* (published Nevo, 3 December 2012).

16 Lv.Civ.App. 2128/09 *The Phoenix Insurance Company v. Amosi* (published Nevo, 5 July 2012).

17 Ibid, at [12] to [17] (for the entire paragraph).

of class actions that gain approval (approximately 10 per cent in 2016, 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.[18] Of the tens of cases that have reached judgment since the Law's enactment, the vast majority have been decided for the claimants, an indication that the court's finding of a 'reasonable chance' of success in the approval stage may in fact include some preliminary review of the merits.[19]

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.[20] The Attorney General, as well as the relevant government commission, must also receive every public notice related to the class action, including interim court decisions as well as any joint motion for the approval of a settlement. Qualified non-profit organisations and government commissions (as well as any individual class member) may, with the court's permission, participate in hearings to the extent the court deems such participation required for the sake of fairness, efficiency, or the defence of any of the class members' interests, and the court may, in its discretion, award a fee to a non-profit organisation in light of its contribution to the hearings. In addition to the Attorney General and all of the aforementioned persons, 'any person acting for the benefit of the class members' interests' may submit a reasoned objection to the proposed settlement of a class action proceeding, including an objection to the costs and fees proposed for the 'class agents' thereby, which objection may not be withdrawn 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.[21] 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.[22]

Motions for class actions are most commonly submitted to the district courts, since they generally involve aggregate claims in excess of 2.5 million Israeli new shekels.[23] They

18 According to figures provided by Vinshal-Margal and Kalament (p. 738) and Fink, footnote 4.

19 Vinshal-Margal and Kalament, footnote 4, p. 741.

20 As noted above, a class action must fall within one of the enumerated categories of causes; the Class Action Regulations, 2010 specify the commission which 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.

21 Section 4(a)(3) of the Law, footnote 2, as amended in 2008.

22 See Chayut, footnote 3; see also the Israel Consumer Council website (English language) at www.consumers.org.il/category/en-consumers.

23 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.

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.[24] Of those motions for approval for which a decision was rendered, the average time lapse between the date of filing and the date of the decision (on the motion for approval) has been around 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 motions for approval to require several years to be adjudicated.[25]

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 motion for approval, 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'.[26] Even prior to the Law's enactment, the Israeli courts had viewed flexibility in damages as essential to certain class actions. A prevalent jurisprudential sentiment is that while the damages awarded in classic tort actions are meant to provide 'corrective justice', a strict adherence to the traditional rules of damages would undermine the basic rationale and primary purpose of the law of class actions: to achieve efficient and effective deterrence against breaches of the law.[27]

In the landmark *Tenuva (I)* case,[28] 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 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.[29]

Subsequently, the Law anchored and built upon the case law which 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.

24 Vinshal-Margal and Kalament, footnote 4, p. 756.

25 Keren Vinshal-Margal, 'Class Actions in Israel: An Empirical Perspective' (in Hebrew), unpublished manuscript, presented at the Hebrew University of Jerusalem on 9 March 2015, p. 35.

26 Section 1 of the Class Actions Law, footnote 2.

27 Chayut, footnote 3, p. 948.

28 Civ.App. 1338/97 *Tenuva Central Coop for the Mktg of Agr Prod In Israel Ltd v. Rabi, PD* 57(4) 673, 2003 (*Tenuva (I)*).

29 Ibid, at 688F.

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.[30]

The Law further recognises, as did the Supreme Court in *Tenuva (I)*, that the award of traditional 'damages' to atomised class members is not always a feasible remedy (especially, as in the *Tenuva* case, where the injured members were consumers of household items, who are not readily identifiable and who do not generally maintain proofs of their purchase or consumption). If a court is of the opinion that class members cannot be individually identified and compensated without unreasonable cost or difficulty, the Law authorises the court to grant damages, or any other remedy, for the benefit of either the group as a whole or the general public.

The Law reflects the jurisprudential sentiment that the damage in a class action is more than just the sum of the parts; the claimant is not just an individual representing other individuals, but rather a 'super-plaintiff' who gives expression to the collective and aggregate interest of the class.[31] 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.[32] 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.[33]

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

30 These provisions reflect the state of Israeli jurisprudence prior to the Law's enactment, which reflected the doctrine of 'fluid class recovery'; see the Supreme Court of Israel decision Civ. App. 10085/08 *Tenuva Central Coop for the Mktg of Agr Prod In Israel Ltd v. estate of Rabi (deceased)* (published Nevo, 4 December 2011): (*Tenuva (II)*), at [46] to [53], citing especially *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472-473 (Cal., 1986).

31 Civ. App. 10262/05 *Aviv Legal Services Ltd v. Bank Hapoalim Ltd* (published Nevo, 11 December 2008) at [10].

32 The Supreme Court in *Tenuva (II)* (footnote 30) reduced the quantum from approximately US$16 million awarded in the District Court judgment, ruling that non-monetary damages for a breach of autonomy be awarded based on a statistically modelled quantum of consumers who had experienced, subjectively, actual feelings of disgust, as opposed to the abrogation of their right to autonomously make an informed decision in the abstract. This distinction was subsequently affirmed in Civ. App. 4333/11 *Solomon v. Guri Importers and Distributors* (12 March 2014) and *Prinir (I)* (footnote 12, 4 September 2014). The Supreme Court also rejected the District Court's allocation of 22 per cent of the global damages to price rollbacks, ruling that the proceeds be distributed between food and nutrition research (44.33 per cent) and the free distribution of dairy products to the needy (55.66 per cent).

33 Tenuva (II), footnote 30, at [36] and [37].

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.[34] The Law's recent 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 which match or approximate the public interest that each particular class action is meant to promote.[35]

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,[36] and any other person whom the court deems appropriate. A proposed settlement must include, *inter alia*, a definition of the class, a summary of the claim and the proposed settlement, the gap between the amount of the claim and the amount of the settlement, the stage of the proceedings and an evaluation of the benefits and risks of their continuation, and the issues and remedies regarding which the proposed settlement would comprise an estoppel. Class members who wish to exit from the proposed settlement may request leave from the court to do so.

The Law mandates that a court may approve a proposed settlement only after it is satisfied that the settlement is fair, adequate and reasonable, and that concluding the proceedings by way of settlement is the most equitable and efficient manner for resolving 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.[37]

34 Cls. Act. (T.A.) 22236-07-11 *Schreier v. Automated Banking Services* (published Nevo, 16 September 2014); Chayut, footnote 3, p. 951.

35 Amendment 10, footnote 9; Sections 20(d) and 27A of the amended Law. The same applies, *mutatis mutandis*, to any similar condition in a court-approved settlement (Section 19(a2) of the amended Law).

36 See footnote 20, above.

37 Amendment 10, footnote 9; the position adopted by the Amendment is consonant with previous academic critique of Israeli and US law: Eran B. Taussig, 'Opposition Motions to Class Action Settlements – Alya V'Kotz Ba' (in Hebrew), 53 Hapraklit 393, 441-451 (Dec. 2014).

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.[38] The Attorney General has typically filed objections to around 15 per cent of proposed settlements, and among such cases, the court's tendency to reject the settlement or approve the settlement with substantial changes is correspondingly greater.[39] 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 motion for approval of a class action (and a defendant in the action itself), subject to procedural rules regulating the lawful service to foreign defendants. A class may also include foreign members, thereby binding such members to the result of the proceedings, although a preponderance of foreign connecting factors may guide the court in deciding whether to allow the service of proceedings abroad, or whether it will relinquish its jurisdiction under the *forum non conveniens* doctrine.

An Israeli court gains jurisdiction over a foreign defendant in one of three ways: either by direct service of claims to the defendant (or an officer of the defendant) within the territory of Israel, by service to the defendant abroad upon leave from an Israeli court (or a registrar who is a judge) under Regulation 500,[40] or by service to the defendant's 'authorised agent' in Israel under Regulation 482.[41] 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.[42] 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,[43] and that the mere fact of an exclusive distributorship, unless supported by evidence of additional factors, does not in

38 Vinshal-Margal and Kalament (pp. 754–755) and Fink, footnote 4.

39 Vinshal-Margal and Kalament, op cit.

40 Permission to serve a statement of claims outside of the territory of Israel is governed by Regulations 500-503A of the Civil Procedure Regulations, 1984, and is a matter of judicial discretion which 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.

41 Service to an 'authorised agent' in Israel is governed by Regulation 482 of the Civil Procedure Regulations, 1984, and the case law's expansive interpretation of that term. Either of the purported 'principal' or 'agent' may challenge the validity of such service without prejudice to any defence pertaining to lack of jurisdiction.

42 Lv.Civ.App. 39/89 *General Electric Corp v. Migdal Insurance Company Ltd*, PD 42(4) 762, 768 (1989) (*GE*); Lv.Civ.App. 2652/94 *Tendler v. Le Club Méditerranée (Israel) Ltd* PDE 94(3) 409 (1994); Lv.Civ.App. 11822/05 *Philip Morris USA Inc v. Al-Roey* (published Nevo, 8 May 2006).

43 Cls. Act. (T.A.) 1634-05-11 *Pinchevsky v. Sony Corporation* (published Nevo, 4 April 2013).

and of itself constitute an authorised agency.[44] 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.[45] 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 motion for approval of a class action by leave of the court if the criteria of Regulation 500 are met.[46] In a string of cases regarding foreign companies operating global internet platforms, the courts have interpreted Regulation 500 broadly to allow Israeli plaintiffs and classes to bring their claims before an Israeli court, and have consistently struck down foreign jurisdiction and choice of law clauses in the platform operator's standard terms and conditions by means of the 'presumption of unfairness' clause of Israel's Standard Contracts Law, 1982.[47] Furthermore, although *forum non conveniens* is a doctrine applied in a court's discretion on a case-by-case, fact-dependent basis, a common thread in these cases indicates that where a platform operator appeals to the Israeli public through the internet in the Hebrew language, and especially where Israel has a public policy interest in protecting the rights of Israeli residents, it will be challenging for a foreign defendant to persuade an Israeli court to relinquish jurisdiction.[48]

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 Israeli new shekels in damages.[49] The plaintiffs sought to introduce the 'effects doctrine' to Israel in order to justify extraterritorial application of Israel's Restricted Trade Practices Law, 1988.[50] The registrar refused the defendants' motion to annul the service

44 GE, footnote 42, at [9]; Misc.Civ.Motion (T.A.) 8620/05 *Shitrit v Sharp Corporation* (published Nevo, 26 December 2006); Misc.Civ.Motion (J-m) 6158/09 *Rubin v. Elchiani* (published Nevo, 27 April 2009) at [7].

45 Cls. Act. (T.A.) 19529-06-14 *Hota v. Booking.com BV* (published Nevo, 19 July 2015) (*Booking (I)*).

46 *Booking (I)*, ibid, and Cls. Act. (T.A.) 19529-06-14 *Hota v. Booking.com BV* (published Nevo, 3 February 2017) (*Booking (II)*).

47 Civ. Case (T.A.) 30847-12-13 *Ciappa v. Dadon* (published Nevo, 8 June 2014); Cls. Act. (Central) 39292-04-13 *Klinghoffer v. Paypal Pte Ltd* (published Nevo, 21 September 2015); Cls. Act. (Central) 46065-09-14 *Ben Hamu v. Facebook Inc* (published Nevo, 10 June 2016); Civ. Case (T.A.) 39265-04-16 *Forex Capital Markets Limited v. Dural* (published Nevo, 23 November 2016); *Booking (II)*, op cit.

48 Ibid; see also Lv.Civ.App. *Alison Transport Inc v. Cosco Container Lines Co Ltd* (published Nevo, 15 July 2015) at [12] and Civ.App. 7841/09 *Palestinian Fund for Compensating Victims of Traffic Accidents v. Doe* (Published Nevo, 28 November 2015) at [20].

49 Cls. Act. (Central) 53990-11-13 *Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronic Corp et al* (published Nevo, 6 March 2016); on appeal: App.Reg. 57451-03-16 *Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronic Corp et al* (published Nevo, 29 December 2016). Full disclosure: our firm successfully represented one of the foreign defendants in the proceedings.

50 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.

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 in order 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.[51]

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 motion for approval 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.[52] It must also be shown that the procedural rights of the class members were not compromised; specifically, that they had fair notice of the proceedings, the opportunity to participate in or withdraw from the proceedings, and adequate legal representation throughout the proceeding.[53] 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.[54] 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.[55]

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51 It should be noted that the District Court's decision is currently subject to leave for appeal proceedings pending before the Supreme Court.

52 Lv.Civ.App. 3973/10 *Stern v. Verifone Holdings Inc* (published Nevo, 2 April 2015) (*Verifone*), at [24]. This Supreme Court decision cited in support of its conclusions, amongst other authorities, 'Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress', International Bar Association 6 (2008); John P. Brown, 'Seeking Recognition of Canadian Class Action Judgments in Foreign Jurisdictions: Perils and Profits', 4(2) Canadian Class Action Rev. 220 (2008); and *Currie v. Macdonald's Restaurants of Canada Ltd*, 74 O.R. (3d) 321 (Ont. C.A. 2005, Canada).

53 Verifone, op cit, at [25], citing the elements which have been described by American academics as 'voice', 'exit', and 'loyalty', based on *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 811-812 (U.S., 1985).

54 *Verifone*, op cit, at [27].

55 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,

V OUTLOOK AND CONCLUSIONS

Israel continues to be a class-action-friendly jurisdiction, with an ever-increasing volume of motions for approval of class actions. In an effort to reduce defendants' exposure to groundless claims, it is likely that the Ministry of Justice will soon promulgate a regulation that would require court fees to be paid on the commencement and development of class action proceedings. Representative plaintiffs are currently exempt from such fees, which in Israel constitute a significant check on specious claims under the general rules of civil procedure. The proposed initiative would require representative plaintiffs to pay a set fee of 24,000 Israeli new shekels when filing a class action motion in the district court.[56] While the proposed fee is likely to 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 in light of the new fees (money that is likely to be returned to the fund should the action result in a favourable settlement).[57]

Israel's case law in class action claims continues to be proactive and dynamic. As mentioned above, 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 dynamics of the case law's development, including the *Optronic/Sharp* case mentioned above regarding follow-on actions in competition law. These developments and others will continue to be of great concern to practitioners and multinational corporations alike.

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.

56 As mentioned above, the district court has jurisdiction over claims whose aggregate amount is 2.5 million Israeli new shekels and greater; in the magistrate courts the proposed regulation would assess court fees of 12,000 Israeli new shekels for smaller aggregate class action claims.

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

Chapter 12

ITALY

Gianfranco Di Garbo and Gaetano Iorio Fiorelli[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The first form of class action was introduced into the Italian legal system in 2007 by Law No. 244/2007 (the Finance Law 2008). In particular, this law added Article 140 *bis* to the Consumer Code, which expressly provides for and regulates the 'compensatory collective lawsuit'. In principle, such provision should have entered into force 180 days after the coming into force of Law No. 244/2007. However, owing to several fundamental and procedural issues, its coming into force has been continuously postponed. By Law No. 99 of 23 July 2009, the Italian legislator substantially modified the original Article 140 *bis* of the Consumer Code (Legislative Decree No. 206 of 6 September 2005), adopting a new text that entered into force on 1 January 2010 (the Class Action Law), regarding events and infringements occurring after 15 August 2009 (the date of coming into force of Law No. 299/2009).

Lastly, in 2012 the Class Action Law was amended so as to expand its scope and to protect the contractual rights of a number of consumers and users that find themselves in 'homogeneous' situations, while the previous language of the law required the situations to be 'identical', still according to an opt-in scheme.[2]

More in detail, the current version of Article 140 *bis* provides for that consumers with homogeneous interests are entitled to file a class action against a private corporation in three different cases: breach of contract, unfair or anticompetitive commercial practices and product or service liability (see below).

For sake of completeness, it has to be noted, that, by the Legislative Decree No. 198 of 2009 on the efficiency of public administration, the Italian legislator enacted a different type of class action, granting consumers the right to protect their interests in case of misconduct performed by public bodies or private companies providing public services. The commentators usually refer to this as 'public class actions', as opposed to the above-mentioned 'private class action'.

In this chapter, we will deal with the private class action only, in light of the different scope supporting the public class action.

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2 See Law No. 27 of 2012, which also introduced other amendments to the Class Action Law, for example, regarding the deadline for the consumers to join the class, which is now set forth by the court not later than 120 days after the decision to admit the action. Under the previous version of the law, consumers were allowed to join the class at any time after the admission of the class, even during the appeal proceedings.

II THE YEAR IN REVIEW

In last year's chapter, we reported that in March 2017, the Court of Milan admitted a class action brought against Samsung Electronics Italia, probably the most significant pending case.

The claim arose from on a breach of the rules concerning the unfair trade practices and is based on the fact that for some devices Samsung declared a memory substantially higher than that actually available for the same devices. Based on the technical data presented by the consumer association Altroconsumo, the difference between the actual memory and the declared memory was in a range of 20 to even 78 per cent, depending on the device.

It is worth noting that such action is a follow-up action with respect to the decision of the Italian Competition Authority No. 25238 of 2014, by which the latter had sanctioned Samsung Italia for the incorrect information given to the consumers with respect to the memory available on some electronic devices (i.e., the same object of the class action).

Samsung objected to the action based on the merits, but first alleged that the positions of the consumers were not 'homogeneous' as required by the law.

The objection was receipted by the Court of Milan, which first ruled that the positions of the consumers were sufficiently identified as per the reference to the decision of the Competition of Authority. The Court considered in particular that the different level of gap in the memory was not enough to exclude the homogeneousness of the consumers' positions, as they are all entitled to true and fair information as to the memory available on the devices they bought. Even if such differences imply a different quantification of the amount to be compensated, this point should be considered along with the merits of the case, where specific criteria will be identified to quantify the damages.[3]

The preliminary decision was challenged before the Court, which confirmed its decision on 6 June 2017, and the action proceeded on the merits, where newspapers reported that about 2,300 consumers were registered as plaintiffs.

III PROCEDURE

i Types of action available

Pursuant to Article 140 *bis* of the Italian Consumer Code, (private) class actions can be brought to seek legal relief in case of breach of the following rights, which are now required to be simply 'homogeneous' and no longer 'identical':

a contractual rights of a class of consumers towards the same professional defendant, these rights deriving also from standard terms and conditions and mass contracts;

b rights arising from product liability, even in the absence of a direct contractual relationship with the manufacturer. In particular, reference must be made to the damage arising from defective or dangerous products as regulated by Articles 114 and following of the Consumer Code. It is worth mentioning that, in the case of defective goods, the manufacturer's liability is widely considered by Italian case law as a 'strict and objective liability' and, therefore, the consumer merely has to prove the existence of the damage, the causal nexus between the damage and the use of the product and

3 See the decision of the Court of Milan of 10 November 2016 (Milan Court case No. 17682 of 2016).

the fact that the product resulted as defective during its use, while the producer has the burden to prove that the defect of its product did not exist when the product was put into circulation or that there was no fault or negligence from its side; and

c rights to compensation for the damage suffered owing to unfair commercial practices and anticompetitive behaviour.

Even if so far most of the cases related to unfair trade practices and financial contracts, most commentators consider that also environmental law should be covered by the Class Action Law, despite the subject is not expressly indicated in Article 140 *bis* of the Consumer Code.

Limitation periods are the same applicable to ordinary civil actions (i.e., five years for torts and 10 years for contractual liability).

ii Commencing proceedings

Pursuant to new Article 140 *bis* of the Consumer Code, consumers and users that have suffered damage are entitled to bring a class action lawsuit. Such a lawsuit may be brought individually by the consumer, as a party of the relevant damaged class, or through associations to which the consumers have granted proper delegation of power or through a committee in which the consumers participate. Any association may be delegated, provided that they are registered in a special register held by the Ministry of Industry or, lacking such registration, are deemed by the court to be sufficiently representative of a class of consumers in a given market.

It is worth noting that consumer associations are not entitled to bring class actions on their own.

Other consumers or users that intend to join a class action that have already been initiated, can do so without the need of a counsel for the defence. Such joining involves the waiver to start any individual lawsuit grounded on the same claim as that of the joined class action.

Both the defendant and the public prosecutor have to be notified of the complaint. The public prosecutor will then be able to take part in the first stage of the proceedings and recommend that the court admit or dismiss the class action for reasons of public interest.

According to Article 140 *bis*, if a consumer is willing to benefit from the court's decision, he or she is required to join the class and file the relevant documentation supporting his or her position (e.g., the invoices or tickets proving he or she bought a certain item), listing the factual elements and legal grounds on which his or her claim is based. Nonetheless, joining the class does not imply that the party will directly participate in the proceedings, and, for this reason, he or she is not required to be assisted by a lawyer.

A consumer may also decide not to opt-in. In this case he or she will be allowed to file a separate individual action. Furthermore, if he or she joins the class and then the lead plaintiff decides to bargain a settlement with the defendant, he or she can refuse to be bound by it and regain his or her individual power to sue.

As to overseas claimants, nothing in the Italian law prevents them from joining the action, pursuant to the same provisions applicable to Italian and EU consumers.

iii Procedural rules

Class action lawsuits fall under the jurisdiction of the court located in the main city of the region where the company is based (with some exceptions) and are handled by a panel of three judges if the tribunal, no matter what is the value of any single (or aggregated) claim.

At the end of the first hearing, the court rules on the admissibility of the lawsuit. In particular, the lawsuit shall be declared inadmissible if:

a it is *prima facie* clearly groundless;

b there is a conflict of interest;

c the judge believes that the individual rights indicated in the class action are not homogeneous; or

d the proponent does not appear to be capable of properly protecting the interests of the relevant class.

In the past, this has proved to be a crucial stage of the class action and most actions were rejected right at that moment, particularly on the point of homogeneity, as opposed to the identity of positions of the consumer plaintiffs. The purpose of the first reform of 2012 was just to make it easier for the class actions to be admitted, but still this is a serious hurdle to overcome.

In that respect, two main positions have been taken by the Italian courts. The first, stricter one, maintained by the Court of Milan by the decision issued on 8 November 2013, stated that only the breaches caused by a single event may be considered 'homogeneous' for the purposes of the Class Action Law. On the contrary, the Court of Venice (decision issued on 12 January 2016) interpreted the concept of homogeneity as a mere similarity; this means that the class can be considered as homogeneous on condition that the damages are caused by the same behaviour, even if this is not (necessarily) the same event that actually caused all the breaches.[4] Clearly, the interpretation of the Court of Milan implies a substantial limitation of the applicability of the class action. That said, even in the lack of precedents of the Court of Cassation (see below), it seems that the interpretation of the Court of Venice may prevail, as the recent decision of the Court of Milan in the *Samsung* case declared the admissibility of the class on the assumption of the homogeneity of the behaviours.

At the end of this first stage of the proceedings, if the action is considered inadmissible, the court will rule on the legal costs of the lawsuit that the losing party will have to bear. It is worth noting that, while the decision stating the inadmissibility can be challenged before the court of appeal, the decision issued by the latter cannot in turn be challenged before the Court of Cassation.

According to the recent decision issued by the Joint Chambers of the Court of Cassation Court on 1 February 2017, the class action is just one of the possible ways for the consumers to enforce their rights, so the decision of the court of appeal does not prevent the consumers from seeking compensation for the suffered damages following the ordinary procedural rules. According to the Supreme Court, while the inadmissibility declared by the court of appeal prevents the consumer plaintiffs from restating another class action under the same structure, other consumers are still entitled to put forward a class action even based on the same grounds.[5] The Supreme Court also highlighted that the consumers who initially promoted the (inadmissible) class action would be able to join the said new class action, once

4 For example, while one cannot deny that, for an action concerning unfair commercial practices committed by a bank, based on the (same) standard contractual forms, the misconduct is homogeneous (see the cases against the banks); in other cases – such as the unfair information provided to consumers in relation to several models of tablets and smartphones – the situations may be actually different both for the scope of the information and the persons who actually received it under different circumstances.

5 See below a brief description of the *Samsung* case footnote 6.

it is finally admitted. This decision has been criticised by many commentators, in light of the crucial role played by the preliminary stage for scrutiny of admissibility, where most of the class actions started as of 2010 have been stopped over past years. Owing to the features of the Italian legal system, in the absence of judgments issued by the Court of Cassation, there will be no chance to have a clear and final interpretation of the Class Action Law and namely of the criteria set forth to identify the homogeneity of the consumers' positions, a concept still subject to divergent interpretations of the courts of merits. In fact, even though in the Italian legal system the precedents of the Court of Cassation are not automatically binding (stare decisis) on the lower courts, it is without doubt that they have great influence on all territorial courts.

Coming back to the class action proceedings, if the action is admitted, the court will specify the requirements that every consumer should fulfil to join the class.[6] Most importantly, it will order the publication of the decision at the expenses of the plaintiff, and will establish a term within which any consumer may opt-in.

Parties will be able to challenge the court's decision within 30 days of notification. The appellate body (the competent court of appeal) will then re-evaluate the claim and issue a judgment within the following 40 days. If the court of appeal does not overturn the decision of the first degree court, the merits phase will begin.

iv Damages and costs

During the merits stage, the court goes through and analyses the merits of the case. Hence, if the judges find the defendant to be liable, they will rule on the amount of damages that each consumer deserves or indicate general uniform criteria. According to Law No. 27 of 2012, the parties are granted 90 days to reach an agreement on the above; failing this, the court will quantify the amounts due. Consistently with the opt-in mechanism, consumers who did not join the class are not bound by any agreement.

Punitive damages are not allowed under Italian law.

At the end of this stage the Court will also rule on the legal costs that the losing party should bear. The decision can be challenged before the Court of Appeal and, subsequently, in the Court of Cassation.

v Settlement

Any possible settlement reached during the proceedings is binding only on the consumers who have joined the action and expressly accepted the settlement.

IV CROSS-BORDER ISSUES

Class Action Law does not expressly address the possibility for overseas consumers to join the class, or that a class action can be brought before foreign companies. Ordinary jurisdiction and applicable law provisions apply.

As to follow-up actions relating to competition law infringements, where an infringement has been identified by a decision of the European Commission, Italian courts

6 For example, in the recent *Samsung* case, the Court of Milan made reference to some smartphone and tablet models, bought within a certain period of time, also relying on the decision of the Italian Competition Authority that had dealt with the case from a public enforcement point of view.

will consider themselves bound by the findings made in that decision, according to Article 16 of EU Regulation No. 1/2003. An Italian court may, therefore, opt to stay proceedings brought in reliance on a European Commission decision where that decision is subject to appeal before the European courts, so as not to reach a judgment that is irreconcilable with the outcome of that appeal or appeals.

It is worth noting that under a recent judgment, the joint divisions of the Italian Supreme Court ruled on 5 July 2017 (judgment No. 16601) that in Italy it will be possible to enforce judgments issued by foreign court granting the payment of punitive damages. This will apply also to judgments following class actions, whereas for domestic class actions it will still be impossible to get punitive damages, as the general principle emerging from the Italian framework on civil liability is based on compensatory damages, which are granted only as a compensation for the actual losses, injuries or harm suffered as a result of the behaviour of the wrongdoer.

V OUTLOOK AND CONCLUSIONS

Even after the amendment of 2012, the class action has not proved over the years to be an effective instrument to secure and enforce consumers' rights. Even if official data are not available, it is well known that since 2010 fewer than 10 cases reached a positive outcome for the consumers. Throughout 2016 and 2017, consumers associations scored some important points, but most commentators state that the law needs sweeping amendments, otherwise the entire system is doomed to fail.

As mentioned above, the most common problem with class actions still lies with the requisite that consumers have to be in a homogeneous situation. Based on that, most class actions have been dismissed at the preliminary stage as they were found to be inadmissible under the Class Action Law. This was the case, for example, with some class actions with a potentially huge impact, as those started versus the state-owned broadcasting company (RAI TV), the navigation companies Moby and Snav, and the railway company active in Lombardia, Trenord.

A further problem with the Class Action Law over the past years has been the availability of the action to consumers only, and the rather restricted definition of 'consumer' adopted by the courts.

As highlighted above, two different trends were maintained by courts, and so far no consistent trend has been established, also owing to the fact that the Supreme Court is not allowed to reconsider the decisions issued by the courts of appeal.

As regards the subject of the cases, the majority of the class actions concerned unfair commercial practice allegedly committed by Italian banks against consumers.

Below is a short outline of some of the most significant class action cases bought before Italian courts over the past years.

i Some significant cases

IntesaSanPaolo

This case was started in 2011 before the Turin Court by the consumer association Altroconsumo. The Court finally ascertained that some overdraft charges applied by the bank

were unlawful and sentenced the latter to give them back to the account holders. However, owing to the some formal issues as regards the joining deeds, only six consumers were finally compensated.[7]

Wecantur

The action started by some consumers seeking compensation for damage suffered a result of the cancellation of a holiday package. The Naples Court sentenced the tour operator Wecantur to pay €3,600 for each consumer, but in the end nobody got his or her money, as Wecantur went bankrupt.[8]

Volkswagen and FCA – class actions versus the automotive industry

Late in 2015, the Turin Court of Appeal admitted a the class action started by the Italian consumer associations Altroconsumo against Fiat, regarding the falsification of the pollution tests of the vehicle Panda third series 1.2.[9] More recently, Altroconsumo scored a good point for a class action brought against Volkswagen about the well known case concerning the falsification of pollution tests of diesel vehicles. On 16 June 2016,[10] the Venice Appeal Court, by reversing a previous decision of the Venice First Degree Court, admitted the class action concerning the Volkswagen vehicle model Golf 1.6 HDI and opened the possibility for further consumers to join the action. In November 2017, the Court rejected an appeal, and the case is now pending on the merits over more than 90,000 claims filed.

British American Tobacco Italia

This is the first and only case of a tobacco class action in Italy. The lawsuit was filed by Codacons, on behalf of several consumers who claimed that the high level of nicotine contained in the cigarettes sold by the American British Tobacco Italia caused addiction. Consequently, the plaintiffs sought compensation both for the costs of the cigarettes purchased under this dependence and the health damages caused by the same.

From a procedural point of view, the defendant objected that the alleged facts occurred before Article 140 *bis* came into force, thus no class action could be filed, and that in any case the rights at issue were not homogeneous.

The Court of Rome partially upheld the arguments of British American Tobacco and ruled that the class action proceedings was applicable only for the misconduct that occurred after Article 140 *bis* became enforceable (i.e., after 15 August 2009). Then, as regards the merits of the case, the Court considered the action to be groundless on the statement that every smoker was in fact fully aware of the risks arising from the consumption of cigarettes, and the damage was, therefore, a consequence of a free and aware choice of theirs.

The Court also declared that a collective protection could be granted only upon condition that the judge's assessment can focus on the same legal and factual issues (i.e., on homogeneous rights). On the contrary, in the specific case, as every consumer had his or

7 See the decision of the Court of Turin of 28 March 2014 (Turin Court case No. 32770 of 2011).

8 See the judgment of the Court of Naples of 18 February 2013 (Naples Court case No. 2195 of 2013).

9 See the decision of the Court of Appeal of Turin of November 17 June 2015 (Turin Court of Appeal case No. 1775 of 2015).

10 See the decision of the Court of Appeal of Venice of the 17 June 2016 (Venice Court of Appeal case No. 298 of 2016).

her own smoking 'history' and has been differently affected by the nicotine, the Court of Rome ruled that the class was not homogeneous for the purposes of the Class Action Law. Accordingly, the action was dismissed as being inadmissible.[11]

ii Conclusions

The Italian class action system clearly needs further legislative interventions to gain popularity.

As reported above, only a few class actions have been declared admissible. Indeed, there are several issues among the provisions of Article 140 *bis* that need to be addressed.

The courts tend to allocate the litigation expenses between the parties or to apply the general principle whereby the losing party bears the costs and attorney fees of the winning party. However, one of the most significant financial burdens of a class action litigation is the publication expense of the ordinance admitting it. Even Article 140 *bis* does not contain provisions as to how to allocate such expenses; so far the courts have uniformly imposed on the plaintiff to anticipate those expenses (which, only at the end of the proceedings, may possibly be charged to the defendant, if the action is upheld). Accordingly, in order to comply with the adequacy requirement, a consumer is required to prove that he or she has enough economic and organisational resources to provide the publication of the court orders as well as the legal costs of a possible merits stage.

The economic factor has often been proved to be decisive for the courts to dismiss many lawsuits, and has inevitably affected the practice of class actions in Italy, where most cases are in fact promoted by associations granted with an *ad hoc* mandate. These associations, in fact, have organisational and financial resources greater than single individuals or small groups of consumers.

On the other hand, the costs for proceedings and the high standard of representativeness required by the courts might discourage the consumer associations when the number of class members is presumed not to be significant.

Through Article 140 *bis* a consumer may only seek compensation for damages and restitutions, but not 'punitive damages', which are not allowed by Italian law (whereas, as indicated in Section IV, foreign decisions granting punitive damages may be enforced in Italy).

However, contingency fee arrangements are not allowed by law, and this has made big legal firms reluctant to take cases where the amount of damages awarded may be eventually modest and the attorney fees liquidated by the court not sufficiently rewarding.

For the above reasons, in light of the relevant financial resources needed to have court orders published with national newspapers, the consumers' associations could likely find it too onerous to promote a class action. Moreover, even assuming that the class is dimensionally significant, there is no certainty that after that the action has been admitted, it will end with a positive judgment in the merits. Consumers and associations are forced to run the risk that the high publication expenses are paid for no benefit. Nonetheless, the publicity is necessary to inform people and put them in a position to opt in. Also, the above mechanism has an important impact on the outcome of class actions proceedings. In fact, consumers other than the plaintiffs can join the class only after the action has been admitted.

11 See the decision of Rome Court of 1 April 2011, confirmed by the decision of the Rome Court of Appeal of 27 January 2012.

Hence, in theory, a class potentially involving hundreds and thousands of consumers could stop at the preliminary admissibility stage, if filed by a promoter without the appropriate financial resources.

One may, therefore, wonder whether it may make sense to switch to a opt-out system, which would presumably entail lower publicity costs. Apart from the issues that such a choice may raise, such a mechanism would hardly be successful in our system unless appropriate procedural powers are granted to the consumers that would be involved, by operation of law, into the class action.

Another possible change could involve a better definition of the element of 'homogeneity' in order to ensure its uniform interpretation.

Also for these reasons, the Italian parliament considered enacting a new reform of the class action law.

From 2015, a sweeping reform of the Class Action Law is pending as a bill in the Parliament, the most significant changes should be:

a the inclusion of the rules of the class action in the code of civil procedure, consolidating the private class action and the public class action;

b the availability of the class action instrument not only to the 'consumers' but to all people who have claims caused by illicit actions that affect several defendants; and

c the provision of financial incentives to the attorneys who represent the class; it indeed provides that if the class action is upheld by the court, a portion of the damages allowed (from 0.5 to 9 per cent, depending on the number of members of the class) is paid directly, as premium fees, by the defendant to the attorneys of the plaintiffs.

The bill was passed by one of the branches of the parliament (the Chamber of Deputies), but the general elections, called for March 2018, stopped the reform process, which will have to be restarted in the next few years.

Chapter 13

JAPAN

Yuriko Kotani and Haig Oghigian[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In addition to conventional civil actions seeking damages or injunctive relief, the Consumer Contract Act introduced injunctive relief action by a qualified consumer organisation (QCO) certified by the Prime Minister to protect the interests of a large number of unidentified consumers in 2007.

In addition, the Act on Special Measures for Civil Procedure in Collective Restoration of the Consumer Property Damage (the Special Procedure Law), which is a Japanese class action law, came into effect on 1 October 2016.

The Special Procedure Law has an opt-in system. The plaintiff must be a specified qualified consumer organisation (SQCO) certified by the Prime Minister. Certain district courts have jurisdiction depending on the nature of claims and the estimated number of individual consumers. Claims must be based on contracts between consumers and business operators in which consumers owe monetary obligations.

II THE YEAR IN REVIEW

Prior to the Special Procedure Law, consumers had been required to sue business operators individually to recover damages arising from a seller's misrepresentations and misstatement of warranties and other claims about products or services. Owing to significant financial and informational disparities between the parties, the system had been invariably advantageous to the business operators.

Therefore, the Japanese government had been considering the introduction of some kind of consumer collective action. It extensively reviewed and evaluated class action laws and bills worldwide. In particular, it critically assessed US class actions and adopted what it believed to be best practices suitable to Japanese culture and submitted these to the national Diet. It integrated the new system into Japan's judicial system for civil claims, which has the following characteristics:

a it is a civil law system. Courts can interpret the statutes but only the legislature can make laws;

b there is no jury system in civil cases;

c there is no 'US-style' discovery outside court; and

d there are no punitive damages.

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There has been no report on cases filed.[2]

III PROCEDURE

i Types of action available

Conventional civil actions

Claims do not need to be based on contracts. A broad range of tort claims, including personal injury, is available. However, all of the plaintiffs and defendants must be named and no John/Jane Doe filing is allowed. Claims for monetary damages, or temporary or permanent injunctions, or both, are possible.

Injunction action under special laws

Injunction actions are available against unfair solicitation or unfair provisions under the Consumer Contract Act (since 7 June 2007), unfair presentation under the Act against Unjustifiable Premiums and Misleading Presentations (since 1 April 2009), unfair solicitation, unfair provisions or unfair advertisement under the Act on Specified Commercial Transactions (since 1 December 2009) and false labelling under the Food Labelling Act (since 1 April 2015).

Damage recovery action under the Special Procedure Law

Damage must have occurred after 1 October 2016. Claims must be based on a contract between a consumer and a business operator in which the business operator owes monetary obligations to the consumer in the following five ways.

Claim for performance of contractual obligation

For example, a security deposit of a private membership club is not refunded upon termination of membership even if the membership charter requires the refund.

Claim related to unjust enrichment

For example, though students paid tuition to a language school, they cancelled the lesson agreement before taking all of the classes paid for, but the proportionate refund has not been made.

Damage claim based on non-performance of contractual obligations

For example, persons paid a fee to receive a referral to guarantors for property lease agreements but no guarantor has been referred.

Damage claim based on warranty obligation

For example, purchasers of a condominium in the same building, which does not meet fire resistance standards.

2 As of 20 February 2018.

Damage claim based on tort provisions in the Civil Code[3] provided that actions cannot be brought for personal injury

For example, a broker that purchased on a customer's account unlisted stock issued by a company whose business situation was not confirmed and which caused loss to customers.

Only monetary claims are covered by the action under the Special Procedure Law. Neither demand for product recall nor repair of defective products may be asserted.

ii Commencing proceedings

Conventional civil actions

Any legal entities; both corporations and individuals may initiate the actions.

Injunction action under special laws

Only a QCO may bring the actions. An individual consumer has no standing to sue on behalf of a 'class'. As of 20 February 2018, 17 QCOs have been certified by the Prime Minister.

Damage recovery action under the Special Procedure Law

This is a two-step proceeding.

The first step is to seek declaratory judgment of common liabilities. If the court determines that the business operator does not have liability to make monetary payments to consumers, then the procedure ends. If the court determines that it has such liability, then the procedure moves on to the second step, called a summary procedure to determine claims. A losing party may appeal the judgment to a High Court that has jurisdiction over the competent district court.

The second step is to determine the claims of individual consumers where the opt-in takes place.

The plaintiff must be an SQCO. As of 20 February 2018, only two organisations, the Consumers Organisation of Japan and Kansai Consumers Support Organisation, have been certified by the Prime Minister among 17 QCOs. An SQCO is supervised by the government and subject to corrective action orders and revocation of certification. Compensation and fees to be charged by an SQCO to consumers are regulated. Therefore, there is no room for seeking significant contingency fees.

The defendant must be the business operator who has a contractual relationship with consumers, typically a retailer. SQCO may not sue a manufacturer, unless the manufacturer has entered into the contract with the consumer. If the business operator ultimately loses in the action and paid damages to consumers, it may be able to recover the amount from the manufacturer. Therefore, the manufacturer may file an application to intervene in the action.

In addition to courts that have jurisdiction over the defendant's head office and other business offices, the location where the tort was allegedly conducted, and the location for the performance of the alleged legal obligation, (1) if the number of subject consumers is expected to be 500 or more, any district courts under the common jurisdiction of those courts; and (2) if the number of subject consumers is expected to be 1,000 or more, the Tokyo District Court and Osaka District Court also have jurisdictions.

If multiple cases in which the content of claims and defendants are identical have been filed, their procedures shall be consolidated.

3 Act No. 89 of 27 April 1896, as amended.

After the first step action is filed, if there is pending conventional civil action filed by a subject consumer and the defendant for the related claim, the court where the conventional case is pending may stay the procedure.

An SQCO may apply for provisional attachment to the business operator's assets in order to secure the performance of claims.

iii Procedural rules

Conventional civil actions

In contrast with the US legal system, Japanese civil procedure has the following characteristics (which are also applicable to injunction actions and the damage recovery procedure):

a no jury or lay judge participates in decision-making. Only bench trial by professional judge is available; and

b no discovery is available between the parties. The party seeking information needs to obtain court ruling upon filing a request for specific documents.

Injunction action under special laws

A typical start is when a consumer provides information to a QCO regarding his or her damage. If the QCO sees the merit on the case upon its internal review, it would contact the business operator in question and request suspension of its unfair activities. If the business operator does not accept the request, the QCO would file the injunction action against it. The judgment may be appealed to higher court by a losing party.

Damage recovery action under the Special Procedure Law

As explained in Section III.ii, it is a two-step proceeding.

The first step is to seek declaratory judgment of common liabilities. The outcome of the first step is binding upon the plaintiff (SQCO), the defendant (business operator), other SQCOs and consumers who filed proof of claims at the second step.

The second step is to determine the claims of individual consumers where the opt-in takes place. In principle, the SQCO is required to apply for determination of the claims within one month of the day when the declaratory judgment becomes final.

Opt-in invitations are made in the following methods:

a the court shall post the official notice;

b the SQCO shall notify subject consumers individually in writing or by email and post official notice (internet notice is permitted) at its cost;

c the business operator shall announce the content of the court's official notice (internet announcement is permitted) and upon request by an SQCO, disclose documents containing information regarding subject consumers; and

d the Consumer Affairs Agency shall announce the summary of declaratory judgment.

In response to the invitation, the subject consumer shall authorise the SQCO to file proof of claim on his or her behalf and pay fees to the SQCO. The SQCO shall file the proof of claim per such authorisation. The filing of proof of claim shall toll the statute of limitation.

The business operator shall accept or deny the claim. If the SQCO does not dispute the answer from the business operator, its answer becomes the final determination of the claim.

If the SQCO disputes the answer, the court will decide on the claim's existence and amount, which will be paid to consumers. A losing party may appeal the determination to the High Court in the jurisdiction.

Those consumers who do not opt in are not barred from bringing or resuming individual lawsuits.

iv Damages and costs

Court costs should be borne by the losing party while each party pays its own attorney's fee.

Conventional civil actions

For contract claims, ordinary damages are recoverable while special damages are recoverable if they are foreseen or foreseeable by the breaching party. For tort claims, the statute requires 'causation', which is interpreted by courts as 'foreseeability'.

Injunction action under special laws

Damages are not included in the remedies.

Damage recovery action under the Special Procedure Law

Only direct damages are recoverable. Lost earnings or pain and suffering are unrecoverable.

v Settlement

Conventional civil actions

Court sanction is not needed for a settlement. Only named parties to the settlement and their legal successors are bound by the settlement.

Injunction action under special laws

Court sanction is not needed for a settlement. Only named parties to the settlement and their legal successors are bound by the settlement.

Damage recovery action under the Special Procedure Law

The law authorises the SQCO to settle the case with the defendant during the first step to confirm the common liabilities. Court sanction is not required by law. The settlement triggers the commencement of the second step. The subject consumers who opt in during the second step are bound by the settlement.

IV CROSS-BORDER ISSUES

No punitive damages are allowed. No Japanese statutes provide punitive damages. The Act on General Rules for Application of Laws provides that even when a tort is governed by a foreign law, the victim may make a claim only for damages or any other remedies that may be permitted under Japanese law. The Japanese Supreme Court has found the punitive damage portion of foreign judgment unenforceable in Japan because it is against the public policy of Japan and therefore does not meet one of the statutory requirements for enforcement.

There has been no foreign class action case in which a final foreign judgment was enforced or attempts were made to enforce it in Japan.

V OUTLOOK AND CONCLUSIONS

Injunction action under special laws appear to be effective methods to make business operators voluntarily correct their unfair practices. Many litigated cases have been resolved in a settlement in or outside of court, while some have been decided in favour of the QCO.

Since there have been no cases for damage claims filed by an SQCO, the system does not seem to be functioning well.

Chapter 14

NETHERLANDS

Jan de Bie Leuveling Tjeenk and Bart van Heeswijk[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Dutch law has a different approach to class actions compared with common law jurisdictions like the United States. In particular, the plaintiff in a 'Dutch-style' class action, a collective action, is a representative organisation. Rather than having its own interest in the litigation, it files the claim solely for the benefit of third parties whose interest it purports to represent.[2] The representative organisation, which must be a foundation or association, does not, however, represent the interested parties in a formal sense.

A key limitation to a collective action under Dutch law is that it does not allow representative organisations to claim damages. As a result, in practice, the primary use of a collective action is to pursue a declaratory judgment establishing the basis for liability (e.g., a declaration that the defendant committed a tort or breached a contract). On the basis of that declaratory judgment, the interested parties may claim damages in individual proceedings.

On 16 November 2016, a bill was introduced to the Dutch parliament, proposing to amend the existing collective action so as to permit the representative organisation to claim damages (the Proposal).

Although Dutch law does not provide for an 'American-style' class action, it does provide for a mechanism that is somewhat similar to the US class action settlements. The Dutch Act on the Collective Settlement of Mass Claims (WCAM) provides for an opt-out mechanism that facilitates the implementation of collective settlements through a binding declaration by the Amsterdam Court of Appeals. The WCAM was developed exclusively as a mechanism to offer the opportunity to give a wide effect to settlements reached. Eight settlements have already been declared binding based on the WCAM; court proceedings to obtain a binding declaration in another settlement – Ageas – are currently pending. Since the US Supreme Court's decision in *Morrison v. National Australian Bank*,[3] the international relevance of the Dutch mechanism for collective settlements has increased. Indeed, now that 'foreign cubed class actions' have become a problem in the United States, the Netherlands may become a serious alternative for the certification of collective settlements involving non-US investors in non-US securities listed on a non-US stock exchange.[4]

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2 Article 3:305a Dutch Civil Code.

3 No. 08/1191 (US 24 June 2010).

4 R Hermans and J de Bie Leuveling Tjeenk – 'International Class Action Settlement in the Netherlands since Converium', in: I Dodds-Smith, A Brown (eds.) – *ICLG to: Class & Group Actions 2017*, Global Legal Group Ltd., London, UK, 2016.

Besides a collective action and a mechanism for collective settlements, Dutch law provides the possibility to bundle claims by allowing a multitude of damaged parties to assign their claims to a single third party, for instance a claims vehicle, which can then commence proceedings in its own name.[5]

II THE YEAR IN REVIEW

The Proposal intends to facilitate collective redress in the form of an opt-out mechanism for Dutch claimants, and an opt-in mechanism for foreign claimants. It provides mechanisms for reaching a class settlement similar to the procedure for a WCAM settlement. The Proposal is currently being discussed by the Dutch Parliament. In Section III.ii, we will discuss the current law for a collective action together with the proposed adjustments.

In 2016, Ageas and a number of representative organisations submitted a request to the court to declare binding the global settlement agreement with respect to all securities litigation related to the former Fortis group for events that occurred in 2007 and 2008. These events relate, among others, to the acquisition of parts of ABN AMRO. After an interim judgment in June 2017, the settlement has been revised with Ageas increasing the settlement amount by €100 million, to a total amount of approximately €1.2 billion. Parties to the settlement filed a renewed request for a binding declaration in December 2017. Unlike the previous settlement submitted to the court, all claimant organisations support the renewed settlement. The Dutch court, however, has not yet accepted the revised settlement; it has, instead, requested further details regarding the remuneration structure of the claimant organisations. The settlement will be discussed during hearings in March 2018.

III PROCEDURE

i Types of action available

Claim bundling

Under general rules of Dutch law, claims can be assigned to a third party, who can commence proceedings and sue for damages in his or her own name. This practice of bundling claims is common in the Netherlands, for instance in the context of cartel damage claims. The claims are usually brought by a claims vehicle in its own name, having obtained a large number of claims through an assignment from parties that have allegedly suffered loss as a result of (for example) a cartel.

Collective actions

Article 3:305a of the Dutch Civil Code provides the possibility for a representative organisation to bring a collective action. Under the current law the representative organisation may not file claims for damages. The Proposal proposes to remove this restriction. Section III.ii will further discuss the collective action currently provided by Dutch law and the proposed adjustments.

Collective settlements

With the WCAM Dutch law provides for a mechanism that facilitates the implementation of collective settlements. This mechanism will be outlined in Section III.iii.

5 Article 3:94 Dutch Civil Code.

ii Collective actions

Commencing proceedings

An association or foundation may bring a collective action to protect the interests of a defined group of interested parties or public interests.[6] The representative organisation can file a collective action at its own motion. In order to have standing in court, a number of requirements must be met. The representative organisation must have the objective of protecting such interests according to the objective clause in its articles of association. In addition, the association or foundation must show to be able to sufficiently protect the interest of the parties on whose behalf the action is instituted. This is commonly known as the criterion of representativeness. Before commencing such collective action, the representative organisation must have tried to achieve the required result through negotiations.

In a collective action, the representative organisation represents all persons in whose interest the claim is filed, including but not limited to the persons that are associated with, or members of, the representative organisation.

Procedural rules

Except for a claim for damages, any form of relief may be sought, such as a declaratory relief on liability, rescission or specific performance of a contract, injunctive relief or annulment of a legal act. A declaratory judgment establishing liability can be followed by individual damages claims.

The collective action is covered by the normal rules of Dutch civil procedural law.

Proposal

As stated earlier, the Proposal aims to broaden the scope of the current collective action so as to enable collective actions for damages on an opt-out basis for domestic claimants and an opt-in basis for foreign claimants. Furthermore, the Proposal introduces stricter criteria for representative organisations with regard to governance, funding and representativeness. These criteria would apply for collective actions for damages claims as well as for other collective actions. According to the Proposal, the court will decide early in the proceedings whether the representative organisation meets the relevant criteria and whether the action is fit to be dealt with through collective action proceedings.

Within two days after the filing of the claim, the representative organisation must enter the matter in a central register for collective actions. The entry in the register triggers a three-month period, during which other representative organisations can file alternative competing collective actions that are based on the same event. If more than one representative organisation files a claim for the same event, the court will appoint a lead plaintiff, called an 'exclusive representative', to represent the interests of the whole class.

The court's decision regarding the appointment of an exclusive representative, the definition of the class and the scope of the claim must be notified to all members of the class. This notification will also indicate that Dutch claimants have the opportunity to opt out of

6 An association is defined by Article 2:26 Dutch Civil Code. A foundation is defined in Article 2:285 Dutch Civil Code. A foundation may be set up especially for the purpose of participating in a collective action or settlement.

the collection action and that foreign claimants can opt in. However, at the request of a party to the class action, the court can rule that the opt-in mechanism will also apply to foreign claimants. The minimum period for opting in or opting out is one month.

The Proposal includes a 'scope rule', which provides that the collective action must have a sufficiently close connection to Dutch jurisdiction. As this provision is especially important in the context of collective actions with an international character, this issue will be discussed further in Section IV.

Damages and costs

The representative organisation may not have its own financial interest in the claim. It may, however, derive its funding from third parties to achieve the objectives set out in its articles of association. This means that a third-party litigation funding entity or law firm can provide funds to that organisation to fund a collective action.

In principle, attorney fees can be negotiated between the representative organisation and the attorney without any particular restrictions. However, that freedom is to a certain extent restricted by the Dutch Bar Association's Code of Conduct (DBACC). The DBACC provides that 'an attorney may not agree to charge a proportionate part of the value of the result obtained'. Hence, contingency fees are not permitted. Furthermore, the DBACC provides that 'an attorney may not agree that he will only charge for his services upon obtaining a specific result'. Therefore, attorneys are not allowed to receive no fee at all unless a specific result is obtained. However, charging fees at a higher rate if the case is successful is permissible.

iii Settlement

The WCAM

A collective action could end up in a class settlement certified by the WCAM procedure. However, to be entitled to a WCAM procedure, it is not required that a collective action be filed first. The WCAM provides parties to a settlement agreement the possibility of jointly requesting the Amsterdam Court of Appeals (the Court) to declare the settlement agreement binding. The agreement must be concluded between one or more potentially liable parties, and one or more foundations or associations representing one or more groups of persons for whose benefit the settlement agreement was concluded (together, the 'interested persons'). If the Court does declare the settlement agreement binding, the agreement then binds all persons covered by its terms, unless such person decides to opt out in writing within a certain time period after the binding declaration. The opt-out period is determined by the Court, but is at least three months.

Thus far, the Court has rendered eight final decisions within the framework of the WCAM, namely in *DES* and *DES II* (regarding personal injury allegedly caused by a harmful drug), *Dexia* (regarding financial loss allegedly caused by certain retail investment products), *Vie d'Or* (regarding financial loss allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company), *Vedior* (regarding financial loss allegedly suffered by shareholders as a consequence of late disclosure of takeover discussions), *Shell*, *Converium* (both regarding financial loss allegedly suffered by shareholders as a consequence of misleading statements by the company in a certain period) and *DSB Bank* (regarding possible damages claims on the bankrupt estate of a bank owing to the bank

allegedly violating its duty of care towards the customers).[7] In each of these cases, the Court declared the settlement agreements binding. It further found the settlements reasonable and affirmed the representativeness of the representative organisations.

The procedure of reaching a binding settlement under the WCAM is as follows:

a Settlement: a settlement is concluded with (an) organisation(s) representing the interests of claimants.

b Binding declaration: the Court may declare the settlement binding upon all relevant claimants, 'known' and 'unknown', on an opt-out basis.

c Binding settlement: upon the binding declaration, all beneficiaries are automatically bound to the settlement unless they opt out.

Commencing proceedings

Parties

The beneficiaries are not initially a party to the settlement. However, upon the binding declaration being issued by the Court, all beneficiaries by virtue of the binding declaration are automatically deemed to be a party to the settlement, unless he or she issues an opt-out statement in time. If a group of persons is excluded from the settlement, the binding declaration will not diminish their rights in any way, that is the binding declaration cannot be invoked against them, hence they are free to pursue their claim in court, without the need to issue an opt-out statement in time. Excluding a certain group of persons from the scope of beneficiaries under a settlement is different from the situation where a certain group of persons is included in the scope of beneficiaries under the settlement, but is not awarded any compensation.[8] In that case, the binding declaration can be invoked against these persons: they will need to opt out in time in order to be able to pursue their claim in court.

One or more associations or foundations that, pursuant to their articles of association, promote the interests of, and are representative of the beneficiaries (representative organisations) can conclude a settlement.[9] The WCAM stipulates that the Court must deny the binding declaration of a settlement if the representative organisations are not sufficiently representative with regard to the interests of the beneficiaries.[10] The Court actively ascertains whether this requirement is met. The test as to whether a representative organisation is sufficiently representative is hence a discretionary test applied by the Court on the basis of all circumstances of the matter. This representativeness can be derived from several factual circumstances and that not one circumstance is decisive. In the *Dexia* case, the Court looked at the statutory objects of the foundations and associations involved, the number of participants or members, the activities of these foundations and associations apart from filing

7 Amsterdam Court of Appeals 1 June 2006, LJN AX6440, NJ 2006/461 (*DES*); Amsterdam Court of Appeals 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*); Amsterdam Court of Appeals 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d'Or*); Amsterdam Court of Appeals 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*); Amsterdam Court of Appeals 15 July 2009, LJN BJ2691, JOR 2009/325 (*Vedior*); Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*); Amsterdam Court of Appeals 4 November 2014, JOR 2015/10 (*DSB*) and Amsterdam Court of Appeals 24 June 2014, ECLI:NL:GHAMS:2014:2371 (*DES II*).

8 See for example: Amsterdam Court of Appeals 27 January 2007, LJN AZ7033 (*Dexia*), paragraph 3.12; Amsterdam Court of Appeals 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d'Or*), paragraph 3.3.

9 Article 7:907(1) Dutch Civil Code.

10 Article 7:907(3)(f) Dutch Civil Code.

the WCAM request, such as their websites, mailings to interested persons, activities in the media, and earlier activities in the field of litigation in connection with the issues that were covered by the settlement.[11] In the *DES* case, the Court applied the same standards (in a less elaborate manner).[12]

Terms and conditions of the settlement

The settlement is a private agreement between private parties and as such, in principle, the parties are free to agree on the terms and conditions. That said, the settlement is not intended to only govern the legal relationship between the compensating parties and representative organisations, but ultimately to govern the legal relationship between them and a large group of future parties: the beneficiaries. In deviation from the main rule of interpretation of contracts covered by Dutch law that hinges on the parties' intentions, a settlement – which binds parties that were not involved in the conclusion of that settlement – will need to be interpreted more objectively.[13]

Procedural rules

Once a settlement is reached, the parties may jointly request the Court for a binding declaration.[14] Until now, a binding declaration has been requested – and issued – in eight cases.[15]

The WCAM limits the options of the Court to either issue or altogether refuse a binding declaration.[16] In practice, the Court however issues interim judgments to indicate whether or not the settlement, in its view, passes the test and allow the parties to submit one or more amended settlements accordingly, before issuing a final judgment.

The Court's decisions are non-appealable unless a binding declaration is refused[17] (which has never happened, although the Court has indicated in some cases it would only declare the settlement binding after being amended) and then only by all petitioners jointly to the Supreme Court of the Netherlands on limited grounds of material procedural errors or breach of law.[18]

11 Amsterdam Court of Appeals 27 January 2007, LJN AZ7033 (*Dexia*), paragraph 5.23 ff.

12 Amsterdam Court of Appeals 1 June 2006, LJN AX6440, NJ 2006/461 (*DES*), paragraph 5.8 ff.

13 Supreme Court of the Netherlands 9 December 2017, NJ 2017/11.

14 Article 7:907(1) Dutch Civil Code: 'may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused'. The Amsterdam Court of Appeals has exclusive jurisdiction to decide on Pre-Agreed Settlements under the WCAM. Article 1013(3) Dutch Civil Code. Kamerstukken II 2003/04, 29 414, No. 3, p. 25.

15 Amsterdam Court of Appeals 1 June 2006, LJN AX6440, NJ 2006/461 (*DES*); Amsterdam Court of Appeals 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*); Amsterdam Court of Appeals 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d'Or*); Amsterdam Court of Appeals 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*); Amsterdam Court of Appeals 15 July 2009, LJN BJ2691, JOR 2009/325 (*Vedior*); Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*); Amsterdam Court of Appeals 4 November 2014, JOR 2015/10 (*DSB*) and Amsterdam Court of Appeals 24 June 2014, ECLI:NL:GHAMS:2014:2371 (*DES II*).

16 Pursuant to Article 7:907(4) Dutch Civil Code, the Court may not amend or supplement the settlement except with the petitioning parties' consent.

17 Article 1018 Dutch Code of Civil Procedure.

18 Article 79 Dutch Law on the Organisation of the Judiciary.

Petition

The compensating parties and the representative organisations submit a joint petition to the Court, together with the settlement, in which they request the Court to issue a binding declaration.

Notification

Notification of the persons for whose benefit the settlement agreement is concluded is crucial, both at the stage of the litigation aimed at obtaining a binding declaration, as well as after the binding declaration has been issued.[19] The WCAM provides for direct notification of interested persons known to the petitioners, as well as for public notification, through announcements in newspapers, of interested persons whose identity is unknown to the petitioners. Insofar as foreign unknown interested persons are concerned, the Court may order announcements in relevant foreign newspapers, as is demonstrated in *Shell* and *Converium*.[20]

Judicial review

A settlement will need to meet certain mandatory statutory requirements in order to qualify for a binding declaration.[21] These requirements may be divided into two categories; on the one hand, more 'technical' requirements (such as a description of a damage-causing event and the group of beneficiaries), essentially pertaining to information that is necessary for a standardised settlement, and on the other hand more substantive requirements, which enable the Court to determine whether the terms and conditions of the settlement provide sufficient safeguards for the interests of the beneficiaries to justify a binding declaration (such as 'reasonable compensation', see the following paragraphs, and the representative organisation being sufficiently representative).

Reasonableness test

The WCAM provides that the Court will refuse the binding declaration if the compensation awarded in the settlement is not reasonable, having regard to, among other things, the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage. In determining whether the amount and terms of the compensation awarded in the settlement are 'reasonable', the Court may take into account all circumstances of the case – whether they arose before or after determination of the amount of compensation and before or after the settlement was reached.[22] In *DSB Bank* the court also took into consideration that it is both in accordance with the law and in the interest of the parties involved that the number of opt-outs is as limited as possible.

'Reasonableness' of the settlement has many aspects. The first aspect discussed here is the reasonableness of the criterion by which it is determined whether a person is included

19 Direct international notification, insofar as EU-domiciled persons are concerned, is governed by Council Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. If interested persons reside outside of the EU, notification must be effected pursuant to applicable treaties, most notably the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

20 See the minutes of the court session in Shell of 12 July 2007 and the minutes of the court session in Converium of 24 August 2010, both published on the website of the Court.

21 Article 7:907(2)(3) Dutch Civil Code.

22 Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*), paragraph 6.2.

in the group of interested parties. The Court will not easily decide that a certain group was wrongly excluded from the settlement.[23] Obviously, if a group is excluded from the settlement, the binding declaration will not diminish their rights in any shape or form, that is: the binding declaration cannot be invoked against them; and they still have standing in court, without the need to issue an opt-out statement in time.

Please note that the type of exclusion described in the preceding paragraph is different from the situation where a certain group is included in the settlement, in the sense that it is covered by the description of interested persons potentially eligible for compensation, but is not awarded anything. In that case, the binding declaration can be invoked against this group and these persons need to opt out in order to still have standing in court. In such case, the Court will fully test whether such limitation is reasonable.

The concept of 'reasonableness' also refers to the amount of compensation awarded in the settlement. It is an implied starting point of the WCAM that the settlements may differentiate between different groups of eligible parties on the basis of the expected strength of their claim in court. In addition, the Court in *Dexia* held that a settlement is the outcome of negotiations in which all parties have made concessions based on the perceived strength of its legal position and perceived interest in having the matter resolved outside of court. As a consequence, a settlement will normally not result in full compensation of the losses as originally presented by the claiming parties. The Court held that this in itself does not make a settlement unreasonable.[24]

In the *Shell* case, the Court held on multiple grounds that the compensation granted was not unreasonable. It referred to the broad support the settlement had met – both from institutional investors and from shareholders' associations. The Court also referred to two favourable opinions of US scholars that were filed by the petitioners, which indicated that the settlement was somewhat better for the beneficiaries than the average of settlements in comparable cases. The Court furthermore took into account that the alleged misleading statements had not given rise to any litigation outside of the US, which suggests that it was uncertain if an award in a non-US court could be obtained that would be better than the compensation awarded in the settlement.[25]

In *Shell*, no question arose about unequal treatment of shareholders in different jurisdictions, as the shareholders were actually treated equally in all jurisdictions. However, one can imagine international cases in which the settlement differentiates between parties residing in different countries, on the basis that their claims have a different value under the laws that apply in each of their cases.

In *Converium*, just as in *Shell*, the settlement only regarded non-US shareholders. The Court found that the proposed non-US settlement amount was considerably lower than the US settlement amount. However, it held that despite this difference the amount of compensation was not unreasonable. The Court ruled that the difference between the US and non-US settlement amount was justified given the fact that the legal position of the US shareholders differed from the legal position of the non-US shareholders. According to the Court, the non-US shareholders were excluded from the US settlement, and it would be very

23 In DES (ground 5.19), the Court held that it will only test whether it is 'incomprehensible' that a certain group of potentially eligible persons was excluded from the settlement agreement (in that case, the group of haemophilia patients).

24 Amsterdam Court of Appeals 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*), paragraph 6.6.

25 Amsterdam Court of Appeals 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*), paragraph 6.15 – 6.17.

difficult for them to get compensation outside the US, whereas it was improbable that they would get compensation in the US. Also, the non-US shareholders could opt out and start individual proceedings.[26]

In the *Converium* case, the Court ruled that despite a considerable lawyers' fee of 20 per cent, the amount of compensation as included in the settlement was not unreasonable. As most preparatory work had been done by US lawyers, the Court took into account US standards of what is common and reasonable in judging what a reasonable fee is. The Court found that it was sufficiently established that according to such standards, the fee was not unreasonable.[27]

Binding effect

A binding declaration by the Court transforms the settlement into a binding settlement, meaning that all beneficiaries – known and unknown – are bound by it unless they expressly opt out within a certain time period.[28] The opt-out format of a binding settlement hence makes the playing field more transparent: if a binding declaration is obtained, the compensating parties will, after the opt-out period, know who may still sue for damages.

An opt-out notice can only be submitted after the binding declaration has been issued by the Court. The duration of the opt-out period is set by the Court, normally three to six months after publication of the binding declaration.[29]

The parties can stipulate in the settlement that the compensating parties are jointly entitled to terminate the settlement in case of a certain percentage of opt-outs.[30] The percentage can be agreed upon in the settlement – the WCAM does not specify which percentage must be met.

IV CROSS-BORDER ISSUES

i Collective actions

Scope rule

Apart from the question of international jurisdiction, the Proposal provides for a 'scope rule' for admissibility of the collective action. The scope rule provides that a class action is inadmissible if the claims have insufficient nexus with the Netherlands. The Proposal specifies that sufficient nexus with the Netherlands exists if one of the following condition are fulfilled:

a the majority of the individuals on behalf of whom the representative organisation files the collective action resides in the Netherlands;

b the defendant is domiciled in the Netherlands; or

c the event on which the collective action is based, took place in the Netherlands.

26 Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*), paragraph 6.4.1 – 6.4.5.

27 Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*), paragraph 6.5.1 – 6.5.7.

28 Article 7:908(2) Dutch Civil Code.

29 Article 7:908(2) Dutch Civil Code.

30 Article 7:908(4) Dutch Civil Code.

ii Collective settlements

Jurisdiction in international settlements

With regard to proceedings for the binding declaration under the WCAM of international settlements, the Court assumes jurisdiction rather easily, even if the case is substantively not connected to the Netherlands.

With regard to the jurisdiction, recognition and enforcement of a binding declaration, the Brussels I *bis* Regulation is applicable if the person 'to be sued' (i.e., the shareholder or, in a product liability case, the alleged victim of a defective product) is domiciled in a Member State of the EU.[31,32] If the person 'to be sued' is domiciled in Norway, Switzerland or Iceland, the Lugano Convention is applicable. In both *Shell* and *Converium*, the Court assumed jurisdiction with regard to the shareholders domiciled outside the Netherlands, but within the EU, Switzerland, Iceland or Norway, as their potential claims were 'so closely connected' to the claims of the shareholders domiciled in the Netherlands that it was 'expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[33] Furthermore, the Court also assumed jurisdiction with regard to the shareholders who were not domiciled in the Netherlands, or in any other EU Member State, Switzerland, Iceland or Norway. The basis for this decision was the fact that five out of six petitioners in *Shell* and two out of four petitioners in *Converium* were domiciled in the Netherlands. The ground for jurisdiction was based on Article 3 of the Dutch Code of Civil Procedure, which provides that, in this type of proceeding, Dutch courts have jurisdiction if at least one of the parties requesting the binding declaration, or one of the defendants, is domiciled in the Netherlands.

The decision by the Court on international jurisdiction in *Converium* implies that even if the case is substantively not connected to the Netherlands, but a minority of the parties 'to be sued' are domiciled in the Netherlands and one of the parties to the settlement is a Dutch entity (for example, a Dutch foundation representing the interests of the alleged victims), the Court will assume jurisdiction. It should be noted that the Court in *Converium* also held as a separate and autonomous ground for jurisdiction that the settlement to be declared binding has to be executed in the Netherlands.[34]

International recognition and enforceability of a WCAM decision

Whether the WCAM procedure will prove to be helpful in declaring international settlements binding will, in the long run, also depend on whether foreign courts recognise and enforce a binding declaration by the Court. The criteria dictating whether foreign courts will decide on recognition and enforcement of a foreign court decision will differ from country to country. However, insofar as the foreign court is a court of an EU Member State, a solid argument can be made that the decision to declare a settlement binding is a 'judgment' as referred to in Article 2(a) Brussels I *bis* Regulation. Such judgment must be recognised by the courts

31 Council Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 12 December 2012 (the Brussels I *bis* Regulation).

32 In both *Shell* and *Converium*, the Court rules that for the purpose of these international instruments, the WCAM procedure is a 'civil and commercial matter' and that the shareholders are to be regarded as the persons 'to be sued' as referred to in the Brussels I *bis* Regulation and the Lugano Convention.

33 See Article 8 Section 1 of the Brussels I *bis* Regulation, see Article 6 Section 1 of the Lugano Convention.

34 As a consequence, the Court also assumed jurisdiction on the basis of the predecessor of Article 7 sub 1 of the Brussels I *bis* Regulation and Article 5 sub 1 of the Lugano Convention.

of other Member States unless one of the grounds to refuse recognition in Article 45 apply. However, these grounds are rather narrow. A ground for refusal that may be relevant in these cases is that no proper service of the defendant took place (Article 45 Section 1(b). The court that must decide on recognition may not review the binding declaration of the Court as to its substance (Article 52) unless it is manifestly contrary to public policy in the Member State in which recognition is sought (Article 45 Section 1(a) Brussels I *bis* Regulation). However, it should be noted that a specific mechanism for international recognition and enforcement for collective settlement proceedings has not materialised to date. In addition, there are no legal authorities, such as judgments, on this specific matter of recognition of WCAM judgments, except some scholarly writing. The atypical nature of the proceeding (a contractual settlement with a subsequent binding declaration from the Court, which has the effect of making other persons bound as contractual parties to the same settlement unless they opt out) combined with the lack of a specific mechanism for recognition and enforcement leads to uncertainty with regard to recognition and enforcement abroad.

Representativeness in international settlements

In WCAM settlements with an international character, the representative organisations must also be sufficiently representative regarding foreign beneficiaries. In the *Shell* case, a Dutch foundation was created for the sole purpose of representing the interests of all non-US shareholders affected by the alleged misrepresentations by Shell. This foundation sought and obtained the support of participants and supporters, such as shareholder organisations in relevant foreign countries and institutional investors. In the WCAM petition, all interested persons were represented by this foundation (backed up, so to speak, by its participants and supporters) and the Dutch Shareholders' Association (VEB). The Court accepted these two parties as being sufficiently representative. It seems that the Court very much looked at the articles of association of the foundation and the VEB and abstained from scrutinising the actual activities of these entities. In the *Converium* case, the shareholders were represented in a similar manner as in the Shell case, and the Court also accepted the Dutch foundation and the VEB as being sufficiently representative. In both the Shell case and the Converium case, the Court repeated part of the *Dexia* ruling, reiterating that it is not required for each petitioner organisation to be representative for all persons involved.[35] In *Converium*, the Court added to this ruling that there is insufficient reason to set the extra requirement that each petitioner is sufficiently representative for a group of a sufficient size of interested persons.[36]

V OUTLOOK AND CONCLUSIONS

The WCAM, in force since 2005, may become an efficient mechanism for settling international mass claims. If the pending Proposal, facilitating collective actions for damages, will be enacted in its current form, Dutch law will also provide a collective action mechanism to obtain damages in mass litigation situations. One of the objectives and expected consequences of the Proposal is that defendants will be more incentivised to reach a settlement. Therefore, it

35 Amsterdam Court of Appeals 29 May 2009, LJN BI5744 (Shell), paragraph 6.3; A similar formula was employed in Amsterdam Court of Appeals 15 July 2009, LJN BJ2691 (Vedior), paragraph 4.20 and 4.21; and Amsterdam Court of Appeals 4 November 2014, JOR 2015/10 (DSB), paragraph 6.2.3 and 6.2.4.

36 Amsterdam Court of Appeals 17 January 2012, LJN BV1026 (*Converium*), paragraph 10.2.

will be interesting to see whether the Proposal in its current form passes the Dutch parliament and how the introduction of the collective action for damages will influence the class action climate in the Netherlands.

Chapter 15

NORWAY

Andreas Nordby[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The Norwegian system of civil justice was overhauled at the beginning of this century, and a new Civil Procedure Act was adopted in 17 June 2005 and entered into force 1 January 2008.[2] The overall aim of the reform was to ensure fair justice with greater efficiency (faster and cheaper).

As part of the reform, class actions were introduced in the Civil Procedure Act. The introduction was made with a particular view on promoting access to justice in cases involving small claims and to obtain more efficient and effective justice in such cases. The American and in particular the Swedish rules served as inspiration for the specific chapter in the Civil Procedure Act devoted to class actions (Chapter 35). In addition to specific rules applicable to class actions the Civil Procedure Act also allows, to a rather large extent, joinder of parties in ordinary proceedings, provided that certain conditions are fulfilled.

The enactment of the class action rules was preceded by considerable debate in Norway. Simply put, advocates for consumer interest saw class action as a vital and important instrument to ensure justice, while advocates for business interest warned against adopting class action rules and feared 'ill-founded blackmailing' lawsuits. However, the rules were adopted unanimously by the Norwegian parliament.

The Civil Procedure Act includes the possibility for both opt-in and opt-out class actions. According to the preparatory works, the main rule for class action shall be deemed to be opt-in. Which of the two procedures that is most suitable for a specific class action is ultimately left to the court to decide.

Class actions may be brought either by a claimant meeting the conditions for becoming a group member provided that the action is approved or representative or public bodies, provided that the action falls within their purpose and natural sphere of activity (e.g., the Consumer Council).

Class actions are heard before the ordinary courts (i.e., there are no specialised courts for class actions). Norway has a court system with three tiers. In civil cases the court is composed by one legal judge in the Court of First Instance, three legal judges in the Court of Appeal and five legal judges in the Supreme Court. In the Court of First Instance and in the Court of Appeal the court may, in an individual case, be strengthened by two technical expert judges. There is no jury in civil cases in Norway.

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2 An unofficial (and not necessarily updated) translation of the Civil Procedure Act into English may be found at the following page: https://lovdata.no/dokument/NLE/lov/2005-06-17-90/.

Class actions have been brought on different areas involving different areas of law (pension law, tax law, consumer law etc.). However, class actions typically involve some kind of monetary claim (i.e., the class is seeking to obtain damages, repayment or similar from the defendant).

II THE YEAR IN REVIEW

In the early years following the entry into force of the class action rules, there was some uncertainty whether class action would play any significant role in Norway. Furthermore, for some cases that were brought as class actions in this early phase there seemed to have been no point in applying the class actions rules (e.g., the number of claimants was very small and all the (potential) claimants were known at the time the class action was instigated).

The development during the past years seems, however, to imply that the legal environment has matured. A number of class actions have been brought, or discussed, in cases where there may be a real benefit from applying the class action rules (see below).

In 2013, three unions brought a class action against several oil and offshore companies alleging that a certain night-time tariff that was paid to employees should also be included in the basis for the employee's pensions arrangements. The class action was approved as an opt-out action and had approximately 7,000 members. The class did not succeed in its action.

In 2016, the Home Owners Association instigated a class against the municipality of Oslo alleging that property tax, which was introduced following the municipal election in 2015, is invalid, and that illegally recovered property taxes should be repaid. Some 2000 citizens in Oslo have so far joined the class actions, which is handled as an opt-in class action. The case was heard before the District Court in April 2017, and the decision was handed down 21 November 2017. The group was unsuccessful, and the District Court found that the property tax was lawful. The case has been appealed, but no appeal hearing has been scheduled.

In 2016, the Norwegian Consumer Council instigated a class action against DNB, the largest Norwegian bank alleging that some 180,000 customers[3] have lost a total of approximately 700 million kroner by paying excessive fees for management of their savings. The average claim per customer is somewhat below 4,000 kroner. The class action was brought as an opt-out action. The action was approved as a class action by the District Court in January 2017, but DNB appealed the case to the Court of Appeal and argued that the action should not be approved as a class action. The Court of Appeal dismissed the appeal from DNB and found that the requirements for an opt-out action were met. DNB further appealed the case to the Supreme Court, which dismissed the appeal. The main hearing in the case was held in late November and early December 2017. In January 2018, the District Court handed down its decision where DNB was acquitted. The Consumer Council has appealed the case to the Court of Appeal, but no appeal hearing has been scheduled.

In 2016, a class action was brought against a private school based on the school having had too high tuition fees. The action was approved as a class action in January 2017, with close to 500 members (former students with the school). In September 2017, the District Court handed down its decision and ordered the school to repay an amount to the members of the class action. The case has not been appealed.

3 It seems that a very limited number (around 50 persons) decided to opt out of the action.

In 2016–2017, there was a debate about whether to instigate another class action against the municipality of Oslo claiming repayment of refuse collection charges. Almost all households in Oslo have experienced garbage not being collected after the company running the refuse collection on behalf of the municipality of Oslo had severe problems. A claim for repayment of refuse collection charges would probably not constitute any large amount for the individual household (around 100 kroner each), but multiplied by the number of households (over 300,000) the total claim may be significant. So far, no class action has, however, been brought.

III PROCEDURE

Section 35-1(2) of the Civil Procedure Act defines class action as an 'action that is brought by or directed against a class on an identical or substantially similar factual and legal basis, and which is approved by the court as a class action'. The characteristic feature of a class action, as opposed to an ordinary action with several plaintiffs, is that it is the class (group) as such that is party to the litigation.

i Types of action available

The Civil Procedure Act recognises two different forms of class actions:

a opt-in: anyone who falls within the scope of the class as defined by the court in its approval of the class action is entitled to be registered as a member within the time limit set by the court; and

b opt-out: anyone who falls within the scope of the class as defined by the court in its approval of the class action is automatically a member of the group (and will be bound by a subsequent ruling) unless he or she withdraws from the class.

In order 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 with a class comprising of claimants in mind. However, pursuant to Section 35-15 the class action rules in Chapter 35 apply *mutatis mutandis* to class actions whether the class is defendant, except that class membership without registration (i.e., opt-out, for natural reasons) is excluded. Applying the class action rules in a case where the class is defendant will give basis for a series of question, 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'.[4] So far there have been no class actions where the class is the defendant.

In addition to class actions the Civil Procedure Act also allow for joinder of parties in ordinary proceedings. An action may be brought by several plaintiffs (or against several defendants), for instance, when the factual and legal basis for the claims is the same or substantially similar, provided that all claims fall under Norwegian jurisdiction and the court is the correct venue for one of the claims, and the claims can be heard by a court with the

4 Inge Lorange Backer, 'The Norwegian Reform of Civil Procedure', *Scandinavian Studies in Law*, Volume 51, 2007, page 41–75 on page 61.

same composition and pursuant to the same procedural rules. There are no formal limits as to how many parties that may participate in such a lawsuit, and there are many examples in case law with several hundred parties. Several parties on the same side in a legal action shall be regarded as independent parties in relation to the opposite party.

Another option under the Civil Procedure Act is consolidation of actions (cases), which means that two or more actions raising similar issues are joined to be heard in one hearing or be adjudicated jointly.

ii Commencing proceedings

A class action may be instituted by anyone who fulfils the conditions for class membership if approval to bring the action is granted. For example, in a case against a bank concerning the legitimacy of an increase in borrowing rates, action may be brought by any bank customer being affected by the increase. Furthermore, a class action may also be brought by an association, trust or public body if the action falls within the scope of their purpose and field of activity. As this alternative indicates, there is no requirement that the organisation has its own claim similar to that of potential class members in order to initiate a class action lawsuit. This alternative will, *inter alia*, allow the Consumers' Council to bring class actions on behalf of consumers.

The class action shall be brought by submission of a writ of summons to the court. The writ of summons shall contain information necessary for the court to assess whether the conditions for a class action are fulfilled. In the writ of summons it shall also be stated whether the class action is sought to be brought as an opt-in or opt-out action.

Pursuant to Section 35-4 of the Civil Procedure Act the court must approve that the action is brought as a class action. In order for a class action to be approved the following conditions, set out in Section 35-2, must be met:

a several persons have claims or obligations whose factual or legal basis is identical or substantially similar;

c the claims can be heard by a court with the same composition and in the main pursuant to the same procedural rules;

e class procedure is the most appropriate way of dealing with the claims; and

f 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', cf. letter (a). In practice there have been some cases where the number of group members has been on the very low side. If the number of group members is low, this will have to impact the court's assessment of whether class procedure is the most appropriate way of handling the case, cf. letter (c). A low number of (potential) group members will weigh against handling the case as a class action. However, at the same time it must be kept in mind that a feature of the class action institute is to ensure that the action is made public – so that potential group members are informed of the lawsuit. In some cases it may be significant uncertainty as to how many group members that exist. In such cases, it may be an argument in favour of class action that class action is the only way to get in touch with potential members or claimants. This appears to have been the situation in a case from 2009, which concerned state liability for wrongful implementation of EU Directives; the case was approved as a class action because it was suspected that there were many potential claimants (members). However, the case ended with the class only consisting of seven members.

In order for an action to be approved as class action, the members of the group must have 'claims or obligations whose factual or legal basis is identical or substantially similar', cf. also letter (a). This is often a matter of debate in actions that are being pursued as class actions and it is quite common that the defendant is arguing that the requirement is not met. When assessing whether this requirement is met, the court cannot only apply the claimants' perspective but must also take into account possible 'objections' from the defendant. The claimants may rightfully argue that the basis for their claim is very similar (e.g., they were all customers in the same bank, acquired share in the same share fund, got the same standard information, etc.). However, when looking at the objections from the defendant it may be that the requirement is not met after all, because it may be necessary to decide whether some of the customers have lost their rights owing to statutory limitation, some of the customers were given specific information prior to entering into the agreement or whether there are other individual circumstances on the customers' side.

In general, however, the class action rules have been designed in a manner to cater for certain possible individual differences and to ensure that such differences will not be an obstacle for a class action. Pursuant to Section 35-10, the court may decide that the provisions on class actions shall not apply to the hearing of issues in the dispute that only relate to a limited number of class members, but that the class members themselves rather 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', cf. letter (b). This requirement will typically be fulfilled as long as the case concerns ordinary civil claims.

A class action may only be approved if the procedure is the most appropriate (i.e., 'best' way of dealing with the claims, cf. letter c). This is a vague criterion and leaves the court faced with a petition for a class action with a margin of appreciation. Based on the preparatory works, the following elements should, however, be taken into account:

Finally, class action may only be approved if it is 'possible to nominate a class representative', cf. letter (d): any person who fulfils the requirements to initiate a class action and who is willing may serve as class representative. However, it is left to the court to appoint the class representative. Pursuant to Section 35-9(3), the representative must be able to safeguard the interests of the class in a satisfactory manner and also be able to cover the class's potential liability for costs towards the other party.

Provided that the court approves the class action, the court shall also define the scope of claims to be covered by the class actions and thereby also the range of class membership. There is no limitation as to who that may be member of the group, in other words, both private individuals and corporations, nationals and foreigners may be members – depending on how the court has described the scope. However, only persons who could have brought or joined an ordinary legal action before the Norwegian courts may be class members. This may to a certain extent limit the possibility for foreigners to join a Norwegian class action. An example, taken from the preparatory works, will illustrate this: a Norwegian resident consumer having purchased tangible goods from a professional party. Germany will be able

to instigate ordinary legal proceedings in Norway against the German trader.[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 no longer included in the class action may, within one month after the ruling for reversal or amendment becomes final and enforceable, require the court to continue to hear their claims as individual actions.

Apart from the specific rules in Chapter 35 of the Civil Procedure Act, class actions are handled by the courts in the same manner as ordinary individual cases. Courts are *inter alia* obliged to keep an active dialogue with the parties during the preparatory stage of the proceedings.

As a general rule, the main hearing in a civil case shall, unless there a special circumstances, take place within six months of the date of submission of the writ of summons to the court. This also applies for class actions. However, in class action cases it is rather common that the defendant contests that the criteria for bringing the action as a class action are met. This may lead to exchange of pleadings and in some cases also a separate hearing with respect to the approval issue. In case the class action is approved, the approval may also be appealed to the Court of Appeal. Thus, in many class actions it will not be possible to schedule the main hearing until later.[6]

5 Also, Norwegian law recognises that consumers to a certain extent may take legal action against a professional party in the before the courts for the place where the consumer is domiciled, cf. also Article 16 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6 The case against DNB is perhaps illustrative, where the writ of summons was submitted 21 June 2016 and where it took until 1 September 2017 (when the Supreme Court dismissed the appeal from DNB) to resolve the procedural issue of whether the case should be heard as a class action.

The class shall be represented in court by a class representative nominated by the court when giving approval to hear the action. The representative shall keep the class members informed of the handling of the action. The representative is liable for costs awarded to the opposite party but can claim reimbursement from the class members individually if this was made a condition for registration as a class member. As a main rule the class is required to be legally represented by counsel, who shall be an advocate, in addition to the class representative.

iv Damages and costs

When the class actions rules were adopted it was emphasised that it was not the intention to make any changes to the substantive law (tort, contractual liability, etc.). This means that the same rules with respect to burden of proof, documentation for economic loss, etc. will apply in a class action, and damages will be awarded based on each member's individual loss. However, in a class action involving a significant number of members, a certain standardisation may in practice take place. 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 party being successful in a class action will be entitled to recover its cost from the losing party, provided that the court finds that the costs have been necessary to incur in view of the importance of the case). These rules also apply to class actions. For class actions, Section 35-13(1) also provides that the court shall determine the class representative's and the legal counsel's fees and coverage of expenses.

Class members in opt-in actions will be liable towards the class representative for costs imposed on the representative for remuneration and refund of disbursements insofar and to the extent that such liability is a condition for registration. On application from the person who has brought the class action or the class representative, the court may namely decide that registration shall be subject to the class members accepting liability for a specified maximum amount of costs. In cases where the class action is brought by a private individual or the class representative is a private individual this is typically done. In cases where the class representative is an organisation or similar, the organisation sometimes decides that it will cover all the costs itself.

Class members in opt-out actions will not have any liability towards the class representative (or towards the other party in the action for that matter) for costs.

Pursuant to the ethical guidelines from the Norwegian Bar Association, it is prohibited for a lawyer to agree a fee arrangement whereby the client's claim in whole or in part is acquired by the lawyer so that the lawyer's fee is dependent on the outcome of the case.

In the case of a class action, there is neither any direct public funding, nor any generally available private funding. In principle each member of the group must cover his or her share of the costs, unless he or she is eligible for legal aid. So far there have been no examples of third-party financing or similar arrangements.

v Settlement

Pursuant to Section 35-11(3), settlement in a class action pursuant to Section 35-7 (opt-out) requires the approval of the court. This requirement is a consequence of the claims or obligations having a low individual value and where it, therefore, cannot be expected that the group members will have any active role on the proceedings or as part of a settlement

discussion. The requirement is also a consequence of the fact that the members of the class action may be completely unaware of the action. The court's approval has thus been seen as important in order to safeguard the members' interest.

The court's approval has two aspects. Firstly, the court must ensure that the process leading up to the settlement has been satisfactory (i.e., that the group members, to the extent possible and taking into account that it as an opt-out action, have been informed of the settlement). Secondly, the court must also ensure that the content of the settlement is satisfactory. With respect to the latter, very little guidance is provided in the preparatory works as to how the court shall exercise its control with the settlement. With reference to how similar provisions have been understood in Denmark and Sweden, it is probably correct to assume that the court should approve the settlement unless it is clearly unreasonable or discriminatory towards some group members. In general, the parties should have a wide margin of appreciation when it comes to agreeing on an amicable solution.

Court approval is not necessary for an opt-in action, but it is emphasised in the preparatory works that it is important that the group representative consults with the group members prior to any settlement.

In case of a settlement, both in case of opt-in and opt-out, the settlement will be binding for all that are members at the time the settlement is made.

IV CROSS-BORDER ISSUES

In general, it is difficult to see that there are any specific cross-border issues arising from class actions in Norway. As noted above there may, however, be some limitations for foreign residents to join a Norwegian class action. To the extent that a foreign resident will be able to join the class action the foreign member will be treated in the same manner as any national member.

Norway is not a member of the EU. However, Norway's cooperation with the EU through the EEA Agreement provides for the inclusion of EU legislation covering the four freedoms, as well as non-discrimination and rules of competition, into Norwegian law. Provisions equal to the EU antitrust rules (Articles 101 and 102 TFEU), prohibiting such as cartels or abuse of a dominant position in the market, are also found in the EEA Agreement Article 53 and 54 and are also implemented in secondary legislations. With respect to the competition area, where private enforcement and class actions have been subject to great interest, it should be mentioned that Directive 2014/104/EU has not yet been made part of the EEA Agreement. However, the Norwegian Ministry Trade, Industry and Fisheries in December 2015 launched a consultation setting out a proposal for possible amendments to Norwegian law if the directive is made part of the EEA Agreement. The inclusion of this directive has been somewhat controversial in the sense that the EEA EFTA states are of the opinion that provisions on civil procedure are, in general, not EEA relevant and fall outside the scope of the EEA Agreement.[7] In general, it remains to be seen to what extent any EU initiative on this area (e.g., if the current Commission Recommendation of 11 June 2013

7 This is, for example, also the background for why Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, which also contains some procedural rules, has not been made part of the EEA Agreement.

on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law is followed by a directive or a regulation) will impact Norwegian law.

V OUTLOOK AND CONCLUSIONS

The Norwegian rules concerning class actions have 'celebrated' their 10-year anniversary. As previously noted, the application of the rules seems to have matured during these years and class actions are now a natural part of the Norwegian legal landscape and are being brought in cases where there is a real benefit to applying the rules.

At the same time, it may seem as though the consumer side, strongly advocating class action rules, may have had expectations that were somewhat too high. On the other hand, the sceptics from the business organisations appear to have been too pessimistic. The scepticism from the business organisations seems to have continued into the court room, in the sense that private corporations facing class action, as a first line of defence, take the position that the requirements for class actions are not fulfilled. In some cases it is difficult to see why it is argued against the class action. A class action may to a certain extent be advantageous also for a defendant; it will be sufficient for the defendant to engage with the class representative (and not multiple counterparties) and the court has, through the appointment of the class representative, made sure that the representative has sufficient financial strength to cover the defendant's legal fees. Public bodies have taken a perhaps more pragmatic approach and not opposed the case being litigated as a class action.

The Norwegian Ministry of Justice has stated that it will carry out a 're-examination' of the Civil Procedure Act and launch a public consultation. It remains to be seen whether the proposal will include changes to the class action rules.

Chapter 16

POLAND

Agnieszka Trzaska[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In Poland, the mechanism of pursuing claims in group proceedings, which can be perceived as the 'Polish version' of the US class action, has been present since 2010. It was introduced into the Polish legal system by virtue of the Act of 17 December 2009 on Pursuing Claims in Group Proceedings, Journal of Laws 2010.7.44 of 18 January 2010 (the Act). This Act is separate from the regulation provided for by the Polish Code of Civil Procedure (CCP).[2] After several years, the Act was amended in 2017 by virtue of the Act of 7 April 2017 Amending Certain Acts to Facilitate the Seeking of Receivables (hereinafter 'Amendment 1');[3] the amendments have been in force since 1 June 2017.

The Polish group proceedings are a type of court proceedings facilitating the joint pursuit of many claims that are based on the opt-in model and the principle of representation.

In Article 1, the Act defines group proceedings as civil court proceedings in cases where claims of a single type from at least 10 persons are pursued, based on the same or identical actual grounds.

The Act is an example of the 'sectoral approach', which means that group proceedings are not permitted in every civil case (which qualifies for examination by a civil court), but in certain categories of cases (the catalogue of such cases was expanded by Amendment 1).

Thus, group proceedings are permitted in the following cases,[4] which involve claims:

a for liability for a loss caused by a hazardous product;

b for torts;

c for liability for the non-performance or improper performance of a contractual obligation;

d for unjust enrichment; and

e in other matters with regard to claims for consumer protection.

As a rule, group proceedings may not be used to pursue claims arising out of the violation of personal rights. This exclusion does not apply to options to pursue claims in group proceedings that result from bodily harm or disturbance of health, including claims of the closest family

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2 Consolidated text of 19 January 2018 published in Journal of Laws 2018.155.

3 Journal of Laws 2017.933 of 12 May 2017.

4 Prior to Amendment 1, group proceedings were permitted in cases involving claims for the protection of consumers, liability for loss caused by a hazardous product and liability in tort, with the exception of claims for the protection of personal rights.

members of the claimant, deceased as a result of a bodily harm or disturbance of health. As regards this category of claims, the pursuit of pecuniary claims in group proceedings is limited to the request for the establishment of the defendant's liability.

The entity that holds the sole mandate to institute group proceedings is known as the representative. This function can be performed by a member of the group or a *poviat* consumer ombudsman. All members of the group must approve the person who will act as the representative.

The Act is an example of solutions based on the opt-in model; participants of group proceedings can only be persons who directly expressed their will to participate in the proceedings by submitting a declaration on joining the group (before the proceedings are instituted or during the second stage, while the group is being formed, see also Section III). The very institution of group proceedings does not preclude the option for the individual pursuit of claims by persons who did not join the group or who have left the group (the admissibility of leaving the group is limited by certain time frames – see Section III.iii). A binding judgment is effective upon all members of the group, although they are not formally a party to the proceedings in which the judgment is issued.

Group cases belong to the functional competence of the regional courts. There is not a single court or several specialised courts competent for these types of cases. The cases may be examined by one of the 45 regional courts in the Republic of Poland. Group cases are examined by a panel of three professional judges.

The institution of group proceedings is quite popular in Poland. As evidenced by the statistical data published by the Ministry of Justice, a total of 195 class actions (in the Polish form) were filed in courts from 2010 to 2015. In that period, a total of 122 cases were examined in the course of group proceedings. Only approximately 38 per cent of civil cases for which group proceedings were instituted in 2010–2015 were examined on substantive grounds in that period. The majority of the class actions involve consumer claims; there are far fewer cases brought by groups of enterprises. Amendment 1 will most likely result in an increased number of such actions. Between 2000 and 2016, a majority of the group proceedings sought to establish the defendant's liability. Cases for the payment of pecuniary performance made up a small fraction of the group proceedings cases.

II THE YEAR IN REVIEW

The Act was amended in 2017, seven years after it was passed. The purpose of Amendment 1 was primarily to increase the efficiency of group proceedings; Amendment 1 was the legislator's response to certain dysfunctions of the existing solutions that were revealed in the first years of using the group pursuit of claims mechanism.[5]

5 As the explanatory memorandum to the draft reads: 'The aim of this draft is, firstly, to overcome problems such as: (i) excessively limited objective scope of application of the Act, (ii) lengthy examination of cases in group proceedings (especially in the first stage of the so-called certification), (iii) difficulties and problems related to seeking pecuniary performance in group proceedings, (iv) interpretative doubts causing a decrease in the effectiveness of examining cases for establishing liability in group proceedings and (v) the risk of unjustified charging of the claimant with a deposit to secure the costs of proceedings. These changes are aimed at increasing the effectiveness of group proceedings. The goal of the draft is also to eliminate other specific issues and interpretative doubts that arise in the practice of application of the Act.'

The objective catalogue of cases that may be potentially examined in this procedure was expanded. What is particularly important is the extension of the option for the group pursuit of claims to include claims for the non-performance or improper performance of the agreement regardless of the object of such claims (which also includes non-consumer claims) or claims for unjust enrichment. An objective exclusion, based on the criterion for the source of the claim origin (violation of personal rights), was also limited.

The provision stipulating the requirement to standardise pecuniary claims sought in group proceedings was changed (see Section III.i and Section III.iv). The provision that stipulates a special type of action permitted in group proceedings, namely the action to establish liability, was formulated in greater detail.

Further, Amendment 1 introduced minor changes to the procedure to accelerate and improve the examination of cases in group proceedings, in particular to shorten the certification stage. The rules relating to the announcement of the commencement of proceedings were made more flexible.

To conclude explanation of Amendment 1, it is worth stressing that group proceedings instituted prior to 1 June 2017 will be subject to provisions of the Act in its existing (original) wording, while proceedings instituted after that date will be subject to provisions of the Act in their new wording.

The recent period has been dominated by group actions brought by consumer groups against financial institutions, such as banks and insurance companies, in connection with 'abusive clauses' in unfair contractual provisions.

III PROCEDURE

Polish group proceedings are court proceedings described by specific stages; the legal regime of the proceedings is prescribed by the provisions of the Act and the provisions of the CCP.

Apart from group proceedings, which is a mechanism for the collective pursuit of claims, the provisions of the CCP provide for certain institutions related to the number of entities in court proceedings.

Under the Polish CCP, collective actions by representative bodies, for example, consumer organisations or interest groups, are not possible.

The CCP allows for actions to be brought by NGOs regarding their chartered objects in specific categories of cases (e.g., environmental protection and consumer protection), but these involve an individual action for a specific natural person that may be, in addition, submitted only with the written consent of such a person.

The institution of 'co-participation', where multiple entities are present on one side of the litigation (the claimant's or defendant's side) feature among typical institutions that tackle the issue of multiple entities, as part of the classic bilateral process. The CCP distinguishes between formal and material collaborative participation. The first occurs when the subject of the litigation involves claims or liabilities of a single type, based on the same factual and legal basis if, in addition, the jurisdiction of the court is justified for each separate claim or liability as well as for all of them jointly. Material collaborative participation takes place if the subject of the litigation involves joint rights or obligations of several entities or rights or obligations based on the same factual and legal basis.

In addition, several individual cases can be merged procedurally for joint examination and resolution or for examination only. Such merging is merely technical in nature, the cases still have a standalone nature and maintain their separateness.

i Types of action available

In accordance with the wording of provisions of the Act (Article 1 and Article 2) the following premises (preconditions for the admissibility of group proceedings) should be met:

a homogeneity of claims of the group members;
b identical (the same) or, similar (equal) factual grounds (basis) of claims (common factual grounds for claims sought);
c size of the group (number of members);
d whether the claims can be examined in group proceedings given their object (whether the claims belong to one of the categories of cases – see above); and
e in addition, for pecuniary claims, Article 2 (1) of the Act provides for standardisation of the amount of the pecuniary claims of individual group members.

The requirement of homogeneity means that a representative should apply to the court on behalf of each member of the group for legal protection in the same form, for example, for establishment or for payment (sometimes there is a requirement that the claims result from the same type of legal relations). As the Supreme Court explained in its decision of 28 January 2015:

> *[i]n this provision, the legislator used the 'claim' term in the procedural meaning, namely as seeking of adjudication of a performance or establishing the existence of a legal relation or law or the formation of a legal relation or law. The need to pursue a 'single type of claim' in group proceedings, within the meaning of this provision, means that all claimants should seek the adjudication of the performance or the establishment or formation of a legal relation or law.*[6]

Claims by members of a group sought in group proceedings, in accordance with Article 1(1) of the Act, should be based on the same (identical) or similar (equal) factual grounds. Without doubt, the interpretation of this premise has risen the greatest doubts in judicature when the Act comes into force. When explaining this premise for admissibility of examining the case in group proceedings, it is argued that the factual grounds of a claim, as referred to in Article 1(1) of the Act, are the main set of facts that constitute the grounds for the origination of a disputed legal relation and a specific claim; the scope of the factual grounds of a claim does not include factual circumstances that affect the amount, objective scope or maturity of the claims.

The requirement for the size of the group means that the proceedings should encompass at least 10 claims.

From the viewpoint of interpretation of the provisions that lay down the premises for the admissibility of group proceedings, the first statements of the Supreme Court based on the Act of 2015 were of particular importance. The following decisions are of note: the judgment issued in the case of a group of close persons injured as a result of a structural collapse (i.e., decision of the Supreme Court, Civil Chamber, of 28 January 2015, I CSK 533/14); judgment of the Supreme Court, Civil Chamber, of 14 May 2015 II CSK 768/14 issued in the case involving a group of consumers pursuing the establishment of liability for damages of a bank for the improper performance of the contract (more precisely, provisions on the method in which interest was accrued on the bank loan); and the resolution of the Supreme

6 No. I CSK 533/14.

Court of September 2015 regarding the case of a group of local government units against the State Treasury related to the incorrect implementation of the EU law (fees charged in connection with vehicle records).

In the first of the judgments mentioned above, the Supreme Court stressed the need to take the essence, purpose and functions of group proceedings in the course of interpretation of provisions of the Act into account.

When the Supreme Court issued these rulings, the courts examining polish class actions began to be more open in their judicature towards group solutions for pursuing claims, while the interpretation of the provisions of the Act became more in favour of certification. Since mid-2015, and in particular in 2016, a number of cases have been positively certified, for example, a series of cases against insurance companies related to unfair contractual clauses (pertaining to insurance of a low down payment for a mortgage loan, the so-called liquidation fee).

The group proceedings have no limitations as to the method of shaping the demand for the statement of claim; a class action may be an action for performance (adjudication). In the case of adjudication, the amount of claims sought by various group members must be standardised. A class action may take the form of an action for establishing the legal relation or the right (Article 189 of the CCP) or an action for establishing liability (Article 2(3) of the Act). It is also possible that the demand for a class action involves the demand for shaping the right or legal relation (only in such cases where filing such an action is permitted).

Currently, after Amendment 1, standardisation of the amount of claims means that group members must, altogether or in at least groups of two, seek payment from the defendant in the equal amount (previously the Act required that the standardisation took place after the consideration of the 'common circumstances of the case', which gave rise to doubts and resulted in a different approach of the courts to the interpretation of common circumstances). Now, a sufficient criterion for standardisation is the criterion of the amount.

Action for establishing liability

An institution unique to group proceedings is the action for establishing liability; the essence of this action was explained by the Supreme Court in the said ruling of 25 January 2015, arguing that:

> *In these proceedings, the declaratory judgment regarding a large group of persons is aimed solely at establishing defendant's liability for a specific event and does not concern establishing whether damage was incurred by each of the individual group members. This may, but does not have to be, the subject of assessment only in individual trials, as long as, after the statement of claim for establishing liability is accepted, no individual out-of-court settlements are concluded, which is one of the purposes of issuing such a judgment. If individual trials take place, where a judgment issued on the basis of Article 2(3) is a precedent, then, in such proceedings, individual circumstances will be examined, such as the origin of the damage and its amount, causal link, contribution or limitation if any, as long as it applies to individual claims only and not to all group members. The subject of group proceedings for the demand for establishment are only circumstances that are common to all group members and not individual circumstances of individual members to be examined during individual trials at a later date.*

As regards the action for establishing liability, the issue of the defendant's liability is separated from the size of such liability.

Then the legislator essentially 'implemented' the solutions proposed by the Supreme Court to the Act in the form of Amendment 1 to Article 2(3) and Article 2(4) of the Act, where it was specified that the purpose was to establish the defendant's liability for a specific event or events. The statement of claim should state the pecuniary claim for which such a claim is pursued. When accepting the action, the court establishes circumstances that are common to group members and that are premises for the claims pursued by them.

Limitation

The institution of limitation in the Polish law is an institution of substantive law and not of procedural law. The provisions of substantive law determine the deadline after which, in the event of inaction of the entitled party, specific claims expire (strict time limits) or lose their ability to be enforced (limitation periods).

The particular time limits or limitation periods are defined by the provisions governing a specific institution (e.g., a sales contract). In the absence of specific regulations, the general limitation period for proprietary claims is 10 years, and for claims of periodic performance and claims related to business activity, three years.

The limitation period for claims for compensation under tort liability is specifically regulated. A claim of this sort lapses in principle after three years since the date on which the injured party established the damage and the identity of the perpetrator. However, this period may not be longer than 10 years since the date of the event giving rise to the damage.

The period of limitation for compensation for damage resulting from infringement of competition law is longer, amounting to five years, and its course does not begin to run as long as the infringement is still ongoing and is suspended (the limitation period) for the time of duration of proceedings before state or EU authorities concerning the infringement of competition law.

The court is not required to consider the consequences of the lapses of limitation periods *ex officio*, but only when such defence (objection) is raised by the opposite party.

The Act itself contains no specific regulation on the limitation period for the claims of particular group members. The Act provides that, for a claim of such person, the effects of filing a claim in group proceedings (i.e., primarily an effect of suspension of the limitation period for such claim) shall remain only in the following situations: (1) when a group member files an individual group statement of claims covered by the rejected statement of claims, within 12 months of the decision on the rejection of a group action becoming final; and (2) when a person who joins the group but is not covered by the final court decision on the composition of the group files an individual statement of claims within six months of such decision,

ii Commencing proceedings

The entity exclusively mandated to institute group proceedings is the representative, who acts on his or her own behalf but in the name of all the group members. This function can be performed by a member of the group or a *poviat* consumer ombudsman. Group members agree that a certain person should act as a representative. From a procedural viewpoint, that person is solely a claimant in the group proceedings. The Act introduces the requirement for the representative to act via a professional legal counsel. Apart from that, the Act does not regulate the internal relations between the representative and group members; in practice an agreement is usually concluded to regulate such issues.

Current solutions are based on the opt-in model. Group proceedings are open only to persons who clearly express their will to join the group. The Act does not require the group or class to be defined or specified. The announcement on the commencement of proceedings (see below) should basically provide what claims can be referred to the proceedings by submitting a declaration on joining the group. Such a declaration can be submitted by every person (as long as such a person is capable of acting in court proceedings) and of course provided such person has a claim that can be covered by group proceedings. The provisions of the Act do not provide for limitations as to nationality or place of domicile of persons joining the group (for example as regards claims for damages, where the loss was incurred on the territory of Poland, the place of domicile of the group member is irrelevant). The Act does not provide for specific provisions as to jurisdiction; general rules prescribed by EU legislation or relevant provisions of the CCP apply.

Costs

The Act does not include any specific regulations pertaining to the financing of group proceedings; in general, the Polish provisions lack regulations on the financing of proceedings by third persons.

The loser pays the costs rule is in force. The group representative is the sole claimant, and he or she is formally required to bear the costs of the proceedings.

The Act does not regulate the rules for the redistribution of the costs related to the group proceedings (including the costs of legal services) or any allocation to common costs and the costs attributable to each individual claim inside the group. These issues are left to be arranged between the group members. In practice, usually all group members participate in the costs related to the commencement and conducting of the group proceedings, but the Act does not provide for such a requirement. Group members may freely agree on internal relations among them. It is usually agreed that each member pays a fixed or lump-sum amount or it is agreed that such costs are incurred by an entity in proportion to the value of the claims pursued by them.

The CCP's provisions define the costs of the proceedings not as the costs actually incurred by a party, but the costs necessary for the reasonable pursuance of rights or reasonable defence. These costs also include fees paid to legal counsel, but may not be more than six times a specific minimum rate. The court decides on the cost of proceedings in the decision concluding the case in the given instance.

iii Procedural rules

Group proceedings are divided into stages. Compared to an ordinary individual trial, two specific stages that precede the substantive examination of the merits of the case can be distinguished for group proceedings: stage one is the certification stage and stage two involves shaping the composition of the group.

The first stage, namely the certification stage, is when the court examines whether a specific case can be examined as a class action. A statement of claim in group proceedings should contain a motion to examine the case in this procedure with substantiation. Based on these arguments, the court examines whether the premises for admissibility of the group proceedings are met (as discussed above). If the result of the examination is positive, the court issues a decision on examination of the case in group proceedings, if the result is negative, the court rejects the statement of claim. Previously, the Act required the decision on this subject to be passed after the court hearing (which prolonged this stage). Currently, for statements

of claim brought after 1 June 2017, such a decision may be made at a closed session. Before a decision on this subject is made, the court orders that the defendants submit a response to the statement of claim, where the defendants may object to the case being examined in this procedure.

The 'certification' decision may be challenged in the court of appeals. In accordance with Amendment 1, when the decision on the examination of the case in group proceedings becomes final, the admissibility of group proceedings is not subject to re-examination in the further course of the proceedings.

The decision on the dismissal of the complaint on the decision to reject the statement of claim may be appealed against with a cassation complaint in the Supreme Court. In admitting the cassation complaint, the Supreme Court may repeal the appealed decision and issue a ruling on examination of the case in the group proceedings.

The second stage is shaping the group. This stage begins with an announcement on the commencement of the proceedings and ends when the decision of the court on final group members becomes valid. As regards the method of announcement publication, at present, the provisions of the Act let the court choose the method most appropriate for the given case.

The contents of the announcement are proposed by the claimant, and the court orders the announcement to be published. The publication of the announcement on the commencement of group proceedings[7] is to facilitate notification of all those potentially interested in joining the group. In particular, the announcement may be published on the pages of the public information bulletin of the competent court, on websites of the parties or their legal counsels or in the nationwide or local press. The announcement on the commencement of group proceedings can be skipped if the circumstances of the case show that all group members submitted declarations on joining the group.

Declarations on joining the group from new members are referred to the representative. Based on such declarations, the representative prepares a letter with a list of group members and the declarations. The court delivers a list of group members to the defendant and sets the date for filing objections as to the membership of individual persons in the group. The defendant may challenge the membership of a person in the group by arguing that the claim of that person is different from the claims of other members, for example, that it is based on different factual grounds or does not meet other criteria that the court considered during the certification. Then, the court issues (at a closed session or during the court hearing) a decision on the composition of the group, where it lists, by full name or business name, the persons who are members of the group and specifies membership in subgroups if the group members are divided into subgroups. This procedural decision can also be challenged with a complaint.

As regards proving that a person belongs to the group, for cases involving pecuniary claims, the Act requires the claimant (representative) to prove such a membership, in other cases making the fact plausible is sufficient.

7 The announcement on commencement of group proceedings should include (Article 11(2) of the Act): (1) identification of the court before which the group proceedings are conducted; (2) designation of the parties to the proceedings and designation of the subject of the case; (3) information about the possible joining the group by persons whose claims may be included in the class action by presenting the group representative, by the prescribed time limit not shorter than one month and not longer than three months from the announcement date, with a written declaration on joining the group; (4) rules of remuneration of the legal counsel; and (5) a mention of the binding effect of the judgment on group members.

Filing a complaint against the decision on the composition of the group does not suspend the substantive examination of the case.

When the decision on the composition of the group becomes final, attempts by members to leave the group becomes ineffective.

The third stage of the proceedings is the examination proceedings as to the merits of the case. In this scope and with regard to the manner of conducting the proceedings to take evidence, the Act introduces no provisions that would be different from those in force for ordinary proceedings. The progress of the proceedings depends on the subject of the case – Polish procedure does not provide for a disclosure institution.

Certain differences are evident at the stage of issuing the judgment. First, the court is obliged to list all the members of the group or subgroup in the judgment (operative part). If the judgment involves pecuniary performance, the court should determine the amount attributable to each member of the group or subgroup separately.

Second, in each case involving a pecuniary claim examined in group proceedings, where the amount of the claim of any of the group member cannot be precisely proven or such proving is particularly difficult, the court may adjudicate, in the judgment, at its own discretion, the amount in favour of that group member that is not greater than the standardised amount of the claim (given the prohibition to make a judgment in excess of the demand). The court may adjudicate, in favour of a member of the group or subgroup an amount that is not higher than the standardised amount of the claim, at its own discretion, based on consideration of all the circumstances of the case and based on the accumulated evidence. To use such an option, the court should hear the parties on the amounts adjudicated in favour of members of the group or subgroup. If the parties present agreeing motions on the amounts attributable to members of the group or subgroup, in accepting the statement of claim, the court shall be bound by such motions, in accordance with Article 20a(2) of the Act, with regard to the amount attributable to members of the group or subgroup.

The fourth stage is the stage of performance of a final and binding judgment. As regards the enforcement of a pecuniary performance, the enforcement can be instituted by any member of the group or subgroup to the extent of the amount adjudicated in their favour, based on the excerpt from the judgment (Article 22 of the Act). As regards cases involving non-pecuniary performance, enforcement of the adjudicated performance is instituted upon the motion of the representative of the group. Six months after the day on which the judgment becomes binding, if the representative of the group does not put forward a motion for instituting the enforcement, the enforcement is instituted upon the motion of any of the group members.

The speed of proceedings was unsatisfactory in the first years; it is evident that at present the cases are processed much faster.

An institution unique to group proceedings is the option for the defendant to demand that the claimant pay the deposit to secure the costs of proceedings. The intention of the legislator was to introduce the deposit as an instrument to deter claimants from rash bringing of class actions.

From the moment the Act came into force, the institution of the deposit is optional, which means that if the defendant files a motion, the court may, but does not have to, commit the claimant to deposit a relevant cash amount as the deposit to secure the costs of proceedings. Initially the Act did not specify the criteria to be followed by the court in reviewing the motion; such criteria were introduced by Amendment 1. Based on the current wording of the Act (Article 8), the court may issue a decision to oblige the claimant to submit

a deposit to secure the costs of proceedings if the defendant makes plausible that the action is groundless and that the lack of the deposit would prevent or considerably hinder the execution of the ruling on the costs of proceedings if the action is dismissed. Circumstances that justify imposition of the obligation to submit the deposit can be, among others, the poor financial situation of the representative (a party) and the lack of regulations applicable to the rules of payment of the costs of proceedings within the group. The court decides on the amount of the deposit in its decision, having regard to the likely sum of costs to be incurred by the defendant. The deposit cannot exceed 20 per cent of the value of the object of the dispute. Although the motion for obliging the claimant to submit the deposit should be placed by the defendant at the first procedural action, the court adjudicates on the deposit when the decision on the composition of the group becomes final. Amendment 1 introduced this rule so that the deposit can be incurred equally by the group (although formally only the claimant, i.e., the representative is obliged to pay it). If, during the case, it transpires that the deposit is insufficient to secure the costs of proceedings, the defendant may demand an additional security. If the deposit has not been submitted during the time frame set by the court, the court suspends the proceedings, and if the deposit is not paid within the next three months, the court rejects the statement of claim or the appeals measure.

iv Damages and costs

The issues related to damages and their legally permitted amount are governed by substantive law. Polish law incorporates a principle that the damages must not exceed the loss actually suffered by the claimant. Therefore, the damages should correspond to the amount of the loss, and the amount of the damages is determined on a 'differential method' basis. This is based on comparing the assets that would have existed had there been no event causing the loss to the current state of affairs. The principle of *compensatio lucri cum damno* also applies. It is essential that the court may adjudicate, in favour of each group member, an appropriate amount (not greater than the standardised amount) pursuant to Article 322 of the CCP in conjunction with Article 20a of the Act.

In Polish civil law, the general assumption behind the liability for damages is to reinstate the condition that would have existed had the loss event not occurred (Article 361 Section 2 of the Civil Code). The damages remedy the loss and, as a rule, the amount must not exceed the amount of the loss. This also applies to remedying a non-pecuniary loss; the cash compensation for the claimant for the loss incurred should correspond to the size of the loss.

Polish law does not include the concept of punitive damages.

As regards of the rules of sharing the costs and what the cost of proceedings comprise, these issues were discussed above. One of the elements of the costs of proceedings are the costs of court representation – the losing party does not refund the winning party for the costs actually incurred but the costs recognised on a lump-sum basis, being the amount of the specific minimum rate (in the range from one to six times the amount). The Act provides for the option to pay the success fee.

v Settlement

The progress of mediation proceedings is governed by provisions of the CCP. The Act stipulates that in group proceedings, the court may refer the parties to mediation at any stage (Article 7). There are no specific rules for conducting mediation proceedings in group proceedings. It should be assumed that the representative will participate in the mediation.

In entering the mediation, the representative should consider that the representative should obtain the consent from at least half of the group members to reach a settlement and for other dispositive actions.

In accordance with Article 19 of the Act, withdrawal of an action, withdrawal or limiting the claim and conclusion of a settlement requires the consent of more than half of the group members.

A settlement is subject to control by the court, which may find reaching the settlement inadmissible if circumstances of the case show that this stands in conflict with the law or good manners, aims at circumventing the law or is a gross violation of interests of group members.

To date, only a fraction of class actions have ended with a settlement. At least one of the cases brought against an insurance company ended with a settlement at the preliminary stage of the certification.

IV CROSS-BORDER ISSUES

The Act may be quite attractive considering the fact that nine Member States of the EU still have no mechanisms of pursuing claims in group proceedings, for example, with regard to pursuing claims for infringement of the competition laws.

The Polish class action is available to overseas claimants, as long as they have claims included in the proceedings and as long as they are willing to participate in the case by submitting a declaration on joining the group.

To date, the case law has not considered the issue of whether a judgment issued in a foreign class action procedure would be recognised or subject to an execution clause in Poland. It should be noted that Polish provisions are quite liberal. As regards the legal order clause, it should be noted that the Polish law follows the principle that the damages must not exceed the loss and the judgment adjudicating punitive damages would certainly be met with the refusal to be recognised or declaration of enforcement as being in contradiction of the proportionality principle of civil law measures against the perpetrator of the damage.[8]

V OUTLOOK AND CONCLUSIONS

Currently more than 50 class actions (approximately) are pending in Polish courts (at various stages of the proceedings). Considering the number of all cases brought, one may say that the institution of group proceedings is relatively popular.

Undoubtedly the changes introduced in Amendment 1 eliminated the shortcomings that were identified as reasons for excessively lengthy group proceedings. In the future, considerable improvement in this regard should be expected.

In addition, the introduction, to the Polish legal system, of group proceedings based on the opt-out model for same type of cases is being considered at the ministerial level.

8 See the judgment of the Supreme Court of 11 October 2013, file ref. No. I CSK 697/12.

Chapter 17

PORTUGAL

Nuno Salazar Casanova and Madalena Afra Rosa[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The only collective action procedure available in the Portuguese jurisdiction that is similar to common law's class action is the 'popular action'.

In accordance with Article 52 of the Portuguese Constitution, every citizen has the right to individually, or jointly with others, submit petitions, representations, claims or complaints to defend: their rights; the Constitution; the laws or the general interest of sovereign entities; self-government bodies of the autonomous regions; or any authority. They also have the right to be informed of the outcome of any petition, representation, claim or complaint within a reasonable time frame.

All citizens with political and civil rights have the right to popular action, independently or through associations or foundations incorporated to defend relevant diffuse interests.

The general procedure and framework for bringing popular actions is set out in Law 83/95 of 31 August 1995. Law 83/95 establishes a right to 'opt-out' of popular action to all interested parties. This is explained in more detail below.

While the rules concerning popular actions apply to all areas and sectors of the law, there are several provisions, in addition to Law 83/95, that expressly prescribe the right to popular action. These provisions relate to specific areas of the law, such as the Environmental Policy Law (Law 19/2014 of 14 April), the Consumer Protection Law (Law 24/96 of 31 July), the Cultural Heritage Law (Law 107/2001 of 8 September), and the Securities Code (Decree-law 486/99 of 13 November).

Comparable to class actions are the collective actions heard together when multiple claimants join in one action separate claims on a similar or related subject (joinder of parties). This type of group claim is provided for in Portugal in both the Civil Procedure Code and the Administrative Procedure Code. Moreover, when two or more proceedings are already pending before the court, it is possible to request that both cases be joined where there is a connection between the claims (joinder of actions).

The main difference between a joinder of parties or actions and popular actions is the opt-out rule. Also, whereas claimants generally only represent themselves and their interests, even where they join an action, popular actions' claimants represent all parties with an interest or a right in the proceedings. Contrary to the mere joinder of parties, in popular actions the claimant may not have a direct interest in the claim submitted. Furthermore, it

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is not mandatory that the claimants involved in a popular action have suffered any ongoing or impending injuries or damages. Claimants represent their class at their own discretion, without needing a proxy or express authorisation from the other class members.

Since these types of claims are not common, no specific court or judge has jurisdiction to hear popular actions. The administrative and the civil courts have general jurisdiction.

II THE YEAR IN REVIEW

As mentioned before, class actions are not very common in Portugal. According to statistical reports regarding the exercise of civil class actions before the first instance courts, from 2007 to 2016, only 186 cases were finalised.[2] The average number of cases heard before the first instance courts in Portugal is 18 per year.

Nonetheless, the number of class actions filed by retail investors, or associations on behalf of retail investors, for the protection of the investors' homogeneous individual or collective interests in financial instruments, has increased significantly.

In August 2014, the Association of Investors and Technical Analysts (ATM) filed a claim against some of the former directors of PT SGPS for damages caused to shareholders.

In October 2014, more than 500 investors filed a class action before the administrative courts to annul the resolution measure taken against Banco Espírito Santo, arguing that the decision by the Bank of Portugal in relation to the measure, was illegal.

In February 2015, the Association for the Defence of Consumers (DECO) filed a class action against the former directors of Banco Espírito Santo and KPMG seeking compensation for investors that bought shares in the 2014 share capital increase.

In March 2015, the Portuguese Competition Observatory, a non-profit association made up primarily of Portuguese academics, filed a popular action against Sport TV, a television sports channel. The Portuguese Competition Observatory sought compensation for damages caused by competition law infringements, on behalf of all Sport TV subscribers and pay-TV clients in Portugal, during the period between 1 January 2005 and 30 June 2013.[3]

In March 2015, a member of ATM filed a class action against Banco Comercial Português regarding the increase in account maintenance fees.

In March 2016, 100 investors, from the Association of Aggrieved Investors of Banif (Alboa), filed a class action before the administrative courts to annul the resolution measure taken against Banif.

In September 2016, more than a thousand investors filed a class action before the Lisbon Administrative Court against the Bank of Portugal, its governor and the Portuguese state. They claimed compensation for damages caused by serious shortcomings in the prudential and market conduct supervision with regard to the defendants' involvement in the *Banco Espírito Santo* case.

Also, in April 2017, Alboa filed a new claim before the Lisbon Administrative Court against the Bank of Portugal to annul a new resolution that clarified and amended the resolution measure taken against Banif. This claim was also filed against the public prosecutor,

2 This statistical analysis was carried out by the Portuguese Directorate-General for Justice Policy and is available at www.siej.dgpj.mj.pt.

3 For more information regarding the claim presented see 'Press Package: Portuguese Competition Observatory initiates collective enforcement action against Sport TV to compensate consumers for damages caused by infringements of competition law'.

in representation of the Portuguese state, the Resolution Fund, the Directorate General for Competition of the European Commission, the European Commission (EC), Banif and Banco Santander Totta, among others.

In September 2017, the Alfama Heritage and Residents Association (APPA) 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 ATM and the association that represents the aggrieved investors of PT/Oi (Alope) intended to file a class action against Haitong (formerly known as Banco Espírito Santo de Investimento). The claim should take into account the sale of structured finance products of the former Portugal Telecom.

Additionally, in November 2017 the Legionnaire's disease victim support association stated its intent to file a class action for damages against the Portuguese state, on the grounds of the lack of legislation in this regard and a breach of the constitutional right to life.

In January 2018, the president of the Municipality of Sintra announced that a popular action was being drafted against the Portuguese Postal Service (CTT) owing to the unilateral decision to close one of the post offices in the area.

III PROCEDURE

i Types of action available

Popular action comprises the right for an aggrieved party or parties to request the applicable compensation, in the cases and under the terms provided for by law. In particular, popular action may be taken to promote the prevention, cessation or judicial prosecution of offences against: public health; consumer rights; the quality of life, or environmental and cultural heritage preservation. In addition, the right to popular action may also be exercised to safeguard property owned by the Portuguese state, autonomous regions or local authorities.

Popular action applications can be filed before the administrative or the civil courts. The relevant court depends on the interest in question and on whether the interest or right, and the damage caused, is related to a public or a private entity.

Popular action may take any of the forms set out in the Civil Procedure Code and the Administrative Procedure Code.

To initiate a popular action, the claimant must file the claim before the competent court.

Except for Article 22, Paragraph 4, Law 83/95 of 31 August does not provide for specific rules regarding limitation periods applicable to popular actions. In addition, the statute of limitations regime in the Portuguese Civil Code[4] 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

4 Decree-law 47 344/66 of 25 November.

must be an activity covered by the foundation or the association's corporate purpose as set out in its articles of association; (3) the association or foundation cannot carry out an activity that could, in any way, be deemed as competing with an activity carried out by a corporate entity or a liberal professional.

In addition to citizens, associations or foundations created to defend any relevant interest, Law 83/95 also allows local authorities or the public prosecutor to file a claim on behalf of a group of people with a relevant interest.Under Portuguese law, there is no specific definition of a class. In contrast with US law, the class is not determined by preliminary certification and there are no prerequisites that must be fulfilled to qualify the proceedings as a class action.[5]

As prescribed in Article 15 of Law 83/95 of 31 August, once a class action claim is filed with the court, if a member of the class in question disagrees with the proceedings submitted, that person must opt-out of the action.

After being summoned to accept or refuse the claim, the members of the class that have had no involvement in the proceedings will have three options: (1) they can declare that they ratify the proceedings at their current stage and they accept the claimant's representation; (2) they can say nothing, in which case their silence will be deemed as acceptance; and (3) they can declare their refusal of the claimant's representation to not be bound by the decisions that follow.

The right to opt-out of a class action may be exercised, until the end of the evidence production stage of the proceedings by submitting a statement to the court.

Law 83/95 of 31 August does not foresee a minimum number of claims to be filed.

Portuguese law only requires the claim to be filed by an individual and does not exclude overseas claimants. Hence, class action claims may be brought by Portuguese citizens or foreigners in, or residing in, Portugal. Due to the Portuguese constitutional principle of equal treatment, any person has the right to lodge a claim before a court irrespective of their national origin or citizenship.

iii Procedural rules

Once a claim is filed, the interested parties are summoned to join the proceedings, if they wish to, or to declare that they do not agree to be represented by the claimant that initiated the class action. The judge will determine the deadline for interested parties to inform the court of their acceptance or refusal.

The summons to accept or refuse the claim issued to any potential members of the class covered by the claim will be publicly announced by the media or through a public notice, if the interests in question concern general interests or can be geographically recognised. The personal identification of the class of persons covered by the claim does not need to be provided in the summons. The potential members of the class covered by the claim may be referred to as holders of the relevant interests. The summons should also identify: the case file, the first claimant that submitted the claim, when there are several; the defendant or defendants; the subject matter of the class action; and the grounds for the claim.

When the interested parties cannot be specifically identified, the summons should refer to the relevant scope of people. This scope should be determined based on the specific

5 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.'

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.[6] While the parties must provide the necessary evidence to the court, judges have a more active role in Portugal than they do in adversarial systems in the US. Judges conduct the trial and have the power to question witnesses and also require the production of evidence.

The Portuguese civil litigation system, as opposed to the US legal system, is characterised by written procedure. The parties lodge their claim, defence and replies (if applicable). As a general rule, the judge only intervenes after all written pleadings have been filed and, when necessary, call for a pretrial hearing. At the pretrial hearing, the judge will verify if the procedural prerequisites have been fulfilled. If so, the judge will determine the subject matter of the case and the key issues that are to be subject to evidence. At the final hearing the judge will hear the witnesses' testimony, as well as the parties and the experts' clarifications, if requested. The hearing will end with the parties' closing arguments and be followed by the final judgment.

As provided by Law 83/95 of 31 August, in class actions the judge is more independent than in civil procedure actions. The judge is not dependant on the evidence submitted by the parties and may require the parties to provide additional evidence.

In addition, if the judge believes that it is highly unlikely that the application will succeed, the judge can preliminarily refuse the claim. However, before reaching such a decision, the public prosecutor must be heard and the judge should carry out the preliminary assessments deemed necessary or requested by the parties or the public prosecutor.

The public prosecutor may replace the claimant when the claim is withdrawn, 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 class action is final and no longer subject to appeal (when it has the force of *res judicata*), the decision will be binding against all interested parties. Apart from the members of the class who expressly opted out of the proceedings, all remaining members who declared their acceptance or who did not opt out will be bound by the court's judgment.

The final judgment will be published in two newspapers, chosen by the judge, which are presumed to be read by the parties with a relevant interest in the subject. This publication must be made at the expense of the losing party. Failure to comply with this obligation will result in liability for disobedience. Instead of publishing the full text of the judgment, the judge may determine that only extracts of its key points are to be published.

6 See Decision of the Supreme Court of Justice dated 8 September 2016, in case No. 7617/15.7T8PRT.S1, available at www.dgsi.pt.

There is no difference between the time taken for class actions and other actions in Portugal, where the average length of civil proceedings is three years though some actions last for several years.

The trial is heard and decided by a single judge, without a jury.

Pursuant to Portuguese law, as a general rule, no punitive damages are awarded for class actions. All types of damages may be recoverable, including general and special damages and compensation for loss of profit. The law does not impose a maximum limit on the damages that the court may award: the quantum is fixed taking into account the losses suffered by the claimants.

The remedies available in class actions include compensation for damages, specific performance, penalties for non-performance and injunctions.[7]

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 right holders that may lawfully request it.

The Securities Code provides that when compensation is not paid due to a statute of limitation or the inability of the court to identify the injured parties, payment should revert to the guarantee fund for the transaction giving rise to the claim or, if such fund does not exist, to the investors' compensation system.[8]

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 and 50 per cent of the regular fees. The judge should take into consideration the claimant's financial situation and the substantial or formal grounds for the refusal of the claim.

Law 83/95 of 31 August provides for the joint liability of claimants involved in the proceedings.

In Portugal – as in most of the Member States of the European Union[9] – the use of contingency fees (also known as *pactum de quota litis*) is prohibited by Article 106 of the Portuguese Bar Association Statute (Law 145/2015 of 9 September) and Article 3.3 of the Code of Conduct for Lawyers in the European Union. Contingency fees are defined as the agreement between a lawyer and client, entered into prior to the final conclusion of the case, whereby the client undertakes to pay a share of the damages awarded with the lawyer, regardless of whether the amount awarded represents payment in cash or in kind.

7 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).

8 Article 31, paragraph 3 of the Portuguese Securities Code.

9 The *quota litis* is permitted in Spain, for example.

Nonetheless, lawyers and their clients can previously agree that the fees to be awarded are based on the value of the case's subject matter or that, apart from the fees awarded based on other criteria, the lawyer will be entitled to additional fees related to the outcome of the case.

iv Settlement

In Portugal, there are no specific rules regarding the settlement of class actions, so the general requirements set out in the civil procedure code apply.

In accordance with Paragraph 3 of Article 290 of the Civil Procedure Code, when the parties to a class action enter into a settlement agreement, the agreement must be submitted to the court for approval.

To approve the settlement of the class action, the court must assess if the class of people covered by the claim was adequately and lawfully represented.[10]

The settlement agreement will only be binding on, and enforceable in relation to, those who subscribe to it. The members of a class that refuse to subscribe to the agreement or that have expressly opted out of the class action will not be bound by the settlement.

IV CROSS-BORDER ISSUES

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

Additionally, the EC recently issued a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States, concerning violations of rights granted under Union Law (EC Recommendation 2013/396/EU of 11 June 2013). Though non-binding, EU Member States were supposed to have implemented the principles set forth in the Recommendation in their national collective redress systems by 26 July 2015. By 26 July 2017 at the latest, the EC will assess the implementation of the Recommendation.

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

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').[11]

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.[12]

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.[13]

10 See, for example, Miguel Teixeira de Sousa, A legitimidade popular na tutela dos interesses difusos, cit., page 242.

11 Point 13 of the Recommendation.

12 Point 14 of the Recommendation.

13 Point 17 of the Recommendation.

The Recommendation favours an opt-in model, as opposed to the opt-out system applicable in Portuguese class actions. The class of claimants is constituted by the interested parties, claiming to have been harmed, providing their express acceptance of the claim. Any legal or judicial exception to this principle must be duly justified based on the sound administration of justice.[14]

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.[15]

Finally, Member States should establish a national registry of collective redress actions.[16]

V OUTLOOK AND CONCLUSIONS

There are many reasons for the fact that the Portuguese popular action mechanism is rarely used. The main problems with the implementation and enforcement of popular action have been summarised by Paula Meira Lourenço.[17] Instead of popular action claims, consumers generally opt for filing injunction claims in accordance with the Portuguese Consumer Protection Law, as these tendy to be more effective. Moreover, alternative dispute resolution schemes, such as mediation or arbitration, has become entrenched and has significantly increased in recent years. Today they are seen as an expedient and efficient option. In most cases, the court cannot immediately fix compensation for damages that it awards. This is because the court requires settlement procedures to be filed, which further delays the enforcement process. Though exempt from payment of preliminary costs, the prohibition of contingency fees can also be discouraging to potential claimants.

Nevertheless, we are witnessing a growing increase in the use of popular action claims, in particular with regard to the protection of retail investors' collective interests.

Following the collapse of Banco Espírito Santo, the downfall of Banif and the related resolution measures taken, associations incorporated to defend and protect the individual or collective interests of investors who suffered injury or losses due to the lack the repayment for their financial investments have not only strived to represent the interests of their members but also of any other interested parties.

With the final outcome of the Banco Espírito Santo, Banif, Banco Comercial Português and Bank of Portugal claims pending, all eyes will be on the implementation and effectiveness of the Portuguese popular action mechanism. The outcome will affect a considerable number of national and foreign citizens and will most definitely be publicly broadcast throughout Portugal and Europe. We are at a turning point that could define the future of the class action

14 Point 21 of the Recommendation.

15 Point 33 of the Recommendation.

16 Point 35 of the Recommendation.

17 See Paula Meira Lourenço, Public Hearing on a Horizontal Instrument for Collective Redress in Europe? (Brussels - 12.07.2011 - 09:30-11:00 - Room JAN - 4Q1) – Portuguese Experience, page 8.

system in our country. It could confirm whether the system is an adequate form of group litigation for the defence of diffuse interests in our jurisdiction. Additionally, the fact that popular actions are in the spotlight may draw out the relevant features of the procedure that require improvement. Finally, it may also serve as evidence that certain rules are blocking the success of this scheme, such as the opt-out system, the lack of preliminary certification by the courts or the prohibition of contingency fees.

Chapter 18

SPAIN

Albert Poch Tort and Andoni de la Llosa Galarza[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Actions seeking collective redress were introduced in the Spanish legal system by Act 1/2000 of 7 January on Civil Procedure (the Civil Procedure Act) as an instrument specifically dedicated to protecting consumers' interests, but they did not become widespread until the advent of the financial crisis, becoming popular in order to challenge financial and banking services contracts.

As explained in the preamble of the Civil Procedure Act, collective actions regulation is not intended to create a special proceeding, and, therefore, its regulation is scarce and limited to some specific procedural rules spread throughout the Civil Procedure Act (Articles 11, 15, 221, 222, 519, etc.) to complement the two existing proceedings (ordinary or oral).

This lack of regulation on the Civil Procedure Act has generated a vast number of problems when the number of collective actions filed before the courts has increased, demonstrating that Spanish regulation is far from being perfect and some amendments have to be made in order to improve and refine the system.

II THE YEAR IN REVIEW

The evolution of collective actions in Spain has gone hand in hand with the consumer law promoted by the European Union and the development of EU Directive 93/13/ECC of unfair terms in consumer contracts.

i Coordination with individual actions

The most relevant issue regarding collective actions was mainly focused on some controversial judgments issued by the Provincial Court of Barcelona denying the possibility to start an individual claim on the same grounds after the collective action had been filed.

The interpretation of the Provincial Court, affected many individual claims already filed before the courts by thousands of consumers and revealed significant controversies with regard to the effects of judgment of a class action to non-litigants, whatever the outcome, and not only if it is beneficial, as Article 222(3) of the Civil Procedure Act states that 'judgments shall affect all the parties to the proceedings, including their heirs, as well as non-litigants whose rights found the standing to sue of the parties under Section 11 of this Act'.

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In the aim to clarify the situation, Mercantile Court No. 9 of Barcelona requested a preliminary ruling of the Court of Justice of the European Union (CJEU) concerning the interpretation of the Spanish legislation on collective claims on the light of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The judgment issued by the CJEU on 14 April 2016 ended the discussion and stated that individual actions could not be automatically suspended concerning an ongoing collective action brought by a consumer association; therefore, both individual and collective actions can coexist in a separate court procedure.

The interpretation of the CJEU was also confirmed by several rulings of the Constitutional Court of Spain, which set aside the judgment of the Provincial Court of Barcelona and established that any provision preventing an individual action to be filed before the Court when a class action has already been filed is contrary to the constitution.

ii Damages arising out of competition infringements

The most significant change in Spanish civil procedure in 2017 was because of the transposition of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Antitrust Damages Directive).

The implementation of the Antitrust Damages Directive by the Royal Decree-Law 9/2017, of 26 May, which also transposes directives of the European Union in the financial, commercial and health fields, and on the movement of workers, reinvigorated the debate about class actions in Spain as many scholars considered them the ideal instrument for the injured parties (not only consumers) to claim damages arising out of antitrust infringements.

However, the difficulties of forming a new government and the delay in the transposition of the Antitrust Damages Directive finally excluded class actions from the regulation of the Royal Decree-Law 9/2017, which introduces significant developments for the claimants of antitrust damages such as the right to obtain the disclosure of evidence relevant to their claim, both from the defendant and the national competition authority, as well as the recognition of the right to claim damages by the person that acquired the claim.

Despite those achievements, it must be pointed out that the parliamentary process to pass the Royal Decree-Law 9/2017 into a Law is not concluded yet and a collective mechanism to obtain compensation for antitrust damages may still be included, which would be desirable if we take into consideration that antitrust infringements require a collective redress mechanism in order to be effective for the plurality of individuals that have suffered a harm.

iii Mass service contracts: banking, automotive and telecoms

Following the trend initiated in recent years, Spanish consumer associations have filed numerous claims on the basis of EU Directive 93/13/ECC on unfair terms in consumer contracts.

Once again, the most significant collective actions filed before the courts in Spain were related to financial contracts in order to remove unfair clauses from the financial institutions' model contracts, in particular, the mortgage expenses clause or the application of the official Spanish mortgage index IRPH.

It was also as a consequence of a collective action challenging a floor clause insert in a financial contract that the Supreme Court had the opportunity to analyse, in its ruling

367/2017 issued on 8 of June 2017, the *res judicata* effect of the judgment for the pending individual actions. Therefore, the judgment concluded that the abusive nature of the clause for the reasons expressed in that judgment will be binding for individual actions, except when exceptional circumstances, referring to the client's profile or to the information provided by the predisposing bank in that particular case, may justify a different ruling.

Beyond the financial sector, the 'dieselgate' scandal also resulted in the filing of a collective action before the commercial court of Madrid by a consumer and users' association against the vehicle manufacturers in order to claim economic compensation for those consumers who acquired manipulated vehicles.

Finally, the telecommunications industry was also targeted as a consequence of abusive practices in the billing of unsubscribed clients, resulting in the filing of a collective action for an injunction before the commercial courts of A Coruña by the public prosecutor, to obtain a cessation and prohibition order in defence of consumers and users.

III PROCEDURE

Contrary to other legal systems with a longer tradition, the Spanish regulation on collective actions establishes a representative system that only grants consumer associations and the public prosecutor the procedural standing to initiate the action.

The minimalistic regulation of collective actions provided by the Civil Procedure Act does not regulate the specific requirements that a collective claim must fulfil in order to be accepted by the courts, such as numerosity, commonality, typicality or adequacy of representation, frequently resulting in notable delays and serious difficulties in bringing forward the proceedings.

From this point on, we will analyse the singularities of the Spanish civil procedural system for the purpose of examining the most relevant rules set on the Civil Procedure Act in order to fit collective claims that will be analysed hereunder.

i Types of action available

According to Article 11 of the Civil Procedure Act, class actions are permitted in all areas of law that involve consumers' or users' interests or rights, which means the individuals that have been damaged by the wrongful conduct must be categorised as 'individuals acting for a purpose unrelated to their commercial or business activity, trade or profession' as it is defined in Article 3 of the Royal Legislative Decree 1/2007 of 16 November on Consumers and Users (the Consumers and Users Act).

The Spanish legislation provides no specific definition of class or collective action, but the Civil Procedure Act distinguishes between the members of affected groups and, therefore, establishes two types of collective redress actions. These actions are:

a applicable to cases in which the group members are identified or easily identifiable (Article 11.2); and

b for the protection of 'diffuse interests' for cases in which the affected group is undetermined or difficult to determine (Article 11.3).

There is no certification of the class process on the Civil Procedure Act, but the grounds of the claims brought by the consumers or users are also relevant because collective claims are not admitted in case each claim should have been analysed on a case-by-case basis.

ii Commencing proceedings

There is no specific court that deals with collective actions, so the commercial courts will have competence if the claim is seeking consumer redress based on unfair or abusive contract terms or if the claim is related to mercantile matters (i.e., a claim seeking a competition unfairness declaration and the damages arising from the unfair act).

The action starts with the filing of the complaint by a consumer's association or the public prosecutor as Article 11 of the Civil Procedure Act does not entitle individuals to bring a collective action for damages before the court (like US class actions), even if the organisations entitled to sue do not start the proceedings.

Actions seeking collective redress under Spanish law when the group members are identified or easily identifiable can only be brought by the following organisations designated in Article 11.2 of Civil Procedure Act:

a consumers' and users' associations that meet the requirements laid down in the Consumers and Users Act (non-profit organisations that are officially registered for the purpose to defence consumers' and users' interests);

b legally incorporated entities that have a statutory purpose in order to cover the defence of consumers' rights and interests; and

c groups of affected individuals, but only when it is constituted by the majority of those users affected.

The Civil Procedure Act provides for the best notice and publicity to be given to all affected by the collective action and the possible intervention of individual consumers and other associations on the proceedings.

It must be pointed out that the Spanish collective redress scheme it not available for companies that do not fall under the definition of consumers or users; however, this does not preclude the possibility of companies bringing a joint action, though they may arise from different titles, as long as they are not mutually incompatible, which, for example, would be the usual scenario for companies damaged by a cartel (Ruling of the Supreme Court, No. 344/2012, 8 June also known as the *Sugar Cartel* case).

iii Procedural rules

The Spanish procedural civil system is based on the principle of preclusion of allegations; therefore, the claim filed before the courts 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.

The filing of the claim will determine whether the proceedings must be handled through ordinary proceedings – when the amount claimed is more than €6,000 – or oral proceedings – when the claim is €6,000 or less or when the proceedings refer to specific matters – which are two basic declarative procedures for seeking compensation. It must be pointed out that an important amendment to the Civil Procedure Act was introduced by Act 42/2015, dated 5 October to reform verbal proceedings by introducing a written statement of defence, which did not exist previously, and removing the obligation to hold oral hearings in all cases, making them more similar to ordinary proceedings.

Opt-in procedure

According to the collective redress scheme provided by the Spanish legislation, the filing of a collective claim opens a second phase based on an 'opt-in' system, where the Civil Procedure Act regulates two different alternatives to notify the initiation of the proceedings to the consumers, depending on the type of action.

When the group members are identified or easily identifiable, the claimant must notify the consumers of its intention to file a claim, and the individuals will be entitled to 'opt-in' the proceedings at any time.

When the members are undetermined or difficult to determine, the court must announce the admission of the claim through media, suspending the proceedings for no longer than two months, after which expiration, individual consumers will not be allowed to join the proceedings but will be able to benefit from the enforcement of the judgment.

The determination of the group members has generated major problems in practice, as some of the courts have considered it to be possible in collective claims that were filed by the claimant in representation of undetermined members, provoking huge delays in the proceedings.

Allegations

Once the proceedings are initiated and the defendant has been notified of the claim, the brief in response will have to be filed before the court in a period of 20 working days in ordinary proceedings and 10 working days in oral proceedings.

The principle of preclusion also applies on the facts or events on which the defence is based, and the Civil Procedure Act is very strict on the parties when they exceed deadlines. Therefore, any documentary evidence and expert reports will have to be attached to the brief of response that will have to be filed before the indicated periods have elapsed.

After the filing of the brief of response, the court will call the parties to a preliminary hearing in which they will have to set out the evidence they are going to submit and will be presented in the trial before the judge (there is no jury in Spanish civil procedure).

Taking of evidence (discovery)

There is no regulated discovery procedure in Spain specifically provided for collective actions, but there are two types of proceedings under the Civil Procedure Act under which a party can request from the other the disclosure of documents that are not at its disposal:

a preliminary proceedings, in order to obtain from the future defendant any necessary information for the case before the proceedings are started; and

b request for documents during the preliminary hearing.

It also has to be pointed out that, since the recent transposition of the Antitrust Damages Directive into Spanish law by Royal Decree-Law 9/2017, specific provisions concerning the disclosure of documents relating to a competition law infringement have been introduced into the Civil Procedure Act to provide the parties with a mechanism to obtain the information from the other party or the competition authorities in order to prove damages.

Judgment and enforcement

Judgments passed in connection with claims filed by associations of consumers and users shall comply with the following rules:

a where the claim is for monetary compensation, or in order to require the defendant to do, abstain from doing or give a specific or generic thing, the judgment shall determine individually which consumers and users must benefit from it according to law; and

b where such determination is impossible, the judgment shall establish the details, features and requirements necessary to demand payment and, where appropriate, to apply for or take part in the enforcement of the judgment, if requested by the claimant association.

Article 222.3 of Civil Procedure Act regulates the extension *ultra partes* of *res judicata* in collective actions, allowing the individual consumers who did not join the proceedings to benefit from the enforcement of the collective action final judgment.

The enforcement of the judgment in collective actions shall follow the standard procedure, but the Civil Procedure Act establishes a procedural issue to be used by the consumers who did not join the proceedings to prove that they meet the requirements of the proceedings to benefit from the judgment.

iv Damages and costs

Collective actions follow the principle of full compensation; therefore, the action is intended to restore the claimant to its position prior to the wrongful act, and punitive damages are not allowed in Spanish legislation.

All types of damage – even moral – are recoverable as long as the claimants can establish beyond a doubt that there is a cause and effect relationship between that damage and the acts or omissions of the defendant.

The successful party will be able to recover court fees or other incidental expenses and their own legal costs of bringing the proceedings following the 'loser pays' principle unless:

a the case raises serious doubts regarding the facts or the application of the relevant law; and

b the arguments of the losing party are not totally dismissed.

In those cases, the court will not make an order for costs, and each party will bear its own costs.

Finally, *quota litis* agreements and third-party funding are fully valid in Spain and becoming more popular nowadays.

v Settlement

The Civil Procedure Act provides no specific regulation related to the settlement of collective actions. Therefore, and although it is unprecedented, it shall be permitted following the same principles as individual actions, and could only be rejected by the court if it harms the fundamental individual rights of any of the parties or the interests of third parties.

IV CROSS-BORDER ISSUES

The Civil Procedure Act contains no specific regulation that considers cross-border issues, and we are not aware of any collective claim involving foreign issues, according to the Spanish lack of tradition on those cases.

However, Spain may be the competent jurisdiction to hear claims filed by consumers and users residing in Spain according to the provisions stated in the Regulation (EU) 1215/2012, on 10 January 2015, which has led to positive changes in the Spanish procedural framework updating the provisions on jurisdiction, and on the recognition and enforcement of judgments in civil and commercial matters included in Regulation 44/2001.

Regulation (EU) 1215/2012 will facilitate the execution of judgments within Spain, which will be of great importance, given that Spain has traditionally been a country that receives judgments from other EU countries.

V OUTLOOK AND CONCLUSIONS

The deficiencies in the current system of collective actions in the Civil Procedure Act are impelling alternative methods for individuals to appear before the courts by assigning their claims to a special purpose vehicle (SPV) that acquires the claim and may bring the action on its own behalf. This is a possibility that has been barely used in Spain in the past but seems to be increasing sharply to claim damages arising out of antitrust infringements, as it is common in other jurisdictions like the Netherlands.

Meanwhile, the parliamentary process to pass the Royal Decree-Law 9/2017 into a Law represents a great opportunity to introduce amendments in the Spanish regulation of collective actions, in order to improve it in line with the Recommendation of the European Commission 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.

In this regard, the Spanish parliament is currently analysing an ambitious proposal that may amend the Article 11 of the Civil Procedure Law to create a real opt-out class action to enable any consumer in representation of the class – not only consumers' associations – to claim damages and bring class actions before the court when dealing with 'diffuse interests'.

The new procedure goes in the line of the US regulation on class actions – Federal Rule No. 23 – as it (1) includes a pre-certification state; (2) requires the accreditation of the numerosity, commonality, typicality and adequacy; and (3) allows the parties represented to withdraw from the claim by a simple communication to the court.

Even though the proposal has received quite good opinions, most of the scholars and subject-matter experts consider it insufficient and advocate a deeper modification of the Spanish regulation on class actions. Some even have brought forward the possibility of creating a specific law on class actions instead of having several articles scattered in the Civil Procedure Law.

Chapter 19

SWEDEN

Magnus Rydberg and Ola Hansson[1]

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The main and virtually exclusive legislation in Sweden that governs class actions (hereinafter referred to as group actions, in accordance with the official Swedish to English translation) specifically is the Swedish Group Proceedings Act, which came into force in January 2003. The act is only applicable to civil cases and procedural matters thereof; it does not affect substantive law. In addition, where the Group Proceedings Act does not specifically regulates otherwise, the general framework that governs litigation in Sweden (found mainly in the Swedish Code of Judicial Procedure) is applicable to group actions. Owing to the narrow scope of the Group Proceedings Act, the Code of Judicial Procedure to a large extent *de facto* covers group actions. For a number of environmental and competition matters, a few provisions relating to group actions can be found in the Swedish Environmental Code and the Swedish Competition Damages Act. All group action proceedings are adjudicated by judges; there are no juries.

Three categories of groups are entitled to commence group actions:

a private groups (i.e., individuals or companies, and other entities, that have a claim that is subject to the action);

b organisation groups (i.e., non-profit associations that, in accordance with the association's charter, protects consumer or wage-earner interests in disputes between consumers and business operators regarding any goods, services or other utility that a business operator offers to consumers or a dispute of any other kind provided there are significant advantages with the disputes being jointly adjudicated with reference to the investigation and other circumstances); and

c public groups (i.e., authorities, provided that the authority is suitable to represent the members of the group with reference to the subject of dispute).

Group actions are administered by the general courts, which are organised in a three-tier system: district courts (and in the case of group actions, specifically by the district courts appointed by government, with each county having one), courts of appeal and the Supreme Court. However, competent district courts for group actions relating to environment matters and competition matters are the land and environmental courts or the Patent and Market Court respectively.

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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 why this is the case could be that the general procedural rules regarding intervention and consolidation of proceedings are fairly liberal under Swedish procedural law. Anyone who can make it probable to the court that the disputed matter has an impact on his or her legal rights or obligations may intervene in a pending court proceeding. The rules on consolidation are more complex, and there are several ways in which two or more court proceedings can be consolidated, some of which are mandatory. Mandatory consolidation is normally applied if the same claimant initiates more than one court proceeding against the same defendant or if one or more claimants initiate proceedings against one or more defendants, if, under all these circumstances, the claims are based on essentially the same legal ground (e.g., the same contract or the same negligent act). The most prevalent reason for consolidation in other situations is that a consolidation would benefit the handling of the court proceedings, but this type of consolidation is not mandatory. It is not unusual that, for example, claims regarding professional liability for financial advisers that have provided advice to a vast number of consumers are consolidated with support of the procedural rules of consolidation instead of being filed as a group action. Courts may not *ex officio* decide whether consolidated proceedings should instead be pursued as a group action, although such a change is possible under certain conditions upon request by the claimant.

A further reason specific to competition matters as to why group actions are rare in Sweden may be that the statutes of limitation have been unfavourable to claimants prior to the new Competition Damages Act that was enacted in 2016.

II THE YEAR IN REVIEW

There were no group action claims filed in Swedish courts during 2017. An initiative that received some attention was a potential group action against Volkswagen regarding the emission controversy; however, it has since been abandoned. Consequently, no trends can be discerned other than that the interest for group actions in Sweden remains at a low level.

III PROCEDURE

i Types of action available

Any civil claim that can be brought to general courts may be subject to group action, for example, virtually all commercial disputes. Any other type of claim may not be brought as a group action unless such opportunity is available by statutory backing. There is statutory backing for group actions in several environmental and competition matters. Notable matters that may not be litigated as group actions are maritime, patent, trademark and a number of employment matters.

The Group Proceedings Act is, with a few exceptions, applicable to environmental matters where it is permissible to bring a group action, for example, claims concerning damages. One of the exceptions is that public groups (i.e., authorities) are restricted from pursuing certain remedies; public groups may only bring claims concerning damages. Private and organisation groups may, in addition, bring claims concerning the prohibition

of environmentally hazardous activity and claims to order the defendant to take protective measures or other precautions regarding such activities. Moreover, non-profit associations that, in accordance with the association's charter, protect environmental interests – as well as associations of professionals within the fishing, agricultural, reindeer and forestry industries – are entitled to bring an organisation group claim to court, in addition to what follows from the Group Proceedings Act.

Limitation is part of Swedish substantive law. As was mentioned above, the Group Proceedings Act does not affect substantive law. Consequently, general statutes of limitation apply. The general limitation period is 10 years from the occurrence of a claim unless otherwise is agreed upon by the parties or specifically regulated elsewhere, according to the Swedish Limitations Act. Some areas of law are subject to specific limitation periods (e.g., under certain circumstances, matters of product liability). The limitation period can be interrupted if the debtor offers payment, pays interest or instalments or otherwise acknowledges the claim. The creditor may also interrupt the limitation period by presenting a written demand to the debtor or commencing legal proceedings. If the limitation period is interrupted, a new limitation period begins from that day. Concerning interruptions because of legal proceedings, specifically, the new limitation period begins when the legal proceedings are concluded. Generally to avoid limitation, it is sufficient to notify the opposite party of the claim, although in some instances initiation of court proceedings is required.

ii Commencing proceedings

Group actions may only be commenced by anyone who has a claim that the group action concerns. In addition, group actions may only be commenced by the claimant; a claim initiated by a single claimant (which is not in itself a group action) against several defendants cannot be litigated as a group action. This issue is instead resolved by the rules of consolidation mentioned above. The basic prerequisites to pursue a group action are: (1) the action must be based on circumstances (i.e., legal grounds, that are common or of similar nature for the claims by the members of the group); (2) the group proceedings must not appear to be mismatched owing to some claims of the members of the group differing substantially from claims by other members of the group on legal grounds; (3) the majority of the claims to which the action relates cannot equally well be pursued by the members of the group individually; (4) the group, as regards its size, demarcation and other circumstances is appropriately defined; and (5) the claimant, taking into consideration the claimant's interest in the substantive matter, financial capacity to bring the group action and other circumstances, is suitable to represent the members of the group.

The group members themselves are not parties in a group action, with the exception of the representative of the group in private groups (i.e., the actual claimant: the representative of a private group must have a claim that is subject to the group action). However, a group member is in several aspects treated as a party (e.g., in matters relating to conflict of interest and evidence). Notably as well, a group member has an independent right to appeal in his or her own interests or in the interests of the group. How such appeals are administered is a complex issue, but they entail that the group member becomes party to the proceedings.

Theoretically it should be possible to involve more than one defendant in group proceedings. The Group Proceedings Act does not specifically regulate this situation although it may be deemed inappropriate as regards the prerequisites in (1)–(5) above (however, these prerequisites primarily concern the claimant and the group members).

The group is preliminarily defined by the statement of claim. Consequently, a group can be defined fairly loosely at an initial stage, for example, 'everyone who purchased cars from X in the year of 2016'. Ultimately, however, the group is defined by those members of the preliminary group that decide to opt in.

There are no specific provisions in the Group Proceedings Act concerning claimants outside Swedish jurisdiction, hence ordinary rules applicable to individual claims apply to group actions as well. Issues concerning jurisdiction are primarily resolved with reference to international legislation or treaties or, in absence thereof, national sources of law; see further below.

Group actions may be funded in primarily three ways: ordinary contingency fees, contingency fees arrangements under the Group Proceedings Act and third-party funding.

Lawyers that are members of the Swedish Bar Association are generally prohibited from requesting contingency fees, according to the Swedish Bar Association's Code of Conduct. Exemptions may be granted only for very specific reasons, making contingency fees very rare.

However, contingency fees (as agreed upon in a risk agreement) are, under certain conditions, specifically permitted by the Group Proceedings Act. The statutory backing for contingency fees relating to group actions thus makes contingency fees available for members of the Swedish Bar Association acting for a group. Contingency fee arrangements must be in writing and indicate how the fee will differ from an ordinary fee arrangement, that is, how a group member may incur additional legal costs depending on the extent of the claim being sustained or dismissed. The contingency fee arrangement must also be approved by the court. Court approval may be obtained only if: (1) the arrangement is reasonable in light of the nature of the matter at issue; and (2) the fee is not based solely on the value of the relief sought. Contingency fee arrangements according to the Group Proceedings Act are not binding to the defendant. Accordingly, any costs incurred by the claimant specifically as a result of a contingency fee arrangement cannot be recovered from the defendant in accordance with the general loser-pays-principle according to general Swedish procedural law.

There are no general restrictions to third-party funding under Swedish law. Members of the Swedish Bar Association are, however, *de facto* restricted from funding a party's costs themselves owing to restrictions imposed by the Swedish Bar Association's Code of Conduct. There are no restrictions for a member of the bar to act for a claimant funded by a third party. It is worth noting that because of a Supreme Court precedent in 2014, owners and representatives of special purpose vehicles (SPVs) may, under certain circumstances, be held liable for the defendant's litigation costs where the SPV arrangement is made for the purposes of circumventing the loser-pays principle established in the Code of Judicial Procedure.

iii Procedural rules

There are no specific court proceedings of certification prior to a group action being initiated. In practice, however, the court will *ex officio* decide on various issues (including the general prerequisites for initiating court proceedings set out in Code of Judicial Procedure) where a group's statement of claim is filed. A party is not required, but permitted, to raise objections regarding issues that the court will assess *ex officio*. Specifically for group proceedings the court will, *inter alia*, make the following inquiries.

Most importantly, the court will assess whether the claim is appropriate as regards the issues outlined in (1)–(5) above. Generally, the court will only render a formal decision concerning these issues either if the claim is rejected by the court without prejudice or the court dismisses an objection raised by the defendant. Either outcome is possible to appeal. In

addition, group actions brought by a private group or an organisation must be represented by an attorney who is a member of the Swedish Bar Association. There is no such requirement for a public group, and it is not unusual that such group actions are brought by in-house lawyers of the authority bringing the claim. The court may grant exemptions to the member of the Bar-requirement where special reasons apply. Accordingly, the court will inquire whether the claimant's attorney is a member of the Bar. The court will also assess any contingency fee arrangement made under the Group Proceedings Act and how each of the group members will be notified the group proceedings.

As was mentioned above, the Group Proceedings Act has no application on substantive law. Consequently, issues regarding quantum of damages and liability, etc., are resolved in the same way as in any individual action where several parties are involved. Under Swedish law, it is permitted to split issues of liability and quantum of damages, that is, to first bring a declaratory claim regarding the issue of liability to the court and in subsequent proceedings, assuming liability applies, bring the issue of quantum of damages. However, any declaratory action brought before the court concerning whether a certain legal relationship exists, for example, whether a defendant is liable to pay damages, must, *inter alia*, be fitting as regards various criteria. A court shall *ex officio* decide whether such a claim is permitted. Typically in claims concerning damages, this permission is granted. Issues of liability and quantum of damages may also be split in ongoing proceedings by means of an intermediate judgment.

The time frame of litigation in matters that may be litigated as group actions is usually between one to two years in the district court where the proceedings are not a group action. Considering the low number of group actions in Sweden, there is not enough data to draw any conclusions regarding the time frame of group action proceedings. From our experience, group actions may, however, stretch out for several years.

iv Damages and costs

As a starting point and in the absence of an agreement on how to calculate damages, the aggrieved party is entitled to its actual loss incurred. As a general rule, Swedish law does not recognise punitive damages. The 'doctrine of difference' is the primary tool in calculating the amount of damages that the aggrieved party is entitled to. According to this principle, the liable party is obliged to pay damages to the amount that puts the aggrieved party in the hypothetical position where it would have been had the damaging act not been performed (i.e., the aggrieved party is entitled to full financial compensation (including loss of profit)).

Liability to pay damages is, as a general rule, limited to the immediately aggrieved party; third parties, that is, anyone who incurs financial loss as a result of the aggrieved party's loss, are generally not entitled to damages. In addition, the compensation to the aggrieved party may be reduced with reference to, for example, contributory negligence or failure to mitigate loss.

Many of the group actions in Sweden were settled. However one case in which the claimant was successful was initiated in 2008 in the Uppsala District Court. The claimant and each of the 43 group members were awarded damages. The case concerned whether the state had discriminated against the claimant and the group members in application processes to a university run by the state. The judgment was rendered in the spring of 2009 and was affirmed by the Svea Court of Appeal in December the same year.

In general, the winning party is entitled to full compensation from the losing party for reasonable litigation costs (e.g., counsel costs, compensation for the party's own costs, costs for experts and witnesses) and interest, but there are exceptions to this loser-pays principle.

A group member is, as a general rule, not liable for costs since it is only the claimant (i.e., the entity that represents the group; not the actual group members) that is considered a party. There are a few exceptions to this rule, however: most notably, if the defendant has been ordered by the court to compensate the claimant for its costs but is not able to do so the group members are instead liable to pay these costs. The same applies for additional costs resulting from contingency fee arrangements made under the Group Proceedings Act, as was mentioned above. Each member of the group is liable for its share of the costs and not liable to pay more than what it has gained through the proceedings.

v Settlement

Generally under Swedish law, a settlement does not require court approval. However, a settlement concluded by the claimant on behalf of the group members is valid only if the court confirms it in a judgment. The settlement shall be confirmed at the request of the parties, provided it is not discriminatory against particular members of the group or in another way manifestly unfair. A group member has the opportunity to settle its claim individually without involving the claimant. It is also possible for the claimant to settle claims on behalf of a the group, namely the claimant is, according to the statutory text, not able to settle claims on behalf of individual group members although it is disputed amongst scholars whether this limitation actually applies. As was mentioned above, it is in theory possible to involve more than one defendant in group proceedings. Theoretically, it should be possible to settle separately between the defendants.

IV CROSS-BORDER ISSUES

As was mentioned above, the Group Proceedings Act does not contain provisions on jurisdiction. Generally, there are no specific issues arising in relation to group members or defendants not being domiciled in Sweden. Jurisdiction must, however, apply to all group members' claims.

It follows from the above that group actions may be brought on behalf of group members from several jurisdictions. A Swedish court will *ex officio* determine whether it has jurisdiction. Generally, the court will examine the statement of claim to establish if anything therein indicates that the court does not have jurisdiction. If in doubt, the court will normally issue a remedial injunction to the claimant to provide opportunity to argue on the jurisdiction issue. Eventually, the court will rule on its jurisdiction based on international legislation or treaties applicable or, in the absence thereof, national sources of law.

No particular issues of forum shopping in group actions have as of yet, to the authors' knowledge, arisen in Sweden, which is most likely because of the low number of cases. Forum shopping is rarely an issue in general, however, especially in matters where group actions are feasible, mainly due to the widespread application of the Brussels Regulation and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007.

V OUTLOOK AND CONCLUSIONS

As was mentioned above, interest in pursuing group actions in Sweden has remained at a low level since the Group Proceedings Act's inception. However, this may change in terms of competition matters as the rules on limitation have been made more favourable to claimants

in the new Competition Damages Act that was enacted in 2016. In addition, a group action was recently initiated regarding a claim for damages of roughly 135 million kronor. The claimant and the group members are seeking damages for loss incurred in relation to an acquisition of a company. The preliminary group consists of the shareholders of the target company.

Chapter 20

SWITZERLAND

Martin Burkhardt[1]

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[2] 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.[3]

The Swiss Federal Council notes that in this area of collective redress there is a gap in the system of legal protection that the legislator has so far not been willing to fill. On 2 March 2018, the Swiss Federal Council published a project for a revision of the Swiss Civil Procedure Code (CPC) that also contains some steps towards collective redress.[4] The proposals include (1) the extension of standing to claim monetary damages to representative associations on the basis of an opt-in;[5] and (2) the introduction of a group settlement mechanism, the resulting settlement to become binding on the entire class, subject, however, to individual opt-out.[6]

Both proposals are now subject to a formal consultation process, which is open for comments by interested parties until 11 June 2018.

Under the current law, the most recent attempt of a class action-like suit was initiated by the Swiss consumer protection organisation Stiftung für Konsumentenschutz (SKS) before the Zurich Commercial Court against Volkswagen AG (VW AG) and Swiss car dealer AMAG on behalf of approximately 6,000 Volkswagen diesel car owners.[7] 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

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2 Report of the Swiss Federal Council 'Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und Handlungsmöglichkeiten', Berne 3 July 2013.

3 Ibid. p. 14.

4 https://www.admin.ch/ch/d/gg/pc/documents/2940/Bericht_ZPO_de.pdf, Erläuternder Bericht zur Änderung der Zivilprozessordnung (Verbesserung der Praxistauglichkeit und der Rechtsdurchsetzung), pp.17–18.

5 Preliminary draft, new Article 89a ZE-ZPO pp. 3 et seq.; https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf.

6 Preliminary draft, new Article 352a et seq. ZE-ZPO pp. 10 et seq.; https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf.

7 Plädoyer 01/2018, Sammelklage über Umwege möglich, available under: https://www.plaedoyer.ch/artikel/d/sammelklage-ueber-umwege-moeglich/ last accessed 8 February 2018.

lodged a second proceeding claiming individual damages suffered by certain individual car owners (Article 9 Paragraph 3 and Article 10 Paragraph 2 UCA in connection with Article 41ff Code of Obligations), on the basis of individual assignments of their claims by the respective Volkswagen diesel car owners. The two proceedings are still pending.

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.[8]

We keep following the developments.

8 Ibid. p. 52 et seq.

Chapter 21

UNITED STATES

Timothy G Cameron, Lauren R Kennedy, Daniel R Cellucci and Alex B Weiss[1]

This chapter addresses class actions in US federal courts, and provides a practical overview as to how such cases typically proceed. In federal courts, the class action mechanism permitted by the Federal Rules of Civil Procedure allows '[o]ne or more members of a class' to prosecute a lawsuit 'as representative parties on behalf of all members' of the class.[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]

I INTRODUCTION TO CLASS ACTIONS IN THE UNITED STATES

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.

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2 Fed. R. Civ. P. 23(a).

3 See, e.g., *Haynes v. Planet Automall, Inc.*, 276 F.R.D. 65, 73 (E.D.N.Y. 2011) ('The underlying purpose of the class action mechanism is to foster judicial economy and efficiency by adjudicating, to the extent possible, issues that affect many similarly situated persons.') (internal citation omitted).

4 Fed. R. Civ. P. 23(c)(3); see also *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Under US law, the doctrine of *res judicata* prevents parties from re-litigating claims where (1) a previous action resulted in an adjudication on the merits, (2) that action involved the same adverse parties, and (3) the claims asserted in the subsequent action were already raised in that first action. See, e.g., *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, 779 F.3d 102, 107–8 (2d Cir. 2015). This principle applies to judgments in class actions. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

5 Under New York state law, for example, class actions are permitted pursuant to Rule 901 of the New York Civil Practice Law and Rules. State class action requirements often are similar to federal requirements. See Thomson Reuters, 50 State Statutory Surveys: Class Action Requirements (April 2016). The Class

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 defendant(s) choose to file a motion to dismiss and the case survives, then the court will next determine whether or not a plaintiff class should be 'certified' (i.e., confirming whether the case is appropriate for class action treatment, and defining the specific class on behalf of which the case will then be litigated). The court will also appoint class representatives and class counsel, to represent the class. Following certification, notice is typically provided to members of the class – actual notice, where possible, and/or publication notice through newspapers and the internet – and class members are given an opportunity to 'opt out' (or express their desire to be excluded from the class). The case is then litigated on the merits by the class representative(s) and class counsel on behalf of the class (excluding the opt outs), until such time as there is either a settlement or a result on the merits (e.g., after a trial). A final judgment from either a trial or settlement will bind all class members who have not affirmatively opted out of the class action. In addition, any settlement must expressly be approved by the court as fair to the class.

II THE YEAR IN REVIEW

Notable decisions in 2017 concerning class actions include the following cases.

In *California Public Employees Retirement Systems v. ANZ Securities, Inc*,[6] the Supreme Court held that the filing of a timely class action does not extend (i.e., 'toll') the statutory time period within which a plaintiff class member may file the same claim on an individual basis under Section 11 of the Securities Act of 1933. Section 11 imposes liability for 'untrue statement[s] of . . . material fact' or omissions made in registration statements for certain securities offerings, but such actions cannot be asserted 'more than three years after the security was . . . offered to the public'.[7] Prior Supreme Court precedent – *American Pipe & Construction Co. v. Utah* – provides that, under certain circumstances, the commencement of a class action will suspend 'the applicable statute of limitations as to all asserted members of the class'.[8] The Supreme Court found that the *American Pipe* rule suspended certain statutes of limitation, but not statutes of repose, which are intended to give 'complete peace to defendants'.[9] The Court held that the three-year time limit applicable to Section 11 claims was a statute of repose and, consequently, that the previously announced 'tolling' rule did not apply.[10]

In *Microsoft Corporation v. Baker,*[11] the Supreme Court held that a named plaintiff cannot force a federal court of appeals to review an adverse class certification decision by voluntarily dismissing its case. Generally, federal courts of appeals do not have jurisdiction to hear appeals from interlocutory orders (i.e., district court orders that are issued prior to the

Action Fairness Act of 2015 provides for federal court jurisdiction over any class action where the matter in controversy exceeds $5,000,000, 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).

6 137 S Ct 2042 (2017).

7 15 USC Sections 77k, 77m.

8 414 U.S. 538, 554 (1974).

9 *ANZ Securities, Inc.*, 137 S Ct at 2052.

10 Id. at 2053.

11 137 S Ct 1702 (2017).

final disposition of a case).[12] Because an adverse class certification decision does not actually dispose of the named plaintiff's case – it simply requires the plaintiff to proceed individually – these decisions may be construed as interlocutory. Federal Rule of Civil Procedure 23(f), however, provides that appellate courts have discretion to entertain appeals from adverse class certification decisions notwithstanding that they may be deemed 'interlocutory'.[13] In *Microsoft*, the Ninth Circuit denied a Rule 23(f) petition to review an adverse class certification decision. Instead of proceeding individually, the named plaintiffs voluntarily dismissed their claims and appealed, arguing that the voluntary dismissal now constituted an appealable final decision.[14] The Ninth Circuit agreed with the named plaintiffs, but the Supreme Court reversed, reasoning that such a holding would 'impermissibly circumvent[] Rule 23(f)' by making review of class certification decisions mandatory rather than discretionary.[15]

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.[16] 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.[17] Such motions are typically decided before the court certifies the class.[18]

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

12 28 USC Section 1292.

13 'A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.' Fed. R. Civ. P. 23(f).

14 Id. at 1711.

15 Id.

16 Fed. R. Civ. P. 3.

17 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).

18 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) and/or seeking certification of the class.

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides specific guidance to courts concerning the appointment of a lead plaintiff and lead counsel in securities class actions. The PSLRA requires the named plaintiff to publish notice of the class action 'in a widely circulated national business-oriented publication' no later than 20 days after filing the class action complaint.[19] 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'.[20]

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.[21] 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 defenses that render such plaintiff incapable of adequately representing the class'.[22]

The court-appointed lead plaintiff is then empowered, 'subject to the approval of the court', to 'retain counsel to represent the class'.[23]

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,[24] 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'.[25] As a result of those decisions, and a greater focus by litigants on class certification, these motions are typically hotly contested by defendants.

In order 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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19 15 U.S.C. Section 77z-1(a)(3)(A)(i). 15 U.S.C. Section 77z-1 is part of the Securities Act of 1933. The PSLRA enacted parallel provisions related to appointment of lead plaintiff and lead counsel in the Securities Exchange Act of 1934. See 15 U.S.C. Section 78u-4.

20 15 U.S.C. Section 77z-1(a)(3)(B)(i).

21 15 U.S.C. Section 77z-1(a)(3)(B)(iii)(I)(bb). This plaintiff must also have 'either filed the complaint or made a motion' responding to the notice required by 15 U.S.C. Section 77z-1(a)(3)(A)(i).

22 15 U.S.C. Section 77z-1(a)(3)(B)(iii)(II).

23 15 U.S.C. Section 77z-1(a)(3)(B)(v).

24 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

25 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414–15 (2014) (permitting defendants to offer lack of 'price impact' evidence to rebut the 'fraud on the market' presumption at the class certification stage).

Fed. R. Civ. P. 23(a)

All class actions must satisfy the four requirements of Rule 23(a). Rule 23(a) requires plaintiffs affirmatively to demonstrate that the class action meets four prerequisites, referred to in shorthand form as: (1) 'numerosity' (Rule 23(a)(1)), (2) 'commonality' (Rule 23(a)(2)), (3) 'typicality' (Rule 23(a)(3)), and (4) adequacy of representation (Rule 23(a)(4)).

'Numerosity' requires a showing that 'the class is so numerous that joinder of all members is impracticable'.[26] Generally, there is no numerical threshold for determining whether a class is sufficiently numerous. Rather, courts must examine 'the specific facts of each case'.[27]

'Commonality' requires a demonstration that 'there are questions of law or fact common to the class'.[28] This requirement was addressed in *Wal-Mart Stores, Inc v. Dukes*.[29] 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 defenses of the representative parties are typical of the claims or defenses of the class'.[30] 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'.[31] Here, the primary inquiry for courts is to 'uncover conflicts of interest between named parties and the class they seek to represent'.[32] Courts also will assess the adequacy of proposed class counsel at this stage.[33] In assessing the adequacy of class counsel, courts must conclude that the representative's counsel is 'qualified, experienced and capable of handling the litigation',[34] and that class counsel will represent the interests of the class as a whole.[35]

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26 Fed. R. Civ. P. 23(a)(1).

27 *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980).

28 Fed. R. Civ. P. 23(a)(2).

29 564 U.S. 338 (2011).

30 Fed. R. Civ. P. 23(a)(3).

31 Fed. R. Civ. P. 23(a)(4).

32 *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.

33 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).

34 *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.

35 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').

Fed. R. Civ. P. 23(b)

In addition to fulfilling the requirements under Rule 23(a), 'parties seeking class certification must show that the action is maintainable' under Rule 23(b).[36] 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).[37]

The purpose of the predominance inquiry is to test 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation'.[38] '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 generalized, class-wide proof.'[39]

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.*[40,41]

The class certification order

If the court finds certification is proper under the requirements of Rules 23(a) and (b), the court will then enter a 'certification order' pursuant to Rule 23(c). The certification order is important because it defines the class of individuals that – subject to opt-outs – will be bound by the action as it proceeds. The certification order is also the procedural mechanism for appointing the class representative and class counsel. Such orders may be altered or amended before final judgment.[42] 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.[43]

36 *Amchem Prod, Inc v. Windsor*, 521 U.S. 591, 614 (1997).

37 Fed. R. Civ. P. 23(b)(3).

38 *Amchem Prod, Inc*, 521 U.S. at 623.

39 *Tyson Foods, Inc v. Bouaphakeo,* 136 S. Ct. 1036, 1045 (2016) (citation omitted).

40 *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).').

41 Fed. R. Civ. P. 23(b)(3).

42 Fed. R. Civ. P. 23(c)(1)(C).

43 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 – i.e., class members other than the named or lead plaintiff(s) 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').[44] Those individuals that opt out, normally by providing written notice in the manner prescribed by the court, will not be bound by final resolution of the class action, and may bring a separate case against the defendant based on the same underlying claim at some later date (subject to any applicable statute of limitations).[45]

Affording absent class members the opportunity to exclude themselves from a class action comports with the due process requirements set forth in the Fifth and Fourteenth Amendments to the US Constitution.[46] 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.[47] 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.[48] Generally, regular mail is the preferred method of providing notice for individual notice. Notice is also often provided via publication (including in well-read newspapers and on the internet).

Notice must be 'clearly and concisely state[d] in plain, easily understood language'.[49] 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)'.[50]

Rule 23 does not set forth a categorical rule for the amount of time absent class members must be given to respond to this notice. That is usually set at the discretion of the court. Generally, federal courts are advised to provide a minimum of 30 days from when notice is first sent; opt out periods of 60 to 90 days are preferred.[51] Where the class is sizeable, or actual notice is not practicable, those time periods can be significantly longer. As explained

44 Fed. R. Civ. P. 23(c)(2)(B)(v).

45 Fed. R. Civ. P. 23(c)(3); see also *Amchem Prod, Inc v. Windsor,* 521 U.S. 591, 617 (1997). Notice to absent class members, and in some cases, the opportunity to opt out, is required at other stages of a class action litigation as well; most notably, notice must be given to class members who would be bound by any proposed settlement, voluntary dismissal, or compromise. Fed. R. Civ. P. 23(e).

46 See *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 812 (1985).

47 See *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

48 Fed. R. Civ. P. 23(c)(2)(B).

49 Fed. R. Civ. P. 23(c)(2)(B).

50 Fed. R. Civ. P. 23(c)(2)(B).

51 Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center, at 4 (2010).

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 such class members will be bound by any final judgment in the action unless the individual elected to opt out of the class.

Rule 23 provides the court flexibility in conducting the proceeding. For example, the court may issue orders to 'determine the course of proceedings', to 'impose conditions on the representative parties' or to 'require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly'.[52]

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*.[53] There, the Court considered whether to establish a categorical rule regarding the use of representative evidence to establish class-wide liability (instead of requiring individual proof of liability, which likely would preclude class certification, because individual issues would predominate over common class issues). The Court declined to create such a rule, explaining that the permissibility of representative evidence 'turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action' pursuant to Federal Rules of Evidence 401, 403 and 702.[54]

v Settlement

This section focuses on procedural aspects of a class action settlement, as set forth in Rule 23(e), and the jurisprudence that has evolved around those requirements.

The settlement class

Rule 23(c) requires class certification before any entry of final judgment, including when the court enters a judgment approving a settlement.[55] 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'.[56]

52 Fed. R. Civ. P. 23(d)(1).

53 136 S. Ct. 1036 (2016).

54 Id. at 1046.

55 Fed. R. Civ. P. 23(c)(3).

56 *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, following the filing of a motion by the parties providing 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.[57]

Settlement notice

Following entry of preliminary approval, adequate notice of the settlement must be provided to the class. Settlement notice is governed by Rule 23(e)(1), which 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.[58] Settlement notice provides absentee class members the ability to object to the propriety of the settlement, and, in the case of Rule 23(b)(3) class actions, 'the court may refuse to approve a settlement' unless it affords class members a 'new opportunity to request exclusion' (or 'opt out') from the class settlement.[59]

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). Federal courts apply multi-factor frameworks for considering the fairness, reasonableness and adequacy of a proposed settlement. Relevant factors include:

(1) the complexity, expense, and likely duration of the litigation;
(2) the reaction of the class to the settlement;
(3) the stage of the proceedings and the amount of discovery completed;
(4) the risks of establishing liability;
(5) the risks of establishing damages;
(6) the risks of maintaining the class action through trial;
(7) the ability of the defendants to withstand greater judgment;
(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation.[60]

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

57 See, e.g., *Long v. HSBC USA Inc.*, 2015 WL 5444651, at *3 (S.D.N.Y. Sept. 11, 2015); *Danieli v. Int'l Bus. Machines Corp.*, 2009 WL 6583144, at *4-*5 (S.D.N.Y. Nov. 16, 2009).

58 See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005).

59 Fed. R. Civ. P. 23(e)(4).

60 *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 24 (S.D.N.Y. 2016).

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 forth a formula or some other method of distributing settlement proceeds to members of the class.[61] In order 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(s). The processing of these individual class member claims is often handled by private, for-profit companies retained by class counsel.

vi Attorneys' fees and costs

Rule 23(h) specifically authorises courts to 'award reasonable attorney's fees and nontaxable costs', upon motion under Rule 54 of the Federal Rules of Civil Procedure (which sets forth general procedures for claims for attorneys' fees). Rule 23(h) also provides that class members, or the party from whom payment is sought, may object to this motion for attorneys' fees. In both instances, the court must determine the award is reasonable.[62]

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'.[63] In addressing that issue, the Court applied the 'longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States".[64] The Court observed that 'there is no affirmative indication in the Exchange Act that [Section] 10(b) applies extraterritorially', and 'therefore conclude[d]

61 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).

62 Fed. R. Civ. P. 23(h).

63 561 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).

64 *Morrison*, 561 U.S. at 255.

that it does not'.[65] The Court further held that it was not sufficient that 'some domestic activity is involved in the case'.[66] Rather, 'it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which [Section] 10(b) applies'.[67] 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'.[68]

Morrison is generally credited with restoring the presumption against the extraterritorial application of US statutes, unless they explicitly so specify. That principle can impact the availability of the US class action mechanism, in US courts, to foreign litigants.

V OUTLOOK AND CONCLUSIONS

The Supreme Court has several interesting cases concerning class actions on its docket for the upcoming year. In *China Agritech v. Resh*, the Supreme Court will decide whether the *American Pipe* tolling rule discussed above[69] allows a class member to bring a subsequent class action – as opposed to an individual claim – after the applicable limitations period has passed, where the original class action was filed within the limitations period. In *Cyan v. Beaver County Employees Retirement Fund*, the Supreme Court will decide whether the Securities Litigation Uniform Standards Act of 1998 prohibits state (as opposed to federal) courts from adjudicating certain class actions covered by that Act.[70]

Additionally, the Supreme Court is currently reviewing several proposed changes to Rule 23 of the Federal Rules of Civil Procedure. If adopted, these changes would, *inter alia*, establish stricter procedures for submitting class-member objections (requiring that objectors state with specificity the grounds for their objection) and extend the window to file an interlocutory appeal from a class certification decision under Rule 23(f)[71] from 14 days to 45 days when the United States is a party.

65 Id. at 265.

66 Id. at 266.

67 Id. at 267.

68 Id. at 273 (emphasis added).

69 See notes 8–9 and accompanying text.

70 The term 'covered class action' means, *inter alia*, 'any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members'. 15 USCA § 77(p).

71 See *supra* note 13 and accompanying text.

Appendix 1

ABOUT THE AUTHORS

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Rafael is an associate in MinterEllison's dispute resolution practice group acting on class actions and large and small-scale commercial disputes. Most recently, Rafael acted in the *Bellamy's* and *Billabong* class actions.

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Julia is a commercial dispute resolution specialist with over 20 years' experience. She has significant experience in securities class actions, including acting for *Bellamy's*, *Billabong* and *Sigma Pharmaceuticals* in large and complex shareholder class actions relating to continuous disclosure obligations. She has also assisted individuals in relation to the *OZ Minerals* shareholder class actions. Her work often involves strategic liaison with regulators, and she has advised clients in relation to regulatory investigations, commissions and inquiries.

HENNING BÄLZ

Hengeler Mueller

Henning Bälz, born in 1968, studied law in Tübingen, Berlin and Bayreuth. After his studies, he worked as a law apprentice with the Higher Regional Court of Berlin and as a university assistant. He received his doctorate in law from the Freie Universität Berlin in 2001 with a thesis on information rights of shareholders in a stock corporation. Henning joined the Berlin office of Hengeler Mueller in 1999, and worked for one year as a foreign associate at Simpson Thacher & Bartlett in New York (2000 to 2001) and for almost one year in the Frankfurt office of Hengeler Mueller (2001 to 2002). He became a partner in 2004 and is a member of the dispute resolution group of Hengeler Mueller dealing with both litigation and arbitration cases for national and international clients. The focus of his work is on post-M&A matters and contract law in general, as well as matters regarding infrastructure projects.

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Holger Bielesz has been a partner since 2010 and specialises in civil and commercial dispute resolution, claims enforcement, asset tracing and white-collar crime. He has successfully represented banks, investment funds, industrial clients, European foundations and private

clients both in civil law litigation, also acting against a three digit number of opponents, and in relation to white-collar crime matters. Holger also acted as party's counsel before the European Court of Justice. He is a postgraduate of the College of Europe, a highly reputed academic institution in the domain of European Union law. Before joining Wolf Theiss, Holger gained in-depth professional expertise in EU law at a high-profile international law firm in Brussels.

HAKIM BOULARBAH

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Hakim Boularbah is recognised as an expert in civil and commercial litigation and arbitration at national, European, and international levels. His practice covers civil and commercial litigation and arbitration, especially where it presents an urgent or a cross-border dimension. Hakim has broad experience in dealing with mass claims litigation and is one of the most renowned specialists in collective redress. He is currently assisting and representing before the Belgian courts several companies in the first actions for collective redress initiated in Belgium. He also has an extensive practice in enforcement of foreign judgments or awards (especially against sovereigns) as well as in obtaining interim relief measures and protective measures or in opposing them.

He has assisted the Belgian Economy FPS (Ministry) in drafting the bill on class actions. In 2011, he was appointed as member of a group of European experts set up by the European Commission to draft a proposal for regulation on cross-border attachment of bank accounts. Since 2011, he has been regularly invited to speak in conferences on class actions and collective redress in the United States and across Europe.

Hakim is professor of civil procedure law at the University of Liège (ULg). He is the author of numerous books and publications on judicial law, private international law and arbitration.

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Dr Martin Burkhardt represents parties in commercial litigation and international arbitration. He also sits as arbitrator.

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He was educated at the University of St. Gallen (1988 lic. iur.), the University of California Berkeley Law School (1991 LLM) and the University of St.Gallen (1996 Dr. iur.). In 1991 he was admitted to the New York Bar and in 1992 to the Zurich Bar. He joined Lenz & Staehelin in 1994 and has been a partner since 2000.

He is a member of the Swiss Bar Association (SAV), the Swiss Arbitration Association (ASA), the New York State Bar Association (NYS BA), and the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI).

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Timothy G Cameron is a partner in Cravath's litigation department. His practice encompasses a broad range of litigation that in recent years has included: securities litigation and shareholder derivative cases; general commercial disputes; antitrust; product liability; False Claims Act and healthcare litigation; tax litigation; and alien tort claims and international torts.

Mr Cameron has particular expertise representing non-US clients in a wide variety of litigation (including class actions) in federal and state courts in the United States, as well as in arbitrations. He has extensive experience dealing with complicated cross-border issues that can arise in such matters, including jurisdictional issues, reconciling US law with the application of local laws, class certification issues involving foreign putative class members and the difficulties of obtaining testimony from witnesses located outside the United States.

Mr Cameron was born in Auckland, New Zealand. He received his LLB (Hons)/BCom degree in 1994 from the University of Auckland, New Zealand; an MComLaw degree with first-class honours in 1997 from the University of Auckland, New Zealand; and an LLM degree in 1998 from the University of Chicago Law School.

From February 1994 to September 1997, Mr Cameron practised law at Russell McVeagh McKenzie Bartleet & Co, in Auckland, New Zealand. He joined Cravath in 1998 and became a partner in 2005.

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Nuno Salazar Casanova has been a litigation lawyer at Uría Menéndez – Proença de Carvalho's Lisbon office since 2004. He was made partner of Uría Menéndez – Proença de Carvalho in January 2015.

Nuno has been actively involved in national and international arbitration and litigation related with derivatives and other financial products and has advised leading banks and other financial institutions on some of the largest and most complex cases.

He leads high-profile often cross-border disputes, including regulatory investigations and enforcement, class actions and other major reputation-threatening litigation, especially where a global strategy is required to deal with litigation that is intertwined simultaneously with civil, criminal, regulatory and administrative issues.

He also represents clients in insolvency and restructuring proceedings, and has participated in numerous cases involving multiple jurisdictions.

He is a member of the supervisory board of Fórum Penal - Associação de Advogados Penalistas, a member and secretary of the Associação Portuguesa de Arbitragem, a member of Club Español del Arbitraje and a member enrolled in the list of arbitrators of Concórdia – Centro de Conciliação e Mediação de Conflitos. He is author of several publications on arbitration, financial litigation and insolvency.

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Mr Cellucci was born in Worcester, Massachusetts. He received his AB from Brown University in 2010 and a JD *magna cum laude* from the University of Michigan in 2015,

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Sharon Daly heads the insurance disputes team within the commercial litigation and dispute resolution department, which is described by *The Legal 500* as 'second to none' with Sharon being personally commended for her ability to respond creatively to complex issues.

Sharon and her team have been involved in some of the most significant commercial litigation before the Irish courts in the last 10 years, including defending a major financial institution in a multibillion, multi-jurisdictional dispute arising from investment in Bernard L Madoff's business. Sharon also acted for insurers in the largest property damage dispute to come before the Irish courts in relation to the liability of hydro-electrical dams and flood damage arising therefrom.

Sharon and her team advise a wide range of clients on insurance issues including policy holdings, coverage, policy disputes and defence of large complex claims. Sharon and her team also advise on regulatory issues for insurers and support commercial transactions for insurers buying and selling their businesses.

As a member of Matheson's Brexit Advisory Group and a council member of the Dublin Chamber of Commerce, Sharon is working with government and other key stakeholders to encourage UK-based multinationals to relocate to Dublin in order to facilitate the growth of Dublin as a leading global business centre, building on Brexit and beyond.

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Jan de Bie Leuveling Tjeenk specialises in corporate litigation, financial services litigation and mass claims. Jan is admitted to the Supreme Court Bar. He regularly acts for corporates and financial institutions, particularly in mass litigation. Recent work includes: representing Shell in a dispute relating to oil spills in Nigeria; advising and representing NAM in mass claims surrounding earthquakes; and advising and representing financial institutions in mass claims relating to interest rate swaps sold to small and medium-sized enterprises.

Jan is a professor of corporate litigation at VU University Amsterdam.

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Andoni de la Llosa Galarza is a founding partner of Redi Litigation. Before that, he worked in the litigation and arbitration department of other renowned law firms in Spain, such as Baker & McKenzie, Garrigues, Uría and Pérez-Llorca.

Those places let Andoni gain experience in all areas of civil, corporate and criminal law litigation, both before courts and before arbitration tribunals.

Apart from that, his expertise in damages claims arising out from antitrust infringements allowed him to give lectures in different forums (including the Barcelona Bar association and the University of Deusto) and to contribute to several publications, both in the press and in specialist publications.

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Gianfranco Di Garbo is a partner of Baker McKenzie. His practice concentrates on the area of dispute resolution in commercial, construction, employment and industrial property matters. He also regularly assists domestic and foreign clients in various aspects of general corporate law. Gianfranco has also vast experience in product liability law, and throughout his career at Baker McKenzie has represented major multinational and Italian companies in major litigation and arbitration cases. He is the author of several publications in contractual matters.

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Hagai's extensive experience in class actions includes advising Fuji Electric in a follow-on action based on the EU decision regarding a GIS switchgear cartel, representing Sharp Corporation in the defence of a follow-on action claiming that LCD panel manufacturers had conspired to fix prices, and representing British Airways in connection with a class action against British Airways and other airlines alleging price-fixing in cargo surcharges.

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Lauren R Kennedy is an associate in Cravath's litigation department. She has worked on a wide range of litigation matters, including those involving patent law, antitrust law, contract law and CERCLA.

Ms Kennedy was born in Mount Kisco, New York. She received a BA *summa cum laude* from Georgetown University in 2007, and a JD with honours from Columbia Law School in 2010. After law school, Ms Kennedy clerked for the Honourable Robert S Smith on the New York State Court of Appeals. Ms Kennedy joined Cravath in 2012. She is admitted to practise in the US District Court for the Southern District of New York and the US District Court for the Eastern District of New York.

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Yuriko Kotani is a senior attorney in the Tokyo office of Squire Patton Boggs. She is a *bengoshi* and graduate of the University of Tsukuba. She also received an LLM from Harvard University. She is admitted to practise in Japan and the United States (California and Washington states). She is fluent in both Japanese and English. Her practice is primarily focused on issues involving both inbound and outbound international business transactions including mergers and acquisitions. She also advises non-Japan-based clients regarding Japan's business laws. Although corporate work is the main focus of Yuriko's practice, she has extensive experience assisting clients with US litigation including class actions, particularly in the areas of discovery and other pretrial procedures. She also advises clients regarding antitrust investigations in the United States and elsewhere. Yuriko is a member of the Daiichi Tokyo Bar Association.

PAUL KREPIL

Wolf Theiss

Paul Krepil has been an associate since 2016 and is a member of the dispute resolution department at the Wolf Theiss Vienna office. Paul focuses on commercial litigation and arbitration. He received a master's degree from the University of Vienna and completed part of his studies at the University of Edinburgh. Before joining Wolf Theiss, Paul gained experience at international law firms and as a judicial law clerk in Vienna.

SÉRGIO PINHEIRO MARÇAL

Pinheiro Neto Advogados

Mr Marçal graduated from São Paulo Catholic University (PUC) in 1985 and achieved credits towards a master's degree from São Paulo Catholic University (PUC). He is a former chairman of the São Paulo Lawyers Association (AASP). Mr Marçal is highly recommended as a product liability law practitioner by *Chambers and Partners* (Band 1), *Who's Who Legal*, *Best Lawyer* and *Euromoney World Leading Lawyers*.

APRIL MCCLEMENTS

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April McClements is a partner in the insurance disputes team within the commercial litigation and dispute resolution department. April is a commercial litigator and specialises in insurance disputes. April is recommended by *The Legal 500* as a next generation lawyer in the insurance sector.

April advises insurance companies on policy wording interpretation, complex coverage disputes (in particular relating to financial lines policies), D&O claims, professional indemnity claims, including any potential third party liability, and subrogation claims. April has extensive experience of managing professional indemnity claims for professionals, including insurance brokers, architects and engineers, for a variety of insurers. She has also been involved in obtaining High Court approval for various insurance portfolio transfers and schemes of arrangement arising from reorganisations or mergers and acquisitions involving life, non-life and captive insurers. April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediations and arbitration.

JULIE METOIS

Allen & Overy LLP

Julie Metois' practice focuses primarily on civil and commercial litigation. Her experience includes advising and assisting financial institutions and major companies before French civil and commercial courts and regulatory investigations. She also has experience advising clients with respect to recognition and enforcement of foreign judgments and international attachment proceedings.

BEVERLEY NEWBOLD

MinterEllison

Beverley acts in large corporate disputes, class actions, and regulatory and compliance investigations, as well as defending claims against directors, including in the context of ASIC investigations. She has significant and recognised expertise, having acted in class actions involving *Bellamy's*, *Billabong*, *Qantas*, *Kagara* and *MFS*.

ANDREAS NORDBY

Arntzen de Besche

Nordby is part of the dispute resolution and litigation group at the Oslo office. Nordby has wide experience in the crossing between dispute resolution and counselling within industries such as technology/telecoms/IT, pharmaceutical industry/biotechnology, food industry, media/entertaining/film production and commodity trade. He has written several articles about procedural law and is also the co-author of a commentary to the Norwegian class action rules. He has previously worked at the Norwegian law firm Thommessen and the division of legislation at the Department of Justice, as well as with the Municipal Lawyer in Oslo.

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Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (Squire Patton Boggs)

Haig Oghigian is senior counsel at the Tokyo office of Squire Patton Boggs. He is a graduate of McGill University, attended graduate studies at Harvard University, has a diploma in Japanese language studies from the Foreign Service Institute and a diploma in international commercial arbitration from the Chartered Institute of Arbitrators, Keble College, Oxford. He is admitted to practise in Japan (*gaikokuho jimu bengoshi*) and is a barrister and solicitor, British Columbia, Canada. Haig began his career in Japan as the legal economic officer at the Canadian Embassy in Tokyo. He returned to private practice in Japan in 2000. His practice is focused on international dispute resolution and advises on a wide range of issues in the pharmaceutical and life sciences sectors, with an emphasis on government relations and regulatory matters. He has acted as counsel, arbitrator and mediator in more than 100 cases, including high-profile ICC, JCAA and SIAC cases in Asia, Europe and the US. He is consistently highly ranked by the leading rating institutions including *Chambers*, *GAR* and *Asia Law 500*. He is widely published in various journals and is the author and editor of *The Law of Commerce in Japan* (Prentice Hall).

ALBERT POCH TORT

Redi Litigation

Albert Poch Tort founded Redi Litigation after having worked at other renowned law firms in Spain where he became a business and antitrust litigation specialist before the civil and criminal courts of justice.

Albert also has extensive experience in national and international arbitrations, having intervened in arbitrations of the International Chamber of Commerce (ICC) and the Civil and Mercantile Court of Arbitration (CIMA), among others.

From 2015 to date he has been listed by the legal directory Best Lawyers® for insolvency and reorganisation law and for litigation.

Albert's working languages are Catalan, Spanish, English, French and Italian.

ERWAN POISSON

Allen & Overy LLP

Partner Erwan Poisson advises French and foreign companies in complex civil and criminal disputes.

He notably advises in the areas of banking and finance litigation, where his experience includes liability claims against banks, financial services and investment funds; corporate litigation, including disputes between majority and minority shareholders, disputes related to shareholding agreements as well as warranties and representations; and product liability and insurance disputes, with a focus on the aviation sector.

His expertise also covers representations before the courts of French-speaking African countries in commercial and criminal litigation matters, as well as before international courts (in particular, the ILO Administrative Tribunal).

Erwan has worked in France and in the UK and is qualified in both jurisdictions. He has developed specific expertise in conflicts of laws and jurisdictional issues (a subject he teaches at university), international judicial assistance, asset-tracing and recovery, and the enforcement of foreign judgments and arbitral awards on assets located in France.

URIEL PRINZ

S Horowitz & Co

Uriel Prinz is a litigator with extensive experience in complex corporate and commercial cases, with a focus on class actions, construction and infrastructure, tenders and administrative law, and the energy and technology sectors.

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.

Uriel also handles the full range of aspects involved in construction, projects, and tender related disputes, including conflict resolution strategies such as negotiation, mediation, expert determination, arbitration, and court proceedings. He has broad experience in successfully contesting and defending clients in cost overrun disputes, EPC contractual disputes, tender and government procurement disputes, and disputes concerning a wide variety of building and design defects. He has been involved in many of Israel's largest BOT, PFI and PPP tenders.

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In class actions, Uriel has handled, among other matters, the defence of British Airways in a motion for approval of a multimillion class action in Israel connected to In class actions, Uriel has handled, among other matters, the defence of British Airways in a motion for approval of a multimillion class action in Israel connected to multi-jurisdictional claims regarding allegations of an international cartel on cargo and freight rates, as well as the defence of the Israel Electric Company in a complex multimillion dollar class action regarding IEC's pricing calculations.

MADALENA AFRA ROSA

Uría Menéndez – Proença de Carvalho

Madalena Afra Rosa joined Uría Menéndez – Proença de Carvalho as a first-year junior associate in September 2016.

Ms Rosa graduated in law from the University of Lisbon and has completed her master's degree course in civil and criminal forensic law at the Catholic University of Portugal.

MAGNUS RYDBERG

Hamilton Advokatbyrå

Magnus Rydberg is a partner in Hamilton's dispute resolution practice. He has extensive experience in assisting clients in domestic and international disputes in various legal areas, such as construction, product liability, audit liability, professional negligence and directors' and officers' liability. Magnus is also frequently engaged by Swedish and international insurers in insurance cases and disputes. Magnus is ranked as a leading lawyer within dispute resolution by Chambers and Partners.

LUCAS PINTO SIMÃO

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Mr Simão graduated from the São Paulo Catholic University (PUC) in 2007, has an LLM in contracts from Insper São Paulo and a master's degree from São Paulo Catholic University (PUC).

Mr Simão has represented big companies in the most relevant product liability cases in Brazil, as such tobacco litigation, drugs and medical devices, cars and electronics issues.

RICHARD SWALLOW

Slaughter and May

Richard is a partner in Slaughter and May's dispute resolution group and co-head of its global investigations group. He has a broad-ranging international commercial litigation, arbitration, and investigations practice. Areas of particular expertise include corporate crime and sanctions work, banking litigation and investigations, and competition litigation. Richard represents clients in complex, high-value proceedings and has managed significant regulatory and criminal investigations often with parallel UK and US aspects. He spent three years working in our Hong Kong office, advising on a range of commercial disputes throughout the South East Asia region. Richard advised British Airways in relation to DOJ and European Commission investigations into an alleged air cargo cartel, and subsequent follow-on damages actions in the UK courts, *Emerald Supplies Ltd v. British Airways* [2009] EWHC 741 (Ch), the leading case on an attempted US-style class action in the UK.

JAVIER TAMAYO JARAMILLO

Tamayo Jaramillo & Asociados

Javier Tamayo Jaramillo is the founding partner and director of Tamayo Jaramillo & Asociados.

He is a lawyer from Universidad Pontificia Bolivariana and holds a master's degree in economics and insurance law from the University of Louvain in Belgium, a doctorate in law

and political science from Universidad Pontificia Bolivariana and an honorary doctorate from the University of San Pedro (Peru). He was a justice of the civil branch of the Supreme Court of Colombia (from 1994 to 1996), and nowadays runs the law firm.

AGNIESZKA TRZASKA

Kubas Kos Gałkowski

Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Gałkowski. Agnieszka specialises in civil substantive and procedural law. She represents clients in court proceedings, including group proceedings, and provides consultancy services to commercial entities in the scope of the widely understood civil, commercial and companies law. She has extensive experience in complicated civil cases, in which problems in the scope of private international law and international commercial arbitration occur, as well as in business matters, including disputes between company shareholders. She has been involved in a number of court proceedings, including the case for taking control over a mobile network operator by one of the world's largest communication companies. She possesses vast knowledge in the scope of group proceedings, currently heading the team conducting group proceedings of flood victims from Sandomierz and Płock against the State Treasury and the remaining relevant entities. She also represents one of the largest banks in Poland in a group action of the group of Franc-debtors – persons that took out a mortgage loan denominated to the Swiss francs. Agnieszka is the main editor of the portal on class actions in Poland and worldwide: www.classaction.pl.

MARIA-CLARA VAN DEN BOSSCHE

Liedekerke Wolters Waelbroeck Kirkpatrick

Maria-Clara Van den Bossche is part of the litigation and arbitration practice and is equally involved in the defence of companies in the first actions for collective redress before the Belgian courts.

She holds a masters degree in law from Ghent University (UGent 2014) and did a bluebook internship at the European Commission, Directorate General Humanitarian Aid and Civil Protection in Brussels.

Maria-Clara joined Liedekerke Wolters Waelbroeck Kirkpatrick in 2015.

BART VAN HEESWIJK

De Brauw Blackstone Westbroek

Bart van Heeswijk focuses on advising large multinationals on contract law, corporate law, mergers and acquisitions and corporate governance. Bart also has experience in EU and Dutch competition law, particularly in multijurisdictional merger filings, advising multinational clients entering contractual relationships on competition law and defending clients in cartel claims.

KEVIN WARBURTON

Slaughter and May

Kevin Warburton is a senior associate in Slaughter and May Hong Kong's dispute resolution department. He joined Slaughter and May's London office in 2007 and, after spending time in the Hong Kong office in 2009 and 2014, relocated there permanently in 2016. He advises a broad range of clients both inside and outside Hong Kong on matters of litigation, international arbitration, regulatory investigations and inquiries, anti-bribery and corruption, data protection and data privacy and alternative dispute resolution mechanisms.

ALEX B WEISS

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Alex B Weiss is an associate in Cravath's litigation department.

Mr Weiss was born in New York City, New York. He received a BA *magna cum laude* from Tufts University in 2012 and a JD with honours from Columbia Law School in 2017, where he was a senior editor of the *Columbia Law Review*. Mr Weiss joined Cravath in 2017.

PETER WICKHAM

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Peter is an associate in Slaughter and May's dispute resolution group. He has a broad-ranging international arbitration and litigation practice with particular expertise in the oil and gas sector, civil fraud and trust law.

Appendix 2

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