CLASS ACTIONS WORLDVIEW

A Study of Trends Around the Globe

A COMPENDIUM OF JONES DAY'S FIVE-PART SERIES PUBLISHED IN 2023 AND 2024

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Introduction

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DIFFERENCES IN NATIONAL LAWS

Class action procedures vary greatly among jurisdictions. These differences include how developed the procedures are; the types of claims parties can bring; the parties that can represent classes; whether classes are structured as opt-in or opt-out; and the rules governing settlement, remedies, and financing. Many countries have enacted more restrictive class procedures than the United States. There are notable exceptions, however, that present risks to defendants sued abroad. This is particularly true with respect to the requirements and procedures for class certification.

Maturity

Class action laws in the United States are highly developed. The current rule governing federal class actions is more than 50 years old, and the thousands of putative cases brought each year have created an ample body of case law discussing the nuances and protections in class action procedure.

Most class action systems are not as formal or longstanding. Some countries, like Argentina, do not have specific class action procedures on the books, but rather allow plaintiffs to assert collective interests before the court under general laws.

Other countries' class action systems are only in their infancy and will be shaped as cases arise. Japan, for example, enacted its class action statute in 2013, and the statute entered into force only in October 2016. Many European countries, including France and Belgium, have also introduced their versions of class action procedures in the last few years, with ongoing proposals for reform and development.

A few jurisdictions—like Australia and China—have had active class action regimes for some time, but these jurisdictions' procedures are not as longstanding as those in the United States, presenting not insignificant risks to those sued there.

Types of claims

Class actions in the United States are not limited to a particular area of law, but can be brought in a variety of matters ranging from securities to civil rights. In other countries, however, class actions are often limited to particular areas of law. Most commonly, class actions are limited to consumers' rights claims, including competition law, contractual liability, financial services, health protection, and product liability. Some jurisdictions also allow class actions in environmental cases. And some jurisdictions, like Brazil and Argentina, allow class actions in other defined areas, such as the protection of the rights of children, minorities, and religious groups.

Beyond legal restrictions on the types of claims that may be brought, some countries may in practice become a preferred forum for global resolution of certain types of class actions or collective claims. The Netherlands, for example, has been the site of several recent cross-border securities law class action settlements between non-Dutch companies and mostly non-Dutch investors.

Class representatives and the right to sue

Another restriction on class actions in many jurisdictions is that, unlike in the United States, private individuals may not file a class action on their own. Rather, the right to bring suit is limited to designated entities, which sue on behalf of the aggrieved individuals.

Each country that limits class actions to designated entities has procedures to give those entities legitimacy. These procedures vary from one country to another. For example, in France and Belgium, plaintiffs must bring their actions through certified associations for the defense of consumers recognized as being representative at a national level. Other countries allow non-governmental organizations (NGOs), public prosecutors, and governmental authorities to be plaintiffs. In Brazil, for example, most class actions are filed by public prosecutors.

Opt-in vs. Opt-out

Jurisdictions also differ on whether and how class or collective proceedings can bind putative class members, with only a handful of jurisdictions adopting true opt-out procedures (as

in the United States). Portugal, for example, has an opt-out system, while Italy launched an opt-in system in 2020. Some countries have a mix of opt-in and opt-out procedures. In October 2015, England and Wales began using opt-out class actions for antitrust cases, but still use opt-in procedures for other types of cases. And, the Netherlands permits parties to ask the court to declare a settlement binding on others.

Settlements

In contrast to developed settlement approval and fairness standards for class actions in the United States, national laws elsewhere do not always provide specific rules for settlement. Yet many jurisdictions like the Netherlands and Mexico encourage class action settlement by generally allowing parties to reach full or partial agreement at any stage of the proceedings.

Before the High Court of England, for example, cases can be settled out of court without court authorization as long as all parties agree, and the court need only be informed. If all parties do not agree (e.g., claimant has not reached agreement with other class members on terms), then court authorization may well be necessary.

Remedies

There are also substantial differences among jurisdictions in their available remedies. The United States offers a full range of remedies, including compensatory damages, injunctive relief, and punitive damages in class cases, but remedies in other jurisdictions are often more limited. Most countries outside the United States do not allow punitive damages.

Compensatory damages are the most common remedy, but even for those damages, some jurisdictions are more restrictive than the United States. France, for example, limits compensatory damages in a class action to pecuniary damages—non-pecuniary damages must be recovered individually.

Injunctions are also a common remedy. In Spain, for instance, the court can order the cessation of the illegal conduct and, in certain cases, the publication of the judgment in public media.

Financing

Another important difference among jurisdictions in class actions is in how they treat litigation financing. Two issues in particular are notable: contingency fees and third-party financing.

Most jurisdictions, including the United States, Brazil, England and Wales, Japan, Mexico, and Spain, permit contingency fee agreements under at least some circumstances. Each of these jurisdictions, however, puts different requirements on those agreements. Other jurisdictions, like Belgium, prohibit contingency fee agreements altogether.

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Most jurisdictions also allow third-party funding under at least some circumstances, though the specific rules vary among jurisdictions. In many of those jurisdictions, however, parties rarely use third-party funding even though it is formally allowed. One exception is Australia. In that jurisdiction, third-party funding for class actions is quite common—nearly half of class actions receive third-party funding.

Third-party financing may, however, increase as class actions become more widely available and is an issue to be watched as new class devices are instituted across the globe. At least one jurisdiction, Argentina, has financial aid for plaintiffs seeking to file a class action.

Certification requirements

Although non-U.S. jurisdictions tend to have greater formal restrictions on the scope of class actions, many of them also pose their own risks because they lack the well-developed class certification requirements and procedures that exist in the United States.

Class actions seeking damages in the United States require, at a minimum, numerosity, commonality, typicality, adequacy, predominance, and superiority. Additionally, the plaintiff bears the burden to prove all of these requirements at the class certification stage. Decades of case law have clarified these requirements, with the result that defendants faced with non-meritorious class actions often have arguments that can prevent certification.

Other countries may not have these safeguards. Most non-U.S. countries do not have as many substantive requirements for class certification. In particular, many countries do not require predominance, which is often the highest barrier to class certification for damages actions in the United States. Italy, for example, requires only adequacy and that the right infringed be homogeneous. In addition, many jurisdictions do not have a U.S.-style class certification procedure where the plaintiff must prove the requirements for a class action. For example, Brazil does not require class certification; it is largely sufficient that a plaintiff otherwise specified in law as able to initiate a class action has standing. And Mexico allows defendants only five days to oppose class certification.

Australia in particular is a significant class action risk, because it lacks both the formal restrictions on the scope of class actions seen in most non-U.S. countries and the class certification requirements of the United States. Australian class actions are not limited to particular plaintiffs or areas of law. Yet Australian class actions also do not require predominance. They may proceed if there are any issues common to the class. Additionally, Australian plaintiffs face no initial certification burden. The onus instead falls on the defendant to show why the class action is not appropriate.

Towards Broadening the Scope of National Class Actions

Over the last few years, there has been widespread announcement that class actions would take off globally. History has not yet seen this wave of suits. Countries around the world implemented class action legislation, but procedural hurdles have continued to prevent widespread use. Class actions remain most popular in the United States, Australia, and England and Wales. There is still opportunity for global class action growth with countries' renewed momentum to reform their policies.

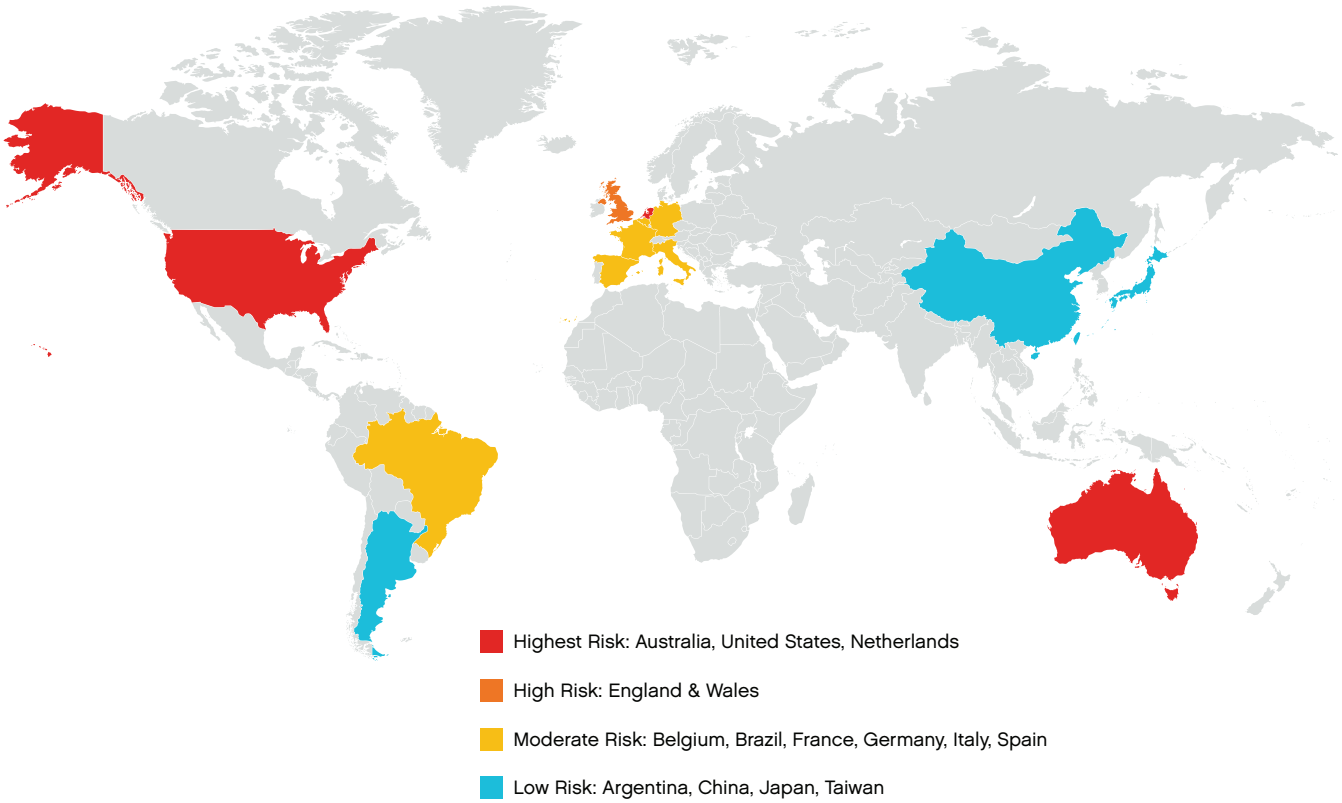
Jurisdictions enthusiastically implemented class action legislation throughout 2014-16. In May 2015, for example, the Italian Parliamentary Commission of Justice approved a bill to reform the current class action procedure and broaden its scope. In August 2015, Argentina undertook a revision of its Civil and Commercial Code to reinforce class actions. In January 2016, the French Parliament extended the scope of class actions to patients and other users of health care services and products, and then later, the French Parliament adopted a bill to further extend the scope of class actions to victims of discrimination.

However, procedural hurdles at the settlement and financing stages have made collective suits time-consuming and costly. For instance, in China, class actions are administratively burdensome because settlements require unanimous consent from each class member. And countries like Belgium and China do not permit contingency fee arrangements, making it prohibitively expensive for plaintiffs to bring a claim. Additionally, a lack of financial incentives stymied initial class action growth in France.

More, recently, countries have reformed their class action policies in the hopes of making class actions more popular and accessible. Italy implemented a new regime in November 2020 in order to encourage individuals to bring suits and lately, in June 2023, to provide consumers with broader redress rights across a wide range of sectors. This is in contrast to Italy's older class action regime, which was known for being expensive and ineffectual. In January 2020, the Netherlands passed a new class action act which broadened the scope of damages and enabled representative entities to bring claims on behalf of international parties. These recent changes represent a renewed, global momentum for class action reform. The latest development at the European Union level is noteworthy as well. At the end of 2020, the European Parliament and the Council of the European Union adopted the Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the "Directive"). This important Europe-wide harmonization will shape the future of national and cross-border consumer litigation.

Class actions remain likely to have a broader impact on companies doing business in the future. Particularly in the context of consumer products in a global supply chain, the risk of simultaneously facing class or collective proceedings in Europe, Asia, and Latin America is on the rise. A truly global and coordinated approach to the facts, law, and issues across venues worldwide will be necessary to reduce exposure risks. Jones Day's class actions practice will continue to monitor this expansion, along with the risks and opportunities it brings to our clients.

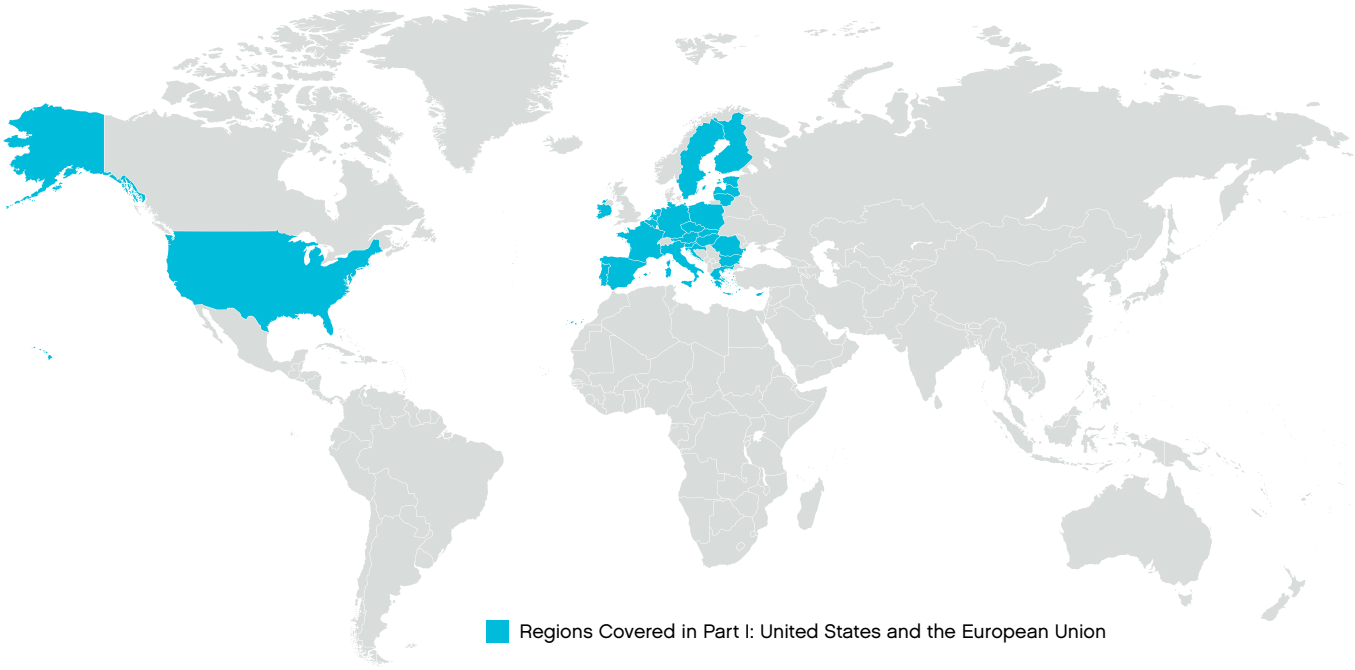
Risk Factor Heat Map



Part I: The United States and The European Union

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

Class Actions Jurisdictions



The United States

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A. BRIEF OVERVIEW AND HISTORY

Although the United States has had class actions since the nineteenth century, federal class actions in their modern form began in 1966 with the adoption of Federal Rule of Civil Procedure 23 ("Rule 23"). Rule 23 sets forth the key procedures for class actions—including the requirements for filing a class action; issuing a class certification order; conducting, settling, and appealing the action; and appointing and compensating counsel.

In addition to federal class actions governed by Rule 23, individual states also have their own class action procedures. In 2005, however, the United States adopted the Class Action Fairness Act ("CAFA"), which expands federal jurisdiction over class actions. Under CAFA, federal courts generally have jurisdiction over any class action where the amount in controversy exceeds $5 million and any member of the plaintiff class is a citizen of a different state than any defendant.

Thus, a class action plaintiff usually has the option of suing in federal court, and a class action defendant who is sued in state court often has the ability to remove the case to federal court.

Class actions in the United States are common—it is estimated that more than 10,000 class action lawsuits are filed in the United States annually.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Class actions may be filed on any area of law within the court's jurisdiction, so long as the requirements of Rule 23 are met. Unlike in many other countries, class actions are not restricted to any particular type or types of cases.

Although class actions may be brought in any area of law, they are most common in those areas where large numbers of potential plaintiffs have individually small claims. This includes antitrust, consumer, environmental, product liability, and securities cases.

Additionally, certain areas of law have administrative procedures that resemble class actions. For example, the Fair Labor Standards Act provides for a "collective action" mechanism to resolve certain disputes under that act. These field-specific actions have different requirements from the general class action provided for in Rule 23.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Any plaintiff, whether an individual or organization, can represent a class if that plaintiff has standing under the substantive

law and meets the requirements of Rule 23. Unlike in some other countries, standing for class litigation is not limited to designated organizations or public representatives.

Class actions are typically brought by representatives seeking to represent a class of plaintiffs, but in rare cases, may also be brought against a class of defendants. For example, in *Bell v. Brockett*, 922 F.3d 502 (4th Cir. 2019), the United States Court of Appeals for the Fourth Circuit affirmed the certification of a defendant class of "all persons or entities who were Net Winners" in an alleged Ponzi scheme. The *Bell* court upheld the lower court's certification while noting that "[d]efendant class actions are so rare they have been compared to unicorns." *Id.* at 504. Notably, the court did so despite what it deemed to be the "inherent risks of such proceedings." *Id.* at 504 n.1. Such defendant class actions are not used in any other jurisdiction but China.

In 2016, two United States Supreme Court cases clarified the requirements for plaintiffs' standing to sue as applied to class actions. *First*, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court clarified that each representative plaintiff must have individually suffered a "concrete *and* particularized" injury to bring a class action. The Supreme Court further held that the existence of a statutory right alone does not confer standing if the plaintiff has no concrete injury. *Second*, in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court held that a defendant facing a putative class action cannot moot the case by offering to satisfy the representative plaintiffs' individual claims before the class is certified.

Two more recent decisions by the Supreme Court shed further light on the import of standing to bring class actions post-*Spokeo*. *First*, in 2019, the Supreme Court emphasized the importance of procedural standing in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), remanding the case to the Ninth Circuit on the grounds that there remained substantial questions about whether any of the named plaintiffs had standing to sue for alleged data privacy violations. The Supreme Court also relied on *Spokeo* to deny standing to a class of participants in a defined-benefit retirement plan alleging ERISA violations in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020). The *Thole* Court held that litigants themselves must have suffered an injury in fact in order to claim the interests of others.

The most recent U.S. Supreme Court decision addressing the "injury-in-fact" requirement of Article III standing in the class context is *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). In that case, the Supreme Court found that a concrete injury for Article III standing requires more than a risk of harm that never materializes. Accordingly, the Court concluded that the majority of putative members of the class—those who could not prove that allegedly inaccurate credit reports were disseminated to any third party—did not have not have standing.

Although class actions may be brought in any area of law, they are most common in those areas where large numbers of potential plaintiffs have individually small claims. This includes antitrust, consumer, environmental, product liability, and securities cases.

D. KEY PROCEDURAL REQUIREMENTS

Rule 23 sets out the requirements for certifying a class.

To be certified, a class must meet all four requirements of Rule 23(a), as well as one of the three requirements of Rule 23(b).

Rule 23(a) requires a class to meet all four of the following requirements:

1. Numerosity—"the class is so numerous that joinder of all members is impracticable";
2. Commonality—"there are questions of law or fact common to the class";
3. Typicality—"the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and
4. Adequacy—"the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b) requires that a class proponent also establish one of the following:

1. Separate actions would create risk of (A) incompatible standards of conduct with which the defendant must comply, or (B) judgments in individual lawsuits would adversely affect rights of other members of the class; or
2. Injunctive or declaratory relief is appropriate for class as a whole; or
3. Common questions of law or fact predominate, and a class is superior to other methods of resolving the issues.

It is important to determine which of the three Rule 23(b) prongs applies, because some procedural rules differ accordingly. Rules 23(b)(1) and 23(b)(2) generally apply only to cases seeking injunctions or cases seeking damages out of a limited fund. On the other hand, Rule 23(b)(3) does not have those limitations and allows recovery of damages. For these reasons, the majority of U.S. class actions are certified under Rule 23(b)(3).

In addition to these requirements, most courts of appeals have recognized an implicit threshold requirement in Rule 23 that members of a proposed class be "ascertainable." *Sandusky Wellness Ctr., L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (collecting cases). The courts of appeals are divided on the meaning of ascertainability. *Id.*

To be ascertainable for certification purposes, a class must be clearly defined by objective criteria. *See,* e.g., *Mullins v. Direct Digit., L.L.C.*, 795 F.3d 654, 657 (7th Cir. 2015). The Third Circuit, however, set out a more stringent standard for ascertainability in a trilogy of cases in 2013 by requiring that the method for ascertaining class members be both "reliable" and "administratively feasible." *Marcus v. BMW*, 687 F.3d 583 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). Under this standard, class members cannot be ascertained by "a method that would amount to no more than ascertaining by potential class members' say so" as this presents due process risks to defendants. *Id.* Since the *Marcus* trilogy, ascertainability is a hotly contested issue in class action litigation. Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 Conn. L. Rev. 695, 695 (2018).

The heightened ascertainability standard set out by the Third Circuit has been endorsed, to varying degrees, by the courts of appeals for the First and Fourth Circuits. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Moreover, the Sixth Circuit Court of Appeals, which had previously rejected the Third Circuit's ascertainability standard, has suggested that it may, in fact, favor the heightened standard. *Compare Sandusky Wellness Ctr., L.L.C. v. ASD Specialty Healthcare, Inc.,* 863 F.3d 460, 472-73 (6th Cir. 2017) with *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *see* Wasserman, *supra*, at 698 n.10. In a recent opinion, the Sixth Circuit characterized the ascertainability standard as one requiring a "sufficiently definite" class definition, such that it is "administratively feasible" for the court to determine whether a particular individual is a member. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 464 (6th Cir. 2020).

However, the courts of appeals for the Fifth, Seventh, Eighth, and Ninth Circuits have either expressly or implicitly rejected the *Marcus* trilogy's administrative-feasibility requirement in favor of the "objective criteria" standard. *See Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 334 (5th Cir. 2019); *Mullins*, 795 F.3d at 654; *Sandusky Wellness Ctr., L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). Additionally, the Second Circuit Court of Appeals, which had previously endorsed the Third Circuit's standard, arguably reversed its position in favor of the traditional approach in *In re Petrobas Sec.*, 862 F.3d 250 (2d Cir. 2017). Compare *In re Petrobas Sec.*, 862 F.3d at 266 *with Brecher v. Rep. of Arg.*, 806 F.3d 22 (2d Cir. 2015). More recently, the Eleventh Circuit formally adopted the traditional ascertainability standard, reversing a position only previously articulated in unpublished opinions. Compare *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021) with *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945 (11th Cir. 2015).

The Tenth Circuit has not addressed the administrative-feasibility requirement. However, in a decision from the District Court of Kansas, the Court "predicts that the Tenth Circuit" would apply "the less restrictive ascertainability test on certification." *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1180550, at *11 (D. Kan. Mar. 10, 2020).

The United States Supreme Court has denied certiorari in three cases involving the issue of ascertainability since 2015—each of which involved a circuit court's rejection of the heightened standard of ascertainability. *Briseno*, 844 F.3d at 1127, *cert. denied*, 136 S. Ct. 313 (2017); *Rikos*, 799 F.3d at 525, *cert. denied*, 136 S. Ct. 1493 (2016); *Mullins*, 795 F.3d at 654, *cert. denied*, 136 S. Ct. 1161 (2016). Some observers have suggested that this pattern may suggest that the Court is waiting to grant certiorari in a case applying the heightened standard so that it can evaluate the actual impact of that standard on class certification. Andrew J. Ennis & Catherine A. Zollicker, *The Heightened Standard of Ascertainability in Class Actions*, Am. Bar Ass'n (Mar. 13, 2018).

Heightened Ascertainability Standard	Traditional Ascertainability Standard
First Circuit (*In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015))	Second Circuit (*In re Petrobas Sec.*, 862 F.3d 250 (2d Cir. 2017))
Third Circuit (*Marcus v. BMW*, 687 F.3d 583 (3d Cir. 2012))	Fifth Circuit (*Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329 (5th Cir. 2019))
Fourth Circuit (*EQT Prod. V. Adair*, 764 F.3d 347 (4th Cir. 2014))	Sixth Circuit (*Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017))
	Seventh Circuit (*Mullins v. Direct Digital, L.L.C.*, 795 F.3d 654 (7th Cir. 2015))
	Eighth Circuit (*Sandusky Wellness Center, L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016))
	Ninth Circuit (*Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017))
	Eleventh Circuit (*Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2022))

Another significant issue in class certification in the United States is the predominance requirement. The predominance requirement, found in Rule 23(b)(3), asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. *Ferreras v. American Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019). Without predominance, individual inquiries threaten to undermine the common proof and class action process, making a class action an unmanageable device to resolve the issues before the court.

Courts can also certify U.S. class actions in part, if some elements of the proposed class meet the requirements but others do not. Under Rule 23(c)(4), the court may certify "a class action with respect to particular issues." Likewise, under Rule 23(c)(5), "a class may be divided into subclasses that are each treated as a class under this rule." However, there is a circuit split on when it is appropriate for a court to do so. The courts of appeals for the Second and Ninth Circuits permit issue certification where it will materially advance the litigation. Petition for a Writ of Certiorari at 9, *Behr Dayton Thermal Prods. L.L.C. v. Martin*, 139 S. Ct. 1319 (2019) (No. 18-472). The courts of appeals for the Third, Sixth, and Seventh Circuits focus on the fairness and efficiency of issue classes without requiring that any efficiency gains from an issue class materially advance the litigation. *Id.* The court of appeals for the Fifth Circuit requires that predominance be satisfied for an entire cause of action before considering whether to certify an issue class. *Id.*

In 2019, the Supreme Court denied certiorari in *Behr Dayton Thermal Prods. L.L.C. v. Martin*, leaving intact the circuit split regarding the proper standard for issue-class certification under Rule 23. *Supreme Court Declines to Review "Broad" Issue-Class Ruling in Toxic Tort Case*, Jones Day *Commentary* (Apr. 2019).

Once the court decides that a class action is appropriate, it "must define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed. R. Civ. P. 23(c)(1)(B).

D. BINDING OTHERS

Class actions in the United States may bind nonparty class members on either a mandatory or opt-out basis, depending on which prong of Rule 23(b) the court uses to certify the class. These rules stand in contrast to many other jurisdictions that utilize opt-in type procedures, binding only those parties who choose to opt into the proceeding.

Classes certified under Rules 23(b)(1) or 23(b)(2) are often referred to as "mandatory actions" because class members are bound by the result and cannot opt out. In those cases, the court "may direct appropriate notice to the class," but the rule itself does not require any notice to potential class members. Fed. R. Civ. P. 23(c)(2)(A). Nevertheless, some courts have held that notice is required in some Rule 23(b)(1) cases. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.,* 246 F.3d 315 (3d Cir. 2001). By contrast, class members have the right to opt out of classes certified under Rule 23(b)(3). For a Rule 23(b)(3) class, "the court must direct class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Class members who choose not to opt out of a Rule 23(b)(3) class will be bound by the result. When a Rule 23(b)(3) class is settled, however, the court may also give class members a second chance to opt out after being notified of the settlement terms. *See* Fed. R. Civ. P. 23(e)(4).

E. REMEDIES AVAILABLE

The remedies available in class litigation are generally the same as the remedies allowed by the substantive law. Depending on the substantive law, these remedies may include compensatory and punitive damages, as well as injunctive or declaratory relief. A court, however, will evaluate whether damages can be proven on a class-wide basis before certifying a class. *See,* e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

For class actions certified under Rule 23(b)(2), plaintiffs can recover damages only insofar as those damages are "incidental" to the injunctive or declaratory relief requested.

F. SETTLEMENTS AND FINANCING

Settlement

Class actions may be settled, but only with the court's approval. Federal Rule of Civil Procedure 23(e) sets out the procedures for approving a class settlement.

In 2018, certain subsections of Rule 23 were amended to address issues primarily related to settlement and notice. The amendment to Rule 23(c)(2) clarifies that notice may be made by any "appropriate" means—including electronically. *See* Fed. R. Civ. P. 23(c)(2)(B). The commentary to the amended rule suggests that courts consider the circumstances when determining if the form of notice is appropriate and evaluate the content and format of the notice, depending on the audience. Liv Kiser & Joe Regalia, *Rule 23's New Amendments: A New Era for Class Actions?*, Am. Bar Ass'n (Feb. 15, 2019). The 2018 amendments also expanded Rule 23(c)(2)(B) to encompass proposed settlement classes. *See* Fed. R. Civ. P. 23(c)(2)(B). Notably, under the amended Rule 23(e), notice to class members of a proposed settlement class is no longer mandatory but, rather, discretionary. *See id.* Under the amended rule, the court is required to give notice to a proposed settlement class only if it concludes that approval under Rule 23(e)(2) and certification is likely. *See* Fed. R. Civ. P. 23(e)(1)(B). According to the commentary, notice in this context is an important event and should be given only if there is a solid record supporting the conclusion that the proposed settlement will likely earn final approval. Kiser & Regalia, *supra*.

The court can approve a class settlement only if requirements for certification are met and the settlement is "fair, reasonable, and adequate," as determined by the court after a hearing. If the proposal would bind class members, the court may approve it only after a hearing and only after finding that it is "fair, reasonable, and adequate" after considering whether the class representatives and class counsel have adequately represented the class, the proposal was negotiated at arm's length, the relief provided for the class is adequate, and the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). In considering whether the relief provided is adequate, the court must take into account the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class; the terms of any proposed award of attorney's fees; and any agreement required to be identified under Rule 23(e)(2).

There is significant debate within the legal community regarding the propriety of *cy pres* settlements—wherein a defendant agrees to pay some or all of the settlement funds to a third-party organization. Courts have approved *cy pres* settlements pursuant to Rule 23(e) in at least two circumstance. Kevin M. Lewis, Cong. Resch. Serv., LSB10131, Update: *Is Cy Pres A-OK?* (2019). *First*, where some class members never claim their share of the settlement proceeds, with the result that a portion of the settlement fund remains unclaimed, it may be appropriate to pay some of the funds to charity. *Id. Second*, it may be appropriate to distribute some of the settlement proceeds to charities when it would be economically infeasible to disburse settlement funds directly to class members. *Id.* Supporters of *cy pres* settlements argue that they serve several socially desirable purposes. *Id.* Critics of *cy pres* settlements believe they often provide little or no benefit to class members. In the commentary to the 2018 amendments to Rule 23 of the Federal Rules of Civil Procedure, the rules committee noted its concern about the inequitable treatment of some class members *vis-à-vis* others in what was likely a nod to creative settlement strategies like *cy pres.* Kiser & Regalia, *supra*.

The Supreme Court was expected to weigh in on the issue in 2019 after it granted certiorari in *Frank v. Gaos*—a Ninth Circuit decision that upheld a *cy pres* class action settlement. However, the Court did not address the merits of the *cy pres* issue—opting instead to vacate and remand the Ninth Circuit's decision on standing grounds. *See Frank v. Gaos*, 139 S. Ct. 1041.

Attorneys' fees

Attorneys' fees in class actions are governed by Federal Rule of Civil Procedure 23(h), which states that "the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Although the general rule in the United States is that a prevailing party cannot recover its attorneys' fees, laws in some areas—such as civil rights and antitrust—allow prevailing plaintiffs to recover attorneys' fees from defendants in certain circumstances. Otherwise, if no such fee-shifting statute applies, attorneys' fees in class cases are awardable only pursuant to an agreement of the parties.

In the commentary to the 2018 FRCP amendments to Rule 23, the committee expressed concern about the disconnect in many cases between attorneys' fees and benefits to the class, noting that in some cases, it will be important to relate the amount of an award of attorneys' fees to the expected benefits to the class. Kiser & Regalia, *supra*. The amendments to Rule 23(e) reflect this concern by making "the terms of any proposed award of attorney's fees" an express factor to be considered by the court in assessing the propriety of a settlement class proposal. Fed. R. Civ. P. 23(e)(2)(C)(iii). Many believe that the Supreme Court will soon be wading into the issue of class relief and attorneys' fees. Kiser & Regalia, *supra.*

If attorneys' fees are available, courts calculate attorneys' fees using one of two methods: the lodestar method or the percentage-of-recovery method. *See In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019).

The lodestar method is typically used where the substantive law allows prevailing plaintiffs to recover attorneys' fees from the defendant, or where the monetary recovery does not fully capture the benefit to the class. Under the lodestar method, courts calculate fees by multiplying the time a lawyer reasonably spent on the case with a reasonable hourly billing rate for the lawyer, which is typically set equal to the lawyer's usual rate. The court may then make adjustments to the final figure at its discretion, taking into account issues such as the relative financial strength of the parties, each party's good or bad faith, and the class's degree of success.

The percentage-of-recovery method is typically used where the litigation generates a common fund for the class members. Under that method, the class attorneys receive a portion of the settlement before the rest of the settlement is distributed to the class.

District courts have great latitude in setting fee awards in class action cases, and an award of attorneys' fees is reviewed for abuse of discretion. *Id.* at 1078. An abuse of discretion occurs if the judge fails to apply the proper legal standard, fails to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous. *Id.*
In the United States, contingency fee arrangements are generally permitted in all areas of law that would be subject to a class action, and are commonly used.

Third-Party Funding

Third-party funding of class actions is also generally permitted, and there are no federal rules against it. But state laws and professional responsibility codes for lawyers put significant limitations on third-party funding, so third-party funding of class actions is rare in practice.

For example, under comment 11 to American Bar Association Model Rule of Professional Responsibility 1.8, lawyers may accept third-party funding only if "the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Likewise, Model Rule 5.4(a) prohibits lawyers from sharing legal fees with non-lawyers, with only certain exceptions not relevant here. This rule likely prevents lawyers from sharing legal fees from a class action with third parties, thus weakening the incentive to invest in a case. Most states have adopted rules similar to these Model Rules.

G. OTHER KEY CLASS ACTION ISSUES

An ongoing open issue is the extent to which plaintiffs in a class action can use statistical sampling to prove their case. In 2011, the Supreme Court rejected "Trial by Formula" and held that a class action procedure cannot abrogate a defendant's right "to litigate its statutory defenses to individual claims." *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338 (2011). The Supreme Court, however, clarified in 2016 that such collective evidence may be used in appropriate circumstances. *See Tyson Foods, Inc. v. Bouaphaekeo*, 136 S. Ct. 1036 (2016). In *Tyson*, employees filed a class action alleging that their employer failed to pay them for time spent donning and doffing their protective gear. Because there were no records of time spent donning and doffing, the Supreme Court held that the plaintiffs could use an expert study of 744 videotaped observations to estimate how long donning and doffing took on average, and then apply that average across the entire class. The Supreme Court held that the admissibility of sampling evidence must be determined on a case-by-case basis, and that if such sampling evidence would be admissible in an individual case, it should generally also be admissible in a class action. Lower courts, however, have remained hesitant to find representative evidence sufficient for purposes of proving injury in class

actions. *See,* e.g., *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020).

An additional issue that has recently developed in the class action arena is the differing substantive standards applicable to litigation classes versus settlement classes. An en banc Ninth Circuit panel explored the issue in *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539 (9th Cir. 2019), and concluded that courts considering whether to certify a nationwide class for settlement purposes, unlike courts considering certification of a litigation class, need not consider the manageability factor. *Hyundai*, 926 F.3d at 556-57. In rejecting the argument that the predominance test is identical for both settlement and litigation classes, the *Hyundai* court noted that "manageability is not a concern in certifying a settlement class where, by definition, there will be no trial." *Id.* Accordingly, *Hyundai* stands for the principle that, in certain cases, settlement classes may be certified under a less stringent standard than litigation classes. The COVID-19 pandemic has also resulted in a significant and increasing number of class actions related to the spread and impact of the novel coronavirus in the United States. A number of class actions have been brought against banks, financial institutions, educational institutions, employers, airlines, event and ticketing companies, fitness clubs, ski resorts, amusement parks, corrections facilities, and nursing facilities alleging a wide variety of pandemic-related claims. *See Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, 10 Nat'l L. Rev. 318 (November 2020).

Moreover, while class actions are currently far more common in the United States than in other countries, a number of trends have begun to limit class actions.

First, recent case law has interpreted Rule 23's requirements for certifying a class action more strictly. For example, in 2013, the U.S. Supreme Court decided *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013). In that case, a cable company's subscribers sued the company, claiming that the company violated the antitrust laws in several different ways. The lower court ruled that the subscribers could advance only one of their many theories of antitrust violation. But the subscribers' damages expert created a model that failed to separate damages attributable to the viable theory of antitrust violation from the damages attributable to the rejected theories. The Supreme Court held that the subscribers could not meet the Rule 23(b)(3) predominance requirement because the damages model failed to show that damages caused by the viable theory of antitrust violation could be measured across the entire class. Subsequent Circuit Court decisions have made clear that courts must engage in a "rigorous" analysis of Rule 23(a) and (b). *See,* e.g., *Hyundai*, 926 F.3d at 556 (citing *Comcast*, 133 S. Ct. at 1426).

Second, a number of Supreme Court decisions handed down between 2018 and 2019 have created additional barriers and impediments to class action litigation. In *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), the Court held that *American Pipe*'s equitable tolling rule, which tolled the statute of limitations for subsequent individual claims by non-party class members during the pendency of the class action, does not apply to successive class actions after denial of certification. Accordingly, upon denial of certification, putative class members may not commence a class action anew beyond the time allowed by the applicable statute of limitations. The *Resh* decision, which resolved a circuit split on the issue, may significantly limit the filing of subsequent class actions after certification is denied. *See* James J. Mayer, *Rejecting the Class Action Tolling Forfeiture Rule*, 94 N.Y.U. L. Rev. 899 (2019). Similarly, in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), the Court held that the 14-day deadline for seeking immediate appeal from an order granting or denying class certification, contained in Rule 23(f) of the Federal Rules of Civil Procedure, is not subject to equitable tolling.

Third, increased use of arbitration is impacting the prevalence of class action litigation in the U.S. Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, parties in the United States may generally agree to have their disputes heard in private arbitration proceedings rather than in court. The American Arbitration Association, one of several organizations that administers arbitrations, lists more than 580 class arbitration cases on its online public docket, 107 of which were filed between January 2017 and March 2021. However, arbitrations can be held on a class-wide basis only if all parties consent to class arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010). In *Stolt-Nielsen*, the Supreme Court held that class arbitration cannot be compelled under the FAA where the agreement is silent on the availability of

such arbitration. *Id.* The Court made clear that consent is a foundational principle of the FAA, and as such, consent to class arbitration is essential.

Companies seeking to avoid class actions in the United States use arbitration agreements and class action waivers in their consumer or other contracts, a practice on which the Supreme Court has taken a widely permissive view.

Building on its decision in *Stolt-Nielsen*, the Court held in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), that an ambiguous arbitration agreement is likewise insufficient to provide a contractual basis for compelling class arbitration under the FAA. Moreover, the *Varela* decision highlighted the benefits of individual arbitration, as opposed to class arbitration—including lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. 139 S. Ct. 1407; Alan S. Kaplinsky et al., *Three Supreme Court Decisions and a Ninth Circuit Preemption Ruling Highlight the Year's Arbitration Decisions*, 75 Bus. Law. 1967 (2020). Accordingly, the *Varela* employees were bound by the agreement to arbitrate on an individual basis only.

Companies seeking to avoid class actions in the United States use arbitration agreements and class action waivers in their consumer or other contracts, a practice on which the Supreme Court has taken a widely permissive view. *See,* e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). In January 2021, the Supreme Court was expected to address a follow-up question to the 2019 *Henry Schein* decision. The question was who—a court or an arbitrator—has the power to decide arbitrability when an agreement has a carve-out clause for certain types of disputes. However, the Court instead dismissed certiorari as improvidently granted. *See Henry Schein, Inc v. Archer & White Sales, Inc.,* 141 S. Ct. 656 (2021).

The Court's recent decisions have made abundantly clear that arbitration agreements may be used to limit and/or waive the right to class proceedings. *See also Am. Exp. Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011). In July of 2017, the Consumer Financial Protection Bureau (CFPB) announced a new rule banning financial companies from using mandatory arbitration clauses with class action waivers in contracts. But a joint resolution passed by Congress just four months later repealed the CFPB's new arbitration rule, and such arbitration agreements are allowed.

As a result of recent Supreme Court cases strengthening and upholding the validity of arbitration agreements, mass arbitration has emerged as a new tactic. In response to being unable to effectively challenge the enforceability of companies' well-drafted arbitration and class action waiver clauses, plaintiffs who have been compelled to arbitrate individually have instead opted to file voluminous boilerplate arbitration demands on behalf of hundreds or thousands of claimants simultaneously. The filing of such demands, depending on the language of an arbitration agreement, can trigger companies' obligation to pay filing and case management fees prior to assessing the merits of each claim—in some instances, millions of dollars in filing fees alone—creating leverage for plaintiffs to elicit early settlements. In a recent opinion, U.S. District Judge William Alsup of the Northern District of California called a company's attempt to prevent mass arbitration a "hypocrisy" because, "in irony upon irony," the company "now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate." *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020). Mass arbitrations are expected to continue to gain popularity alongside the rise in arbitration provisions.

The European Union

A. Brief Overview and History
B. Types of Claims and Scope of Lawsuits That Can Be Filed
C. Class Representatives and Standing to Sue
D. Key Procedural Requirements
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G. Settlements and Financing
H. Other Key Class Action Issues

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A. BRIEF OVERVIEW AND HISTORY

The European Commission (the "Commission") has long been considering whether to legislate a coherent, pan-European approach to class actions. It adopted a Green Paper on antitrust damages actions in 2005 (COM(2005)672, December 19, 2005) and a White Paper in 2008 (COM(2008)165, April 2, 2008). Beyond antitrust actions and damages, the Commission published a Green Paper on consumer collective redress (COM(2008)794, November 27, 2008), pointing out that while most consumer organizations were in favor of EU-wide judicial compensatory collective redress schemes, many industry representatives feared risks of abusive litigation.

In 2011, the Commission initiated a public consultation. Around 300 institutions and experts, as well as 10,000 citizens expressed their views on the EU framework for collective redress. Based on the feedback received, the Commission issued Recommendation 2013/396/EU in 2013 (June 11, 2013), urging the Member States to implement national collective redress mechanisms. Indeed, the Commission emphasized that while the EU already had some of the strongest rules on consumer protection in the world, recent cases had shown difficulties that one may face when it comes to enforcement.

On April 11, 2018, the Commission launched the "New Deal for Consumers" to boost consumer protection in the EU. The "New Deal for Consumers" initiative, aimed at strengthening the enforcement of EU consumer law in light of a growing risk of EU-wide infringements, also is intended to modernize EU consumer protection rules given the market developments.

As part of the "New Deal for Consumers," and after two years of policy debate, negotiators for the European Parliament and the Council of the European Union (the "Council") have reached an agreement on new EU rules on collective consumer action.

A Proposal for a Directive on representative actions for the protection of the collective interests of consumers was issued by the European Commission in April 2018, which was approved by the European Parliament in March 2019. On June 22, 2020, the Council has thus published a proposal for a "Class Action" Directive (Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, the "Directive"). The Directive will replace and modernize the 2009 EU directive and address the current issues in enforcement of consumer law by increasing the available options for EU citizens.

The Directive EU 2020/1828 on representative actions to protect the collective interests of consumers was published on 4 December 2020. This important Europe-wide harmonization will shape the future of national and cross-border consumer litigation.

The Directive required all Member States to implement class action mechanisms by 25 December 2022, at both the national and the EU levels, whereas only 19 out of 27 already had some form of legal remedy to victims of mass harm. Under the Directive, Member States shall ensure that qualified entities as defined below can bring domestic and cross-border representative actions on behalf of groups of consumers. The Directive covers many fields such as financial services, telecommunications, data protection, energy, travel and tourism, in addition to general consumer law. The Directive entered into force on 24 December 2020 and Member States then had 24 months to implement it into national law, as well as an additional six months to start applying its provisions.

The "New Deal for Consumers" initiative, aimed at strengthening the enforcement of EU consumer law in light of a growing risk of EU-wide infringements, also is intended to modernize EU consumer protection rules given the market developments.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The Directive covers many fields listed in Annex I such as financial services, telecommunications, data protection, energy, travel and tourism, in addition to general consumer law.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Actions can be brought by qualified entities designated in advance by the Member States or created on an ad hoc basis for a specific action. These entities will be required to fulfill certain criteria, including nonprofit and transparency requirements in relation to funding, in an effort to avoid conflicts of interest and abusive litigation.

Under the Directive, Member States shall ensure that qualified entities can bring domestic and cross-border representative actions on behalf of groups of consumers (Article 4 of the Directive). A qualified entity is an organization or a public body that represents consumer interests and is designated as such by an EU Member State.

The Directive distinguishes qualified entities entitled to bring domestic actions from those entitled to bring cross-border actions.

The Directive also contemplates improved cooperation between EU Member States, allowing a qualified entity from a Member State to bring a representative action before the courts or administrative authorities of another (Article 4 of the Directive).

D. KEY PROCEDURAL REQUIREMENTS

Member States must ensure that representative actions to obtain injunctive relief are processed with due diligence.

They must also ensure that, where a qualified entity has provided reasonably available evidence to support a representative action and has indicated that additional evidence is held by the respondent or a third party, the court or administrative authority may, at the request of that qualified entity, order that such evidence be produced by the respondent or the defendant or third party in accordance with national procedural law.

In addition, Member States must determine the regime of penalties applicable in the event of failure or refusal to comply with a cessation measure referred to above. The penalties provided for must be effective, proportionate, and dissuasive.

Member States must ensure that the sanctions can take the form of, inter alia, fines, penalties, including fines. Companies may be required to produce evidence contrary to their case, subject to rules on confidentiality. Final decisions would be considered as irrefutable evidence that an infringement occurred in the same Member State and would benefit from a rebuttable presumption in actions brought in another Member State.

The limitation period for all potential redress actions would be suspended by the filing of a representative action. In accordance with national law, Member States must ensure that a pending representative action to obtain the above-mentioned injunction has the effect of suspending or interrupting the limitation period applicable to the consumers affected by the representative action.

E. BINDING OTHERS

The Directive applies an opt-out principle to injunction orders, while opting out or opting in to redress orders is left to the discretion of the Member States.

Member States should—where consumers suffered comparable harm—consider the possibility of enabling consumers to directly benefit from a redress order after it was issued without being required to give their individual mandate beforehand.

F. REMEDIES AVAILABLE

Qualified entities are entitled to seek at least two types of measures: injunction measures and redress measures (Article 7 of the Directive).

Prior to the Directive, European law only provided for representative actions to stop or prohibit infringements of EU consumer law, but not for collective redress. As a result, significant differences existed in the protection of the collective interests of consumers throughout the European Union, as some Member States have introduced actions for collective redress, whereas others have not.

From now on, if a professional harms the collective interest of consumers by acting contrary to one of the instruments of secondary legislation listed in Annex I of the Directive, the entities qualified to do so in each Member State are able to bring a "representative action" before the authorities of that State in order to obtain not only measures to put an end to the harm (Article 8 of the Directive), but also measures to compensate for the harm individually suffered by certain consumers (Article 9 of the Directive).

The national court in an EU Member State is able to issue injunction orders as well as redress orders in the form of monetary compensation, repair, replacement, price reduction, contract termination, or reimbursement, but not punitive damages, which are still not allowed in the Directive.

G. SETTLEMENTS AND FINANCING

The Directive implements the "loser pays" principle as a shield against abusive litigation. This rule seeks to force the losing party to pay the successful party's costs of the proceedings (Article 12 of the Directive).

The Directive allows for third-party funding and regulates it under its Article 10 with the aim of ensuring transparency and avoiding any conflict of interest.

Another safeguard is embodied in the possibility granted to courts or administrative authorities to dismiss manifestly unfounded cases at the earliest stage of the proceeding, pursuant to national law (Article 7 of the Directive).

H. OTHER KEY CLASS ACTION ISSUES

The characteristics of the new European representative action for damages are in fact relatively similar to those of the French class action. The proposed changes do not appear as fundamental in France as they might be in other Member States, since French class actions already allow consumers to seek monetary damages.

The choice between opt-in (inclusion of only those consumers who have explicitly joined the action) and opt-out (inclusion of all consumers who have not taken the step of excluding themselves from the action), for example, is left to them (Article 9 of the Directive).

Some authors regret that the initiative of the European class action is reserved for a representative entity, observing that this is a hindrance to the development of class actions.

However, each Member State retains the possibility of extending the conditions laid down in the Directive, which remains only a minimal and harmonized framework for the Member States.

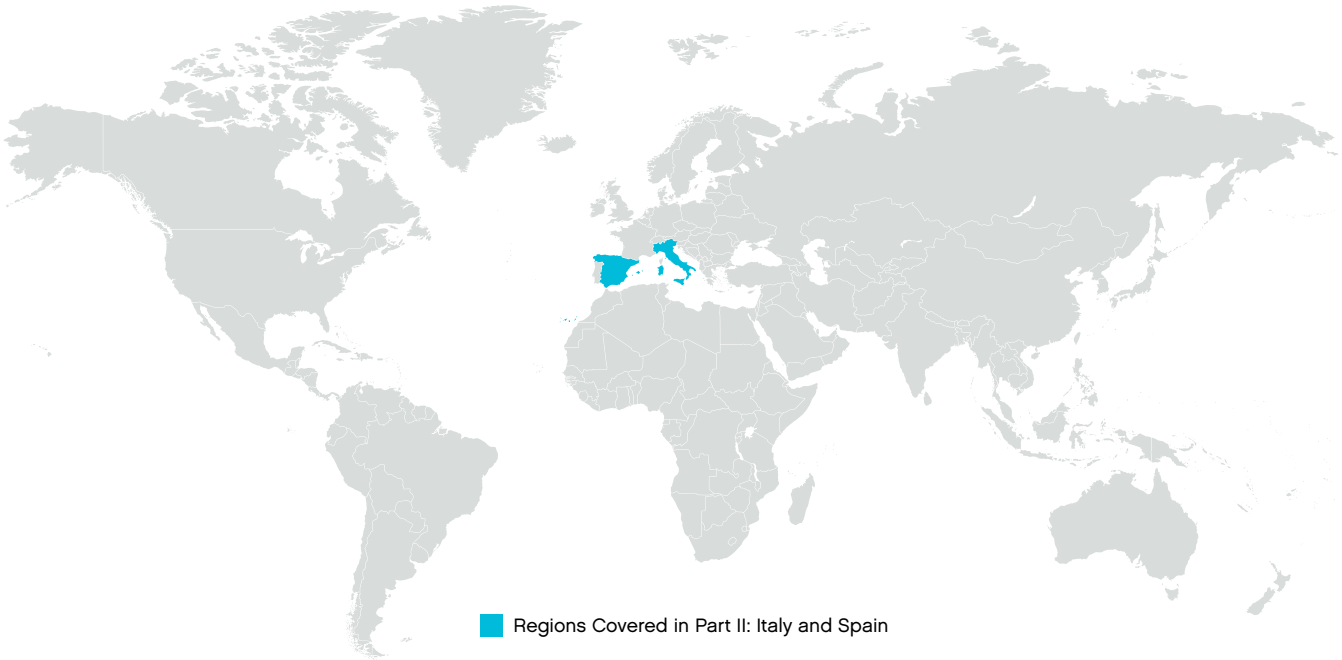
It remains to be seen how European legislations on class actions will take into account the guidelines of the Directive.

Part II: Italy and Spain

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

In Part II, we examine class actions activities in Italy and Spain. Italy is one of the frontrunners in the implementation of the EU Representative Action Directive, while Spain entitles third parties or groups of affected people to bring Collective Actions. This is the second installment of an in-depth, multipart series on class actions that will spotlight a wide array of jurisdictions worldwide.

Class Actions Jurisdictions



Italy

Section Authors

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A. BRIEF OVERVIEW AND HISTORY

Italy-based class actions provide unique litigation opportunities as they build on an *ad hoc multi-layered and ever-evolving system* of legal norms. The general notion of "class actions" indeed encompasses three legal tools, which coexist as they serve distinct scopes of application and pursue different goals: (1) (Private) Class Actions; (2) Representative Actions; and (3) Administrative Class Actions. In sum:

1. **(Private) Class Actions**[1] aim at protecting the *homogeneous individual rights* of the members of a certain class against enterprises/undertakings or entities in charge of public services or public utilities, with respect to misconducts that occurred from May 19, 2021, onward[2] while rendering their respective activities. Today, this is considered the very "general" class action tool (*lex generalis*) in that it establishes the key collective redress principles under Italian law and features a broad scope of application. This is consistent with the legislative choice to make it part of the Italian Code of Civil Procedure.
2. **Representative Actions**[3] aim at protecting *consumers' collective interests* arising from the violation of certain EU regulations and directives (as implemented in Italy), effective June 25, 2023.[4] Today, this is considered a subset of the (Private) Class Action (*lex specialis*), which is included in the Italian Consumer Code. (Private) Class Actions and Representative Actions together form a "*double track system*."
3. **Administrative Class Actions**[5] aim at protecting *collective rights against public administrations* and concessionaires of public services that deviate from certain pre-set qualitative and economic standards, or violate the rules governing their operations, effective January 15, 2010. Today, this is considered a self-standing redress, with limited interplay with the "double track system," if at all, as it embodies the constitutional principle of "quality performance" and "impartiality" that the Public Administration must ensure (Art. 97 of the Italian Constitution).

All the above tools provide for *opt-in* mechanisms.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Each class actions tool is designed to pursue specific claims.

(Private) Class Actions. Art. 840-*bis* of the Italian Civil Procedure Code stipulates that individual homogeneous rights, in contract and/or in tort, may be judicially enforced by means of class actions governed by the new Title VIII-*bis*. While the law-maker did not elaborate on the notion of "individual

homogeneous rights," generally these are *rights arising from the very same contractual breach or tortious event, which may give rise to a harm-type across the class that may be determined via uniform criteria*. Virtually, *any right may form*, under the circumstances, *a homogenous right* eligible for (Private) Class Action protection, unless a special tool (such as the Representative Action or the Administrative Action if pre-conditions are met) governs that specific case. The redress tools comprise *damages or restitution* claims to remedy a homogenous right violation, and *injunctions* to impede the (further) perpetration of unlawful conducts.

Representative Actions. Pursuant to Art. 140-*ter* of the Italian Consumer Code the collective interests of a number of consumers who were or may be harmed by a violation of certain legal provisions devised to govern the subject matters listed in Annex II-*septies* thereof—i.e., certain EU Regulations and/or EU directives, as implemented—may be pursued via Representative Actions. "Collective interests" echo the well-established notion of "diffused interests," which indicate interests that belong collectively, rather than individually only, to anyone part to a certain category or community and may potentially include all the citizens and residents of Italy. When collective interests are at stake, the scope of application of Representative Actions strictly hinges on Annex II-*septies*, as incorporated in the Italian Consumer Code, which covers, i.a., the following: unfair trade practices, consumer goods warranties, misleading advertising, transportation, electricity, gas, tourism, e-commerce, digital services, data protection, product and food safety, insurance and investment funds. The redress tools comprise *injunctive relief* to inhibit the continuation of an unlawful conduct, *compensatory damages*, and *restitution* claims to remedy a collective interest violation.

Administrative Class Actions. According to Art. 1, paragraph 1 of Legislative Decree no. 198/2009, administrative class actions seek to restore "the correct course of the administration's duty or the correct provision of a public service" when a *direct*, *tangible*, *and current violation of identical material interests occurs*. These actions are indeed also known as "collective actions for the effectiveness of the action of government entities and the providers of public services."

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Each class actions tool may be invoked by and against specific persons.

(Private) Class Actions. The standing to sue is especially broad as in principle *anyone holding an individual homogenous right* that may form a class, may bring a (Private) Class Action, be they consumers and/or users, professionals, enterprises, trade associations, etc. Associations or organizations, whose statutory objective includes the protection of homogeneous rights, may also initiate (Private) Class Actions, provided that they are enrolled in a specific public register established by the Ministry of Justice. As to the standing to be sued, (Private) Class Actions may be brought against business entities or entities providing public services or public utilities limited to conducts put forth in the course of their activities. It is debated whether professionals may be sued under this tool.

The redress tools comprise *injunctive relief* to inhibit the continuation of an unlawful conduct, *compensatory damages*, and *restitution* claims to remedy a collective interest violation.

Representative Actions. The standing to sue is significantly limited compared to (Private) Class Actions. Pursuant to Art. 140-*quater* of the Italian Consumer Code, *only*: (i) *nationally representative consumer and user associations* (included in a *special register* held by the Ministry of Enterprises and Made in Italy); (ii) *independent public bodies* in charge of the application of European Union rules on the protection of consumer interests; and (iii) public and private bodies representing the interests of consumers in another Member State (enrolled in a *special register* held by the European Commission), may file Representative Actions *before Italian courts* (aka "*Domestic Representative Actions*"). Pursuant to Art. 140-quinquies the same entities, if they meet specific experience, resources, independence, and transparency requirements and are registered in a special section of the register held by the Ministry of Enterprises and Made in Italy, may bring cross-border Representative Actions *before the competent courts of another Member State* (aka "*Cross-Border Representative Actions*"). This means that these entities only may bring Representative Actions on behalf of consumers, irrespective of having received any specific power or mandate from consumers, while consumers themselves do not have an individual right to seek redress via this tool. However, consumers may in any case bring individual actions, i.e., the (Private) Class Action (this may cause a risk of overlapping between judicial tools). As to the standing to be sued, Representative Actions may be *filed against any "professional person*," defined as any natural or legal person, public or private, acting, including through another person, for purposes relating to his or her trade, business, craft or profession in order to obtain injunctive or compensatory relief. This is a particularly broad notion, which comprises any enterprise, public or private, including entities operating public services or utilities.

Administrative Class Action. Administrative class actions may be filed by consumers, users or any association representing their interests. Governmental entities, public bodies, and providers of public services can be sued as defendants, while independent administrative authorities, jurisdictional bodies, legislative assemblies, constitutional bodies, and the Presidency of the Council of Minister are by law excluded from the pool of possible defendants (i.e., passive standing limitations).

D. KEY PROCEDURAL REQUIREMENTS

Each class actions tool features different procedural requirements.

(Private) Class Actions. (Private) Class Actions encompass three phases: (i) the (procedural) decision on admissibility; (ii) the decision on the merits (an); and (iii) the liquidation of damages (quantum). The first two phases are decided by the court, while the last one is decided by a delegated judge, who is specifically appointed by the court in the third phase.

- **As to the first phase:** According to Art. 840-*ter* of the Code of Civil Procedure, once a (Private) Class Action is filed by means of a petition with the competent Specialized Business Division of the court where the defendant is geographically located (based on e.g., its registered office, residence, or domicile), the presiding court renders a summary proceedings decision on the admissibility of the case in 30 days of the first hearing. The presiding court may stay the proceedings if the same subject matter is under the scrutiny of administrative courts or under the purview of an independent authority. The court declares the class action inadmissible if: (i) the action is manifestly ungrounded; (ii) the concerned rights are not homogeneous; (iii) the plaintiff is in conflict of interests with defendant; and (iv) the plaintiff lacks the prerequisites to properly represent the collective rights asserted in court. If inadmissible, the court rules on legal fees allocation right away. Inadmissibility orders may be appealed against in 30 days of their service.
- **As to the second phase**: The court may decide on the merits based on presumptions and statistical data. In case the court appoints an expert, any cost whatsoever will be advanced by the defendant. Upon a specific disclosure motion by the plaintiff, the court may order the defendant to disclose relevant evidence, an order which, if not complied with, exposes defendant to the sanctions under Art. 840-quinquies. The decision on the merits determines whether the defendant is liable and, in the affirmative, the aggregate amount of damages due.
- **As to the third phase**: This serves for the presiding court to determine the requirements to join the class action, set a period between 60 and 150 days for the holders of homogenous rights to opt in, appoint a delegated judge and a

class representative. Once the defendant files its defences against the allegations of those members who joined in, the class representative submits a "project for the individual homogeneous rights," which regulates the damage/compensation distribution or restitutions among the members of the class (bearing in mind the aggregate damage amount found in the second phase). The project, once approved by the delegated judge, constitutes an enforceable title under Art. 840-*octies* of the Italian Civil Procedure Code. When all the due amounts are paid to the members of the class, the delegated judge declares the third phase closed.

Representative Actions. Pursuant to Art. 140-*septies* of the Italian Consumer Code the Specialized Business Division of the competent civil court sitting in the place where the professional who allegedly engaged in an unlawful conduct is based hears Representative Action cases, which commence by means of a specific petition/statement of claim in the context of simplified civil proceedings. At a minimum, for admissibility purposes the petition shall: (i) establish that the petitioner falls in the closed list of parties having *standing to sue* under this tool; (ii) indicate the elements necessary to determine the *group of consumers affected* by the Representative Action; (iii) confirm the *jurisdiction* of the Italian courts and elaborate on *applicable law*; (iv) disclose the financing to support the initiative, as received or promised by third parties (aka *third-party funding*, a relatively new tool under Italian law), including in order to clear potential *conflicts of interest*; (v) confirm that, in case damage compensation is sought, the relevant consumers' rights are *homogeneous*; and (vi) establish that the action is *not manifestly inadmissible*. The Court rules on admissibility in 30 days of filing (the order shall be published on a specific Ministry of Justice webpage). The Court may decide to stay the proceedings when the underlying relevant facts are under investigation before an independent Authority (e.g., the Italian Antitrust Authority) or under the scrutiny of an administrative court. No third-party joinder is allowed.

Administrative Class Actions. The plaintiff can initiate a public class action by serving a notice to the defendant, who can remedy the alleged breaches within 90 days. If no remedy is taken, the plaintiff has one year to file the action in front of the administrative court. The petition must be published on the defendant's website and by the Ministry of Justice. Other members of the class can join the action within 20 days before the first hearing. The final decisions and the measures taken by the defendant to remedy the collective harm must be published, as well.

E. BINDING OTHERS

Italy has adopted an opt-in model, according to which a final judgment or order is binding only and exclusively upon those who have joined in the class action. This means that the in principle members of a class, who did not join in, may bring separate individual actions against a certain defendant involved in a class action.

(Private) Class Actions. Only the parties who properly opted in are bound.

Representative Actions. Opt-out principle applies to injunctive orders, otherwise the standard opt in rule governs.

Administrative Class Actions. Decisions issued by the administrative court have binding effects upon the concerned public administration only, which is consistent with the adopted opt-in model. Compliance with such decisions usually benefit not only the concerned plaintiff(s), but the whole relevant community, albeit indirectly.

F. REMEDIES AVAILABLE

As a general guideline, under Italian law compensatory damages include actual damages ("danno emergente") and loss of profit ("lucro cessante"), while punitive or multiplicative damages (resulting in overcompensation) are not contemplated. Besides these remedies, Italian law comprises, i.a., restitution claims and injunctive relief. All of these remedies apply to class actions falling in the "double track system."

(Private) Class Actions. The presiding court rejects or upholds the claims for compensation or restitution when deciding on the merits, which is the second phase of the proceedings. In the third phase, the delegated judge approves the damage allocation project prepared by the class representative concerning the individual compensation due to each class member. Alternatively or cumulatively, restitution orders may be

sought (for instance, in cases where a consumer's contract is found to be null and void), as well as injunctive relief.

Representative Actions. Pursuant to Articles 140-*octies* and 140-*nonies* of the Italian Consumer Code, injunctive and/or compensatory relief may be sought in a Representative Action. Specifically, when injunctive release is sought, cease and desist orders may be obtained, as well as the publication of any order against defendant(s). Likewise, petitions for urgent provisional orders may be launched, provided that 15 days of a formal out-of-court cease and desist notice unsuccessfully elapsed. In these cases only, the plaintiff is not burdened with the onus to prove the defendant(s)'s wilful misconduct or gross negligence, nor any plaintiff's harm shall be established (the burden of proof is thus lightened). When compensatory relief is instead sought, damages may be awarded only if homogeneous compensatory rights across the represented claims are proven. Standard burden of the proof requirements apply. Besides damages, compensatory relief includes repair, replacement, price reduction, termination of the contract or reimbursement of the price paid. Representative Actions for damages follow the same rules on damage compensation devised by the (Private) Class Action.

Administrative Class Actions. Art. 1 of legislative Decree no. 198/2009 expressly provides that no damages can be awarded by the administrative court. The presiding administrative court may only enjoin the sued administration to fulfil certain obligations (a "facere" order is rendered, unless the petition is rejected).

G. SETTLEMENTS AND FINANCING

(Private) Class Actions. As to settlements, pursuant to Art. 840-*quaterdecies* of the Italian Code of Civil Procedure settlements may take place pending the proceedings following one of these two paths: (i) the court may submit a settlement proposal (subject to comments and amendments) to the parties, which is published on the website and delivered to the members of the class, who may ultimately decide to adhere or not; and (ii) the class representative may seek a settlement agreement further to the rendering of the decision on the merits, subject to the final approval of the delegated judge. As to financing, (Private) Class Actions may benefit from certain direct and indirect financial incentives to lower costs for plaintiffs in order to make this tool accessible, such as incentives for the plaintiff lawyers and for the class representative, including awards on legal fees proportional to the total aggregate damages established in favor of the class members.

Representative Actions. As to settlements, pursuant to Art. 140-*decies* of the Italian Consumer Code, when compensatory relief is sought representative bodies and the sued professionals may, spontaneously or upon invitation of the Court, reach a settlement agreement, which the concerned consumers are free to accept or not. The settlement agreement, which shall be published on the electronic services portal of the Ministry of Justice, will become effective only for those consumers who have joined the Representative Action for compensation once declared admissible and expressly declare to adhere to such settlement. In this context, Art. 840-*quaterdecies* of the Italian Code of Civil Procedure applies to the extent compatible with Representative Actions. As to financing, third-party funding is expressly contemplated and subject to specific disclosure obligations.

Administrative Class Actions. The potential plaintiff can decide, in place of filing the lawsuit, to seek a settlement with the public administration by submitting a formal request. The settlement agreement must be reached within 30 days of such request.

H. OTHER KEY CLASS ACTION ISSUES

Italian class actions stand on nearly two decades of court precedents and experience. Introduced for the first time in 2009, the applicable legal framework has been revised, if not overhauled, several times, at times further to EU inputs, at time addressing domestic needs. This ever-evolving approach aiming at perfecting the class action legal regime has awarded Italy the title of "frontrunner" in the (relatively young) EU collective redress panorama. To date, Italy indeed offers a very sophisticated, accessible, and multilayered class action system.

The numbers provide clarity on the evolution of the Italian class actions path.

Under the Surviving Old Regime, out of the 79 class actions filed over 10 years, only 25 met the admissibility threshold, of which only 5 resulted in an award of damages. These numbers are indicative of the initial lukewarm interest collective redress raised in Italy when first introduced, the relative inexperience of courts, practitioners and right-holders in this field, and the relative ineffectiveness of the procedural tools available.

The (Private) Class Action effective from 2021 has originated at least 13 purely domestic cases in two years only and many are underway as the main consumers associations, such as Altroconsumo and Codacons, are aggressively pitching initiatives.

Bearing in mind that the Surviving Old Regime still applies to pursue unlawful conducts which took place before the entry into force of the (Private) Class Action in 2021, the official numbers available (under revision by the Ministry of Justice) concerning the (Private) Class Action are encouraging and evidence an increasing interest in collective redress. With the increasing interest the stakes become higher and higher, including considering that opt-in rights further to the decision on the merits may make prediction on damage exposure extremely challenging. This may ultimately encourage settlements.

No official data is instead available at this stage on commenced Representative Actions (domestic or cross-border) since they were introduced only at the end of June 2023. Yet, there is turmoil in Italy and across the EU in this respect as many national and European associations are promoting actions. For instance, the association ALI is promoting a Representative Action in Spain in order to seek damages arising from a cardboard cartel for industrial packaging found by the Italian Antitrust Authority and judicially confirmed.

Game on!

ENDNOTES

1 Law no. 31 dated April 12, 2019, introducing a new framework for class actions, i.e., the (Private) Class Action, by adding Title VIII-*bis*, named "On collective proceedings," to the Italian Civil Procedure Code, which comprises the legal provisions from Art. 840-*bis* to art. 840-*sexiesdecies*.

2 Conducts occurred before May 19, 2021, ("*Cut-Off Date 1*") may instead be pursued under the former class action governed by Article 140-*bis* of the Italian Consumer Code, which was first introduced in the Italian legal system by the Italian Budget Law no. 244 dated December 24, 2007, supplementing the Legislative Decree no. 206/2005 or Italian Consumer Code, as later amended and supplemented (several times) ("*Surviving Old Regime*"). To the extent the applicable statute of limitations for violations occurred before May 19, 2021, runs, the Surviving Old Regime, albeit formally repealed, will survive and apply. Disputes as to applicable law for conducts that occurred across the Cut-Off-Date 1 are thus expected. For an overview of the Surviving Old Regime we refer you back to our former class actions publications.

3 Legislative Decree no. 28/2023 transposing the EU Directive 2020/1828 on representative actions, amending the Italian Consumer Code.

4 It is debated whether conducts occurred before June 25, 2023, ("*Cut-Off Date 2*") may be pursued under the Surviving Old Regime or if they can be pursed at all under the Representative Actions regime.

5 Legislative Decree no. 198/2009, as amended and supplemented from time to time.

Spain

Section Authors

Antonio Canales • Mercedes Fernández

A. BRIEF OVERVIEW AND HISTORY

In Spain, there are no class actions as such, but there are mechanisms that expand legal standing to non-damaged third parties or groups of affected people. Law 1/2000, of January 7, on Civil Procedure (the "LCP"), which entered into force on January 8, 2001, introduced these mechanisms for the first time. We refer to these mechanisms here as "Collective Actions."

To date, parties' use of Collective Actions in Spain has been limited. In the last few years, however, a number of local law firms have begun to specialize in claims representing consumers in similar cases, including with respect to certain financial products issued by savings banks. These claims are contingency fee based. And while claimants in these cases are not using Collective Actions *per se* (but rather suing on an individual basis), the local law firms filing the cases appear to be seeking new types of cases for use of Collective Actions.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Collective Actions are available in civil lawsuits related to the rights of consumers of products and users of services (Spanish law makes this distinction, but we refer to both of them as "consumers"). A consumer uses a product or service for his or her private consumption, as opposed to business or economic activities.

Although certain groups and associations have legal standing to initiate other types of actions affecting the rights of groups of people (e.g., contentious administrative challenges in the context of environmental matters), Collective Actions are most similar to class actions and are, accordingly, discussed here.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

The regulation of the Collective Actions is certainly limited, since it does not include, for example, the requirements that this action must meet in order to be admitted for processing. However, it can be said that collective actions are available in the following circumstances:

- When the same harmful event injures a group of identified or easily identifiable consumers: (i) a consumer association (these entities have to meet certain legal requirements and be included in an official registry) can bring a Collective Action; as can (ii) a legally incorporated entity that has as its purpose the defense of such group; and (iii) groups of affected consumers, even if they do not have a separate legal personality, provided they evidence that the group represents the majority of the affected consumers;

- When a harmful event injures a group of non-identified consumers, or it is difficult to identify injured consumers, legal standing to bring Collective Actions belongs to representative consumer associations, according to defined criteria;
- In the context of the legislation on general terms and conditions of contracts, associations of businessmen, professionals or farmers, Official Chambers of Commerce, and administrative bodies dedicated to the protection of consumption can bring Collective Actions;
- The Public Prosecutor has standing to bring any Collective Action; and
- Entities authorized by EU legislation can bring actions requiring the cessation of infringing conduct in a number of matters, such as misleading advertising, contracts negotiated away from business premises, consumer credit, unfair terms in consumer contracts, etc. (this provision transposes Directive 98/27/EC, of May 19, 1998, on injunctions for the protection of consumers' interests).

D. KEY PROCEDURAL REQUIREMENTS

For a group of affected people to be a party in a Collective Action, the group must show that it represents the majority of the affected individuals. The person acting on behalf of the group must show that the group elected him or her for such purpose. The LCP does not establish any specific requirements for selection or identification of the Collective Action representatives. When a consumer association brings a Collective Action, the bylaws of the relevant association define the representatives before the court.

E. BINDING OTHERS

The final judgment in a Collective Action binds non-parties holding the rights that have been adjudicated in the Collective Action. This means that the final judgment has *res judicata* effect for non-parties, and they cannot bring second proceedings on the same subject matter against the same defendant.

Although certain groups and associations have legal standing to initiate other types of actions affecting the rights of groups of people (e.g., contentious administrative challenges in the context of environmental matters), Collective Actions are most similar to class actions.

When a Collective Action claim is filed, the court publishes the initiation of the proceedings in the media widely followed in the territory where the damage or breach of rights took place. The court also communicates the initiation of the proceedings to the Public Prosecutor to consider if it should become a party to the proceedings.

In cases involving a group of identified or easily identifiable consumers, the claimant must have previously communicated its intent to file the claim to all of the affected consumers who can then choose to participate in the case. The consumer can opt in to the proceedings at any time, but can only take part in procedural acts that have not been precluded.

In cases involving a group of non-identified or difficult to identify consumers, the procedure differs. The claimant publishes the initiation of proceedings, and the court suspends the case for up to two months to give the affected individuals the chance to appear as a party in the proceedings. Once the relevant term has expired, the court cannot accept new individuals as parties.

For those cases initiated by a consumer association, the judgment must determine, if possible, the individual consumers that may benefit from it. Where it is not possible to identify all of the potential individual beneficiaries, the judgment sets forth the requirements that a consumer must meet to benefit from the judgment. Those individuals who believe that they meet the requirements can ask the court to recognize them, and after hearing from the respondent, the court decides whether to accept the applicant's position. To the extent the court agrees with the applicant, it issues an order that constitutes valid title to initiate enforcement proceedings against the respondent.

The Public Prosecutor may also initiate the enforcement proceedings for the benefit of an affected group of consumers.

F. REMEDIES AVAILABLE

Available remedies in Collective Actions include both damages and declaratory or injunctive relief. Damages compensate the claimants for harm suffered, including loss of profit and non-material damages (i.e., damages for pain), but claimants must prove entitlement to relief.

No punitive damages exist under Spanish law. The court can also order cessation or prohibition of unlawful acts or conduct for claims based on consumer rights, and in certain cases, the court can require that the parties publish the judgment in the media.

G. SETTLEMENTS AND FINANCING

There are no specific rules governing the settlement of Collective Actions in Spain, and the general rules of contract law govern settlements. Settlements are available at any point during, or even after, the proceedings. It is possible, but not necessary, for the court to approve a settlement—although a settlement agreement approved by the court allows a party to initiate enforcement proceedings. Courts approve settlement agreements except in cases of a legal prohibition (i.e., when the law establishes limitations for reasons of general interest or the benefit of a third party).

Contingency fee arrangements are permitted for Collective Actions.

Thus far, there is no legislation about third-party funding of Collective Actions, but taking into account that third-party funding is on a trajectory of significant growth, this practice likely will end up being regulated and admitted, as long as it does not represent or give rise to any conflict of interest.

H. OTHER KEY CLASS ACTION ISSUES

With the publication of the EU of the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers, which had to be transposed by the Member States no later than December 25, 2022, the Spanish national regulation will be reshaped. According to the Directive (EU) 2020/1828, the national regulations resulting from the transposition must enter into force as of June 25, 2023.

No punitive damages exist under Spanish law. The court can also order cessation or prohibition of unlawful acts or conduct for claims based on consumer rights, and in certain cases, the court can require that the parties publish the judgment in the media.

On December 20, 2022, the Spanish Government approved and published the content of the Preliminary Draft Law on representative actions for the protection of the collective interests of consumers (the "Preliminary Draft Law"). Although the Spanish legal system already foresees the possibility of filing Collective Actions in consumer matters, the Preliminary Draft Law seeks to address the difficulties and deficiencies of the current regulations by providing a more robust framework for collective protection. This Preliminary Draft Law seeks to configure collective protection as an authentic special protection by introducing a number of key provisions and mechanisms that will enhance the ability of consumers to defend their collective interests.

I. CLASS ACTIONS ARISING FROM COVID-19

Due to the COVID-19 pandemic, some platforms of affected persons and groups were created with the intention of offering advice for those who have or might have suffered any problem directly or indirectly caused by this situation and, specifically, not also offering and giving information, but analyzing measures and establishing lines of action and responsibility at an individual and collective level.

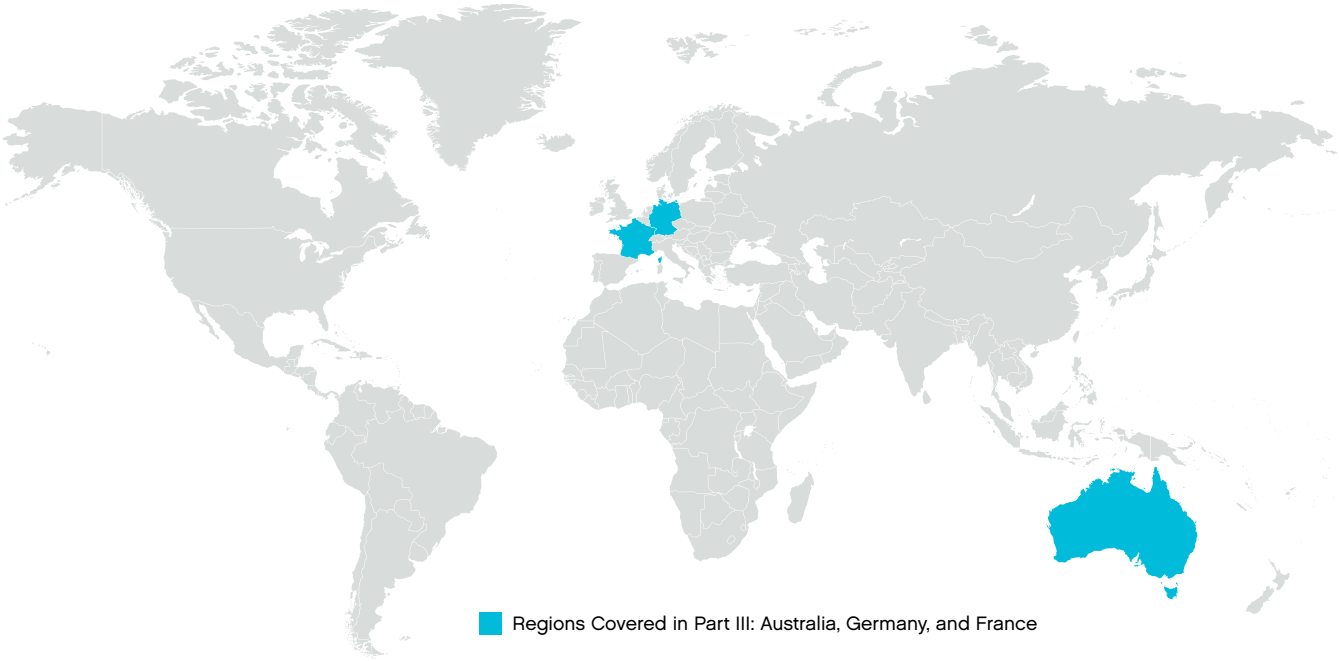
Collective Actions have been filed in a few areas, such as employment claims (on the occasion of the temporary suspension of the work contracts of those companies affected by some financial or productive contingence), or government entities (facing the risks and the failure to guarantee the health of the citizens, claims for property damage liability against the State for those affected by the State of Alarm and having treated patients without adequate means and having agreed on erroneous health action protocols).

Part III: Australia, Germany, and France

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures— sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

In Part III, we examine class actions activities in Australia, Germany, and France. Class actions have existed at the federal level in Australia since 1992, and most of the Australian States now have class action regimes of their own. For most claims in Germany, each plaintiff must file his or her own case, but there also are five types of German collective proceedings. In France, while the regime of class action is already quite comprehensive compared to other EU Member States, it has not yet gained significant traction in the French litigation landscape.

Class Actions Jurisdictions



Australia

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A. BRIEF OVERVIEW AND HISTORY

Class actions at the federal level have existed in Australia since March 4, 1992, when the *Federal Court of Australia Amendment Act 1991* (Cth) took effect by adding Part IVA to the *Federal Court of Australia Act 1976* (Cth). In addition, most of the Australian States now have their own class action regimes. In Victoria, a procedure for "group proceedings" in Part 4A to the *Supreme Court Act 1986* (Vic) became effective as of January 1, 2000, through the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic). In New South Wales, the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) added Part 10 to the *Civil Procedure Act 2005* (NSW) so as to make "representative proceedings" available in NSW courts after March 4, 2011. In Queensland, Part 13A was inserted into the *Civil Proceedings Act 2011* (Qld) so as to make "representative proceedings" available from March 1, 2017. Tasmania added "representative proceedings" through Part VII to the *Supreme Court Civil Procedure Act 1932* (Tas), which took effect from September 9, 2019. Most recently, Western Australia enacted the *Civil Procedure (Representative Proceedings) Act 2022* (WA), which commenced in full on March 25, 2023.

From March 4, 1992, through May 31, 2017, claimants filed 513 class actions in relation to 335 disputes. On average this means 20 class actions are commenced every 12 months, but this understates the current filing frequency as class actions are being brought more frequently today than when they first became available.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Class actions can be used in all areas of law provided legislative requirements are met, and overseas claims and precedents have driven product liability and cartel class actions in Australia.

Key claims include:

- Class actions relating to climate change and ESG issues. Recent filings include two actions against the Australian Federal Government in relation to the alleged impacts of climate change on Australian island territories and Australian children.
- Class actions relating to cybersecurity and data privacy issues.
- Shareholder class actions based on disclosure obligations and other securities issues. From the time periods 1992–2004 to 2005–2017, shareholder class actions went from representing 5% to 23% of all filed class action proceedings,

and this remains a highly active space. The largest recovery to date was AU$200M. Total settlements in shareholder class actions since 2003 run into the billions of dollars.

- Investment and property schemes class actions including *Lehman Brothers Australia*, a case which held an investment bank liable for collateralized debt obligations ("CDOs") and cases against credit rating agencies in relation to their rating of complex financial products.
- Product liability claims involving pacemakers, Fen-Phen diet drugs, Vioxx, hip replacement products, and various other pharmaceutical products and medical devices.
- Cartel class actions involving vitamins, rubber, and air cargo markets. The largest recovery to date was AU$120M.
- Employee claims, which are predominantly wage underpayment claims.
- Consumer class actions in relation to financial products, including claims alleging that bank fees were a penalty and unfair or unconscionable contracts and more recently in relation to cryptocurrency.
- Consumer class actions involving alleged defective emissions devices in vehicles, some of which recently settled for AU$120M.
- Consumer class actions against law firms, brokerage fees, and pain relief products.
- Environmental claims dealing with floods and bushfires (including the East Kilmore fire that settled for AU$494M). Recently, the Queensland floods class action was settled for AU$440M.
- Class actions against the federal and State governments.
- Class actions brought by overseas plaintiffs, including Indonesian farmers whose crops were damaged by an oil spill against the Australian subsidiary of a Thai company, and Indian investors who lost money in a Ponzi scheme that had some funds traceable to an Australian company.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Any person can represent the class provided they are a member of the class and have a sufficient interest to commence a proceeding. Notably, the High Court of Australia has also recently confirmed that class actions can be brought on behalf of group members residing outside of Australia, as well as Australian residents. The Supreme Court of Victoria also has found that it has jurisdiction to hear foreign (New Zealand) securities law claims and the power to award compensation.

Outside of the USA, the statistics suggest that the place a company is most likely to be sued in class action litigation is Australia. Further, a recent High Court of Australia ruling has confirmed that plaintiffs in Australian class actions can bring proceedings on behalf of class members residing in other jurisdictions.

D. KEY PROCEDURAL REQUIREMENTS

Section 33C(1) of the *Federal Court of Australia Act 1976* (Cth) defines the requirements for commencing a federal class action. The section provides that:

- Where seven or more persons have claims against the same person;
- The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- The claims of all those persons give rise to a substantial common issue of law or fact; and
- A proceeding may be commenced by one or more of those persons as representing some or all of them.

There are similar requirements for State-based class actions.

An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required, describe or otherwise identify the group members to whom the proceeding relates, specify the nature of the claims made on behalf of the group members and the relief claimed, and specify the questions of law or fact common to the claims of the group members.

A class action may be discontinued by the court on its own motion or application of the defendant "where it is in the interests of justice to do so" because:

- The costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding;
- All of the relief sought can be obtained by means of a proceeding other than a representative proceeding;
- The representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- It is otherwise inappropriate that the claims be pursued through a representative proceeding.

Therefore, even when the threshold requirements of a representative proceeding are met, a court may still use its discretion to order the discontinuance of a representative proceeding.

There is no certification requirement in the Australian class action regime. The plaintiff does not have to satisfy a court that the proceedings conform with the requirements for commencement of a class action. The plaintiff instead commences the class action in the same manner as other litigation, i.e., filing of the originating process with the court and service on the defendant. The defendant must then approach the court on an interlocutory motion to challenge compliance with procedural requirements and/or seek discontinuance of the class action for one of the reasons set forth above.

E. BINDING OTHERS

Section 33ZB of the *Federal Court of Australia Act 1976* (Cth) provides that a judgment in a representative proceeding binds all group members who have not opted out under section 33J. If notice is required, it is provided under section 33X, and then section 33J, in turn, allows group members to opt out if they do not want to be part of the proceedings. There are similar provisions in the State-based class action legislation.

Australian courts have also allowed the use of a "closed" class. A "closed" class representative proceeding involves group members defined, not just by being a member of the group claiming the right to a remedy, but also by some additional limiting characteristic, such as having entered into a funding agreement with a litigation funder or a retainer with a particular law firm. The Full Court of the Federal Court of Australia in the *Multiplex* class action approved this procedure, holding that section 33C(1) permits a representative party to commence a proceeding where they represent "some or all" of the group members. The right to opt out must be maintained, however, and the group cannot allow putative group members to opt into the proceedings once they have been commenced.

With the court's acceptance of a "closed" class, courts now refer to the traditional opt-out class action as an "open" class action.

F. REMEDIES AVAILABLE

The substantive cause of action defines the remedies available in an Australian class action. However, in contrast to U.S.-style class actions, a single representative action can proceed, even where class members claim different remedies. Even if they must be separately assessed for each individual group member, class action plaintiffs can pursue damages awards. The court can even award damages at an aggregate level without specifying the amounts to be awarded to individual group members, but only when a reasonably accurate assessment of damages is possible.

Australian law recognizes exemplary damages—the equivalent of U.S. punitive damages. However, Australian courts rarely award exemplary damages, and such awards tend to be for small amounts.

Parties can seek injunctive or declaratory relief through the class action mechanism, consistent with the equity powers or statutory authority of the court.

G. SETTLEMENTS AND FINANCING

Section 33V(1) of the *Federal Court of Australia Act 1976* (Cth), and the equivalent provision in the State-based regimes, provides that: "A representative proceeding may not be settled or discontinued without the approval of the Court." The parties accordingly must persuade the court that:

- A proposed settlement is fair and reasonable with regard to the claims and members who will be bound by the settlement; and
- A proposed settlement is in the interests of group members, not just the applicant and the respondent(s).

A representative party in an Australian class action has two costs exposures: (1) the cost of the lawyer acting for the class; and (2) the risk of being liable for the defendant's costs if the class action is unsuccessful.

Australian lawyers often take cases on a conditional or "no-win no-fee" basis and, if they are successful, charge their base rate multiplied by some factor or a specified additional amount up to a maximum of 25% of the base rate. Fee arrangements between lawyers and clients are less permissive in Australia than in the United States, however, and in most Australian jurisdictions fees cannot be set as a percentage of the client's recovery (i.e., contingency fees). However, in 2020, one State of Australia, Victoria, amended its class action legislation to provide for "group costs orders"—effectively, contingency fee arrangements—in class actions. The amendment provides a court with power to order that the legal costs payable to the plaintiff's lawyers be a percentage of the amount recovered in the proceedings; and the plaintiff and group members share liability for those legal costs. The court can only make the order if it is satisfied that it is "appropriate or necessary to ensure justice is done in the proceeding".

The losing party usually pays the other side's costs in Australian litigation, albeit only a portion of the costs actually incurred. This is referred to as "loser pays" or "costs follow the event" and is usually given effect through an adverse cost order. It follows that a successful litigant will recover most of the costs of the litigation. In class actions, however, the costs rule applies to the representative party only and not to group members. Nonetheless, a claimant may hesitate to take on the role of representative party due to the potential liability. The Victorian amendment for "group costs orders" also impacts the liability to pay an opponent's costs as it provides that the lawyer agree to be liable for the costs of the defendant if the case fails.

Since about 2005/2006, third-party litigation funding has supported Australian class actions. By contract, the funder pays the costs of the litigation (such as the lawyer's fees, disbursements, project management, and claim investigation costs) and accepts the risk of paying the other party's costs in the event that the claim fails. In return, if the claim is successful, the funder receives a percentage of any funds recovered and the benefit of any adverse costs order. The agreed share for the third-party financier is typically between 15% 40% of the proceeds (usually after reimbursement of costs). Regulation of litigation funding has vacillated. At present, minimum regulation applies to litigation funders in Australia, with oversight largely left to the courts.

The opt-out class action created a free-rider problem for litigation funders as group members who had not contracted to pay a fee to the funder were able to still participate in the class action. Litigation funders first addressed this through the "closed" class described above. However, an alternative approach has been to seek a court order that all group members, regardless of contractual obligation, pay a share of the funding fee, referred to as a common fund order. The power of the court to make such an order at commencement of the class action was denied by the High Court of Australia. However, at present it is accepted that power exists to make a common fund order at settlement. The ability of the funder to get paid has become a key driver of whether, and how, litigation funding is provided for class action.

H. OTHER KEY CLASS ACTION ISSUES

Class action procedures have continued to develop in the shadow of the High Court of Australia decisions in *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574 and *Wigmans v AMP Limited* [2021] HCA 7; 270 CLR 623. Class closure orders (requiring group members to register, with various incentives to do so, such as being unable to participate in a settlement if there is no registration) are a key step in identifying group members, quantifying claims for compensation and achieving finality. However, there has been a split between two of Australia's main class action jurisdictions as to when an order may be made and when notice of an intention to seek such an order may occur—the Supreme Court of NSW (neither class closure orders nor notice of an intention to pursue such orders permitted prior to settlement) and the Federal Court of Australia (notice of the intention to seek class closure orders may be given prior to settlement).

The substantive cause of action defines the remedies available in an Australian class action. However, in contrast to U.S.-style class actions, a single representative action can proceed, even where class members claim different remedies.

Competing class actions have increased in Australia with the result that an additional procedural step has arisen where carriage of the class action must be determined. The High Court of Australia has endorsed a multifactorial approach to resolve the problem of multiplicity. However, the major driving factors are the representative parties' funding proposals and what is in the best interest of group members. Competing class actions may see all but one proceeding stayed or proceedings consolidated. There have also been instances where the issue has been dealt with through group definition so that one class action was "closed" and brought on behalf of a defined group, and another was "open" to all other group members. Competing class actions may also be allowed to continue together. As a result, there is uncertainty as to how competing class actions may be addressed.

Class action waivers (contractually agreeing not to be part of a class action), a staple of the U.S. system, have been considered by the High Court of Australia in the context of a U.S contract entered into by a Canadian resident (as representative of a U.S. subgroup) for a cruise departing from Sydney, Australia, and operated by a corporation carrying on business within Australia. The waiver clause was held to be void as it met the definition of an unfair contract term pursuant to the Australian Consumer Law, which had extra-territorial effect in the circumstances. Further, the clause granting exclusive jurisdiction to a U.S. court was not to be enforced because the waiver clause was an unfair term, enforcing the exclusive jurisdiction clause would fracture the litigation with some claims in the United States and some in Australia, and the U.S. subgroup would be deprived of the juridical advantage of an Australian class action.

The Australian Parliament has conferred powers on the Federal Court of Australia to award damages in an aggregate amount or lump sum in the original class action legislation. However, the power has rarely been used until recently when it was employed in motor vehicle class actions based on a failure to comply with consumer protection legislation. The award was for a reduction in value of motor vehicles and estimated at AU$2B. However, on appeal, the approach to the calculation of the reduction in value was overturned and as a consequence the orders for aggregate damages were set aside. The judgment has been appealed to the High Court of Australia. The use of aggregate damages awards has the potential to result in very large compensations sums based on streamlined proof of damages—thus adding to class action risk presented for companies by the Australian regime.

Germany

Section Author:
Dr. Dieter Strubenhoff

A. BRIEF OVERVIEW AND HISTORY

Class actions per se are not part of the German system. Consequently, for most claims, each plaintiff must file his or her own case. There are, however, five types of German collective proceedings that parties can pursue.

First, in 2005, Germany enacted the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*, or *KapMuG*), which permits investors to have certain issues in securities and investment cases decided collectively. Under the *KapMuG*, any plaintiff or defendant may apply to the trial court for issues to be decided collectively in a model case. If at least 10 applications relating to similar issues are filed, the trial court will certify a model case and refer it to the appellate court. The appellate court then appoints a model plaintiff from among the applicants and conducts proceedings in the model case until it reaches a final judgment. The judgment binds plaintiffs who filed the request for model case treatment, but has no effect on other plaintiffs. Once the appellate court issues the judgment, the cases return to the trial court to decide remaining individual issues. One example of such a *KapMuG* case is litigation against Deutsche Telekom AG alleging a misleading prospectus due to an overvaluation of its real estate portfolio. Another example is a case against Volkswagen AG alleging securities fraud as a result of defective devices in its cars. The Capital Markets Model Case Act expires on August 31, 2024, and is to be comprehensively reformed by then. A draft proposal is not yet available.

Outside the securities context, consumer and commercial associations can seek injunctive relief on behalf of their members. In 2002, Germany enacted the Injunction Act (*Unterlassungsklagengesetz*, or *UKlaG)*, which reaffirmed this practice and permitted qualified consumer associations to seek injunctive relief with respect to all consumer interests. The *UKlaG*, therefore, provides associations with standing to sue and does not introduce class actions in Germany. Some German antitrust and environmental laws also permit certain interest groups to sue for injunctive relief. These association-initiated complaints are relatively common, particularly in unfair competition suits and challenges to unfair standard contract terms. In 2014, for example, the largest commercial association, the *Wettbewerbszentrale*, brought more than 600 actions. In December 2015, Germany passed a new law extending these injunctive procedures to data privacy cases. In October 2023, the legislator extended the scope of application to include many other cross-sector, consumer protection laws from European and national legislation.

A combination of the above-mentioned collective proceedings was enacted in November 2018 and added to the Code of German Civil Procedure (*Zivilprozessordnung* or *ZPO*), the so-called *Model Declaratory Action* ("MDA" or

Musterfeststellungsklage). It was introduced to facilitate claims of consumers against businesses. By way of such an action, certain factual or legal preconditions of consumer claims against businesses can be determined in a binding manner in a single procedure for a large number of affected consumers. Similar to the *UKlaG*, the *MDA* only provides qualified associations with right to sue. A popular example is the already mentioned Diesel complex against Volkswagen AG. In these proceedings, consumers claimed damages for allegedly manipulated cars, and qualified associations filed a MDA in order to clarify key aspects of these cases.

In addition to these formal collective procedures, some plaintiffs have created a synthetic class action, whereby class members assign their cases to a single litigation entity, which then brings an individual claim and distributes the proceeds back to the class members.

The German legislature implemented the abovementioned Directive EU 2020/1828 with the Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz* or *VDuG)* in addition to several amendments to existing laws on October 13, 2023, into German national law. The VDuG introduces a new representative redress action (*"RA"* or *Abhilfeklage*) alongside the abovementioned *MDA*. In addition, the *MDA* is no longer regulated in the *ZPO* but, like the *Redress Action,* with some adjustments in the new VDuG. With the consolidation of both types of actions into the new VDuG, the same basic requirements apply for both proceedings: Only qualified (consumer) associations are granted with right to sue and at least 50 consumers must be concerned. Both actions cover all civil law disputes with regard to claims and legal relationships of consumers against companies. With the help of the new *RA*, consumer associations can sue directly for the fulfillment of consumer claims. Previously, the model declaratory action could be used to determine the essential requirements of the claim in a binding manner, but the requested redress then had to be claimed again in separate proceedings unless a settlement agreement is reached.

In addition to these formal collective procedures, some plaintiffs have created a synthetic class action, whereby class members assign their cases to a single litigation entity, which then brings an individual claim and distributes the proceeds back to the class members. For example, in 2005, 36 companies allegedly injured by a cement cartel assigned their claims to Cartel Damage Claims ("CDC"), a Belgian company. CDC then sued the alleged cement cartel. In 2013, the German Federal Supreme Court ruled that such assignments were valid generally. However, in 2015, the appellate court in Düsseldorf ruled that CDC was not a proper plaintiff because it was not adequately funded and therefore would be unable to pay attorneys' fees under Germany's loser-pays system if it lost the case. Another example of recruiting plaintiffs and raising assigned claims for a synthetic class action is the platform www.myright.de ("MyRight"), which was created to collect consumer claims against Volkswagen alleging defects in emission devices.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The *KapMuG* is limited to securities cases. These cases may include both securities fraud cases and certain breach of contract cases regarding acquisition and takeover offers. They require at least 10 investors who believe that they have been misled in connection with an investment to file suit collectively. Associations may seek injunctive relief under the Injunction Act in consumer protection (including financial consumer protection), unfair competition, antitrust, and environmental cases.

The *Model Declaratory Action* and the *Redress Action* can be applied more broadly on any civil law disputes. It is available for any consumer actions against a business, whereby small companies are considered consumers if they employ fewer than 10 people and their annual turnover or balance does not exceed 2 million EUR. Only qualified consumer associations may bring the action. Furthermore, the qualified association has to demonstrate reasonably that claims or legal relationships of at least 50 consumers may be affected (in case of the *Redress Action*) or be dependent on the declaratory objectives (in case of the *Model Declaratory Action*). Providing full evidence of being affected or dependent is not necessary.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

The *KapMuG* does not place limitations on class representation, but instead allows any plaintiff or defendant to initiate model proceedings. Once model proceedings begin, the appellate court appoints a model plaintiff from among the plaintiffs who applied. In doing so, the appellate court generally chooses a model plaintiff with a larger claim and more representative issues, and will also give weight to the plaintiffs' own agreements as to who should be the model plaintiff.

Only German commercial or consumer associations registered with the German Federal Office for Justice, or non-German associations registered with the European Commission, may file injunctive collective actions. Many of the German associations are government-funded.

The same applies to the qualified associations that may file a *Model Declaratory Action* or a *Redress Action*. They need to be registered either with the German Federal Office for Justice or the European Commission. In addition, consumer associations registered in Germany have no standing to sue if they receive more than 5% of their funding from companies.

There are no clear requirements to be a proper litigation entity for a synthetic class action, except that the litigation entity must be properly funded so that it is able to reimburse defendants for all of their compensable litigation costs and attorneys' fees if it loses the case. In the case of MyRight, the allegedly affected car owners assigned their claims to MyRight thereby giving the organization standing to sue.

D. KEY PROCEDURAL REQUIREMENTS

The *KapMuG* has minimal requirements for certifying a model case. A plaintiff or defendant need only show that the issues to be certified are significant in other cases as well. In addition, a trial court decision to certify a model case cannot be appealed, but a decision refusing to certify a model case can be appealed.

When originally enacted, the *KapMuG* permitted parties to apply for model case treatment only after they were already in individual disputes. Reforms passed in 2012, however, now permit investors to register their claims and apply for model case treatment before deciding whether to bring their claims.

The basic requirements for the admissibility of the *Model Declaratory Action* and *Redress Action* are: (i) that it is brought by a qualified association; and (ii) that it is reasonably shown to the satisfaction of the court that claims or legal relationships of at least 50 consumers may be affected or be dependent on the declaratory objectives. The *Redress Action* is further subject to the requirement that the claims covered by the action must be materially similar in the sense that the claims are based on the same facts, or on essentially comparable facts, and that legal issues are relevant for the outcome of the case.

E. BINDING OTHERS

Although the *KapMuG* was strictly opt-in at first, the 2012 reform now provides that the result in the model case binds all plaintiffs who have individual claims pending and do not opt-out. The model case results are still not binding on plaintiffs who had not filed individual claims at the time of the resolution.

A *Model Declaratory Judgment* does not award damages to the individual consumer, rather, it grants only a declaratory relief. This means that the findings of the judgment will be binding in any follow-on litigation of a consumer, who registered its claim up to three weeks after the end of the oral hearing of the proceedings. However, each consumer will still need to file a claim individually. The *Model Declaratory Judgment* will not bind consumers who did not register their claims.

In contrast, the new *Redress Action* grants the individual consumer compensation in different possible ways, if they have

registered their claims within the same period of time, i.e., up to three weeks after the end of the oral hearing of the proceedings: (i) If the filing consumer association knows the names of the affected consumers, the court can order the company to pay directly to the consumers; or (ii) If the association seeks compensation for consumers unknown at this moment, and only identified by common group characteristics, the court can award a collective total amount in the judgment and can determine the method according to which the individual amounts due to the respective consumers are to be distributed. This is followed by implementation proceedings, in which a trustee distributes the individual amounts to the relevant consumers. A judicial review on the trustee's decision or subsequent individual actions are possible if the trustee has rejected or disregarded the individual claim in the implementation procedure.

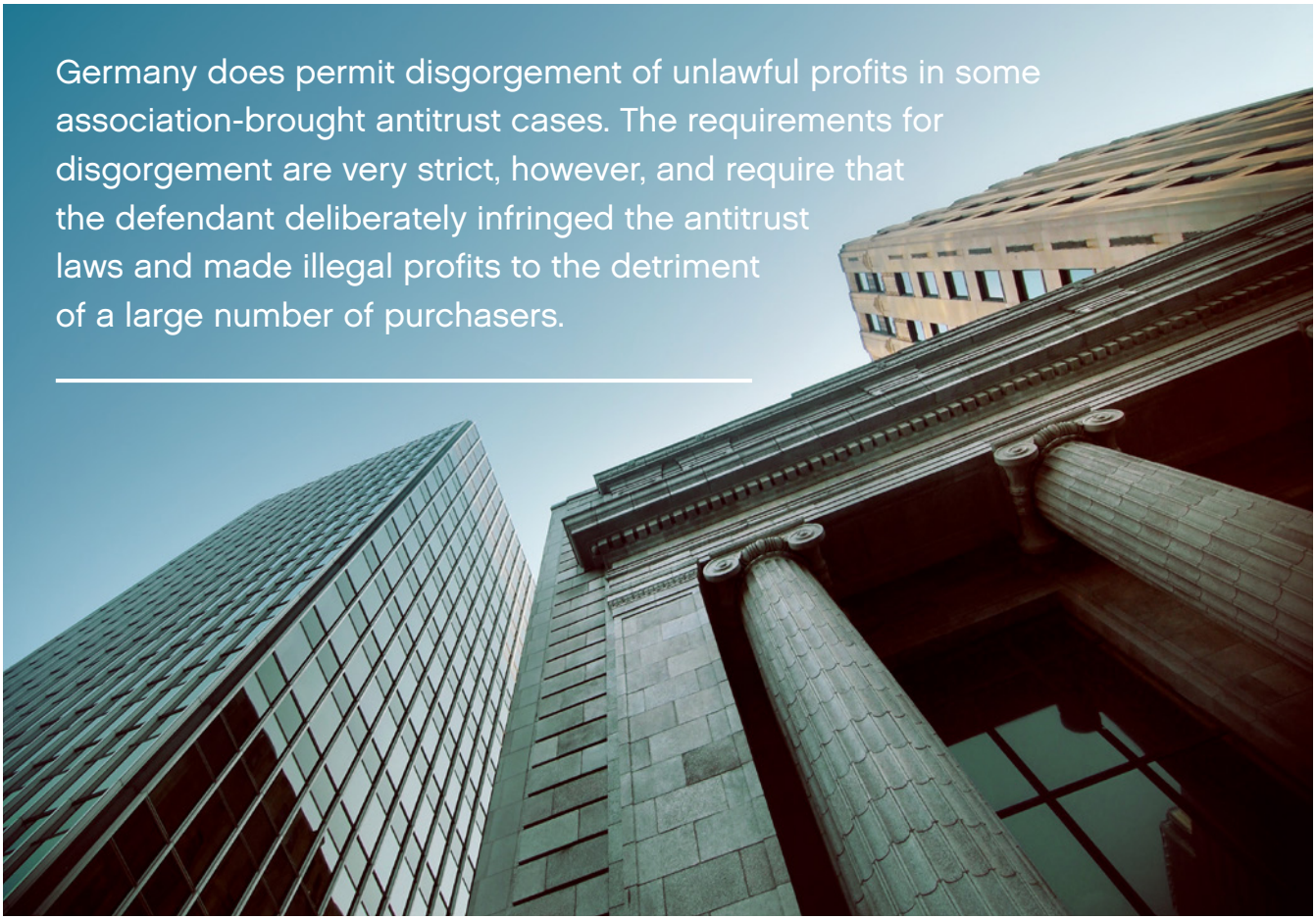
Synthetic class actions apply only to plaintiffs who assign their claims to a litigation entity.

F. REMEDIES AVAILABLE

The *KapMuG* permits recovery of damages, although the trial court ultimately awards these damages after the appellate court finishes adjudicating the model case.

With regard to the UKlaG, associations bringing claims are generally limited to injunctive relief, and the court order in such cases binds only the association and the defendant. Germany does permit disgorgement of unlawful profits in some association-brought antitrust cases. The requirements for disgorgement are very strict, however, and require that the defendant deliberately infringed the antitrust laws and made illegal profits to the detriment of a large number of purchasers. Additionally, the disgorged profits go to the German federal government rather than the association or individual victims.

After a *Model Declaratory Judgment,* the individual consumers need to bring their claims to seek recovery of damages. Thus, the trial court decides on the compensation after the court



finishes adjudicating the *Model Declaratory Case*. With the *Redress Action*, consumer associations can sue directly for the fulfillment of consumer claims.

G. SETTLEMENTS AND FINANCING

Under the *KapMuG*, all plaintiffs in a model case must consent to settle that case. Additionally, following the 2012 reforms, the appellate court must approve the settlement. Therefore, parties typically do not settle model cases. Once the model case is adjudicated, there are no special rules governing the settlement of remaining individual claims. There are also no special rules governing the settlement of association-brought complaints or synthetic class actions.

The qualified association can settle the *Model Declaratory Action* or *Redress Action* on behalf of registered consumers with the approval of the court. However, a registered consumer may opt out. If a particular consumer wishes to opt out, it must be done within a month after the settlement has been published in the register. If a consumer opts out, the settlement will not bind the particular consumer. If a valid agreement is reached, such a settlement usually contains not only the compensation to be paid by the respondent, but also an agreement on the allocation of costs between the parties.

Besides an agreement on the costs, the losing party typically pays the winner's attorneys' fees (calculated based on a statutory tariff), and a plaintiff seeking to bring these collective-style actions should be adequately capitalized to pay those fees in the event that it loses. To reduce the risk for model plaintiffs, the *KapMuG* provides that a prevailing defendant's attorneys' fees be apportioned among all the plaintiffs, not just the model plaintiff.

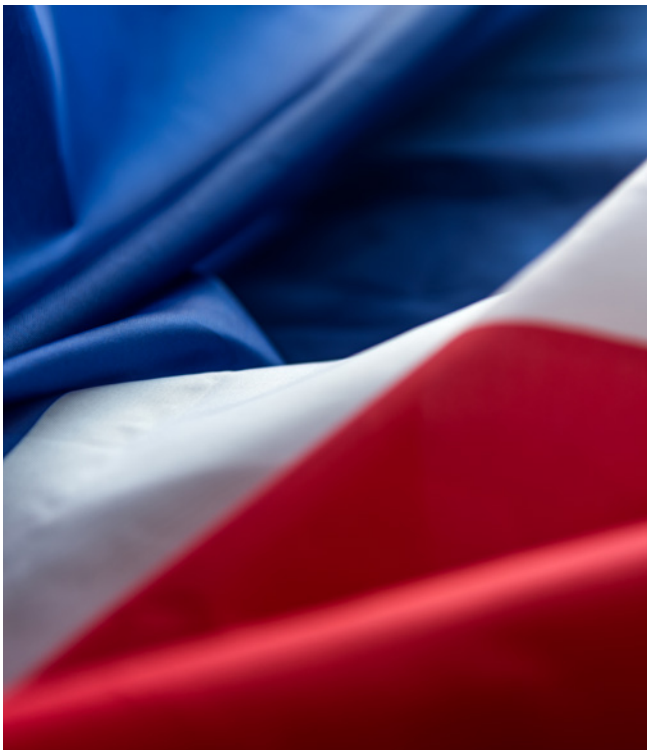
With regard to the *Model Declaratory Action* and *Redress Action*, litigation funding by third parties is subject to certain requirements permitted. It is inadmissible if: (i) the third party is a competitor of the defendant; (ii) the third party is dependent on the defendant; (iii) the litigation funder's agreed success fee exceeds 10% of the sum to be paid by the defendant; or 4) it is to be expected that the third party will influence the litigation of the qualified association to the detriment of the consumer.

In all other respects, contingency fee arrangements are allowed only for individual cases, and only if the client is subject to special circumstances that would prevent him or her from raising legal claims without the fee arrangement. In the case of MyRight, the affected car owners have executed a contingency fee agreement with MyRight, authorizing a success fee of 35%. Also, third-party funding is available.

H. OTHER KEY CLASS ACTION ISSUES

The German government originally enacted the *KapMuG* for a five-year trial period, but has now extended it to August 31, 2024. Germany, therefore, may enact more plaintiff-friendly procedures, especially regarding long proceeding durations, and expand in the scope of the *KapMuG* when it is up for renewal in 2024.

In March 2017, in response to the European Union Directive 2014/104/EU (the "Antitrust Damages Directive"), the German Parliament enacted a law making significant changes to its antitrust legislation. The amended law provides *inter alia* for stronger rights to demand document production from the plaintiff and creates more plaintiff-friendly presumptions such as the (refutable) presumption that a cartel caused damages. This bill is expected to make Germany a more attractive venue for additional synthetic antitrust class actions.



France

Section Author
Ozan Akyurek

A. BRIEF OVERVIEW AND HISTORY

After many years of debates, on March 17, 2014, France adopted a class action procedure statute (Law No. 2014-344) for consumer and competition claims. The enactment of this statute followed the European Commission's recommendation dated June 11, 2013, urging Member States to have redress mechanisms in their legislation to ensure effective access to justice.

In order to bring improvement to the mechanism, the scope of class action procedures has been gradually broadened to include disputes related to health, discrimination, environment, and protection of personal data (see. esp., Law No. 2016-1547 dated November 18, 2016).

Still, while the regime of class action is already quite comprehensive in France compared to other EU Member States, it has not yet gained significant traction in the French litigation landscape. To date, less than 40 class actions have been filed in France. The limited number of class actions filed so far has resulted in numerous calls for reform.

On March 8, 2023, the French National Assembly passed a bill aimed at harmonizing several procedural aspects, encouraging the initiation of proceedings, and serving as a transposition of the Directive EU 2020/1828 on Representative Actions (the "Directive on Representative Actions") (the "Bill"). Indeed, as part of the "New Deal for Consumers," a new Directive on Representative Actions was published on November 25, 2020, which had to be implemented by December 25, 2022. The Bill is currently awaiting approval by the French Senate.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The scope of class actions procedures has been gradually broadened and now covers the following fields, as provided by statutes:

- Consumer law;
- Discrimination;
- Environmental liability;
- Health product liability; and
- Protection of personal data.

Under French law, class actions procedures are currently aimed at: (i) compensating individuals which are in a similar or identical situation, caused by a failure of an entity to comply with its legal obligation(s); and (ii) putting an end to the breaches.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

In order to prevent abusive actions, French law limits the number and type of entities that may bring a class action.

With respect to consumer law, only duly certified associations for the defense of consumers, recognized as being representative at a national level, are entitled to bring class actions in France (Article L. 623-1 of the French Consumer Code). To date, there are 16 associations that can bring suit. (See the Minister of Economy website.) Hence, French lawyers are not entitled to bring such actions on behalf of consumers since they are not recognized as being representative of consumers' interests.

However, in some other fields, this principle has been altered so that more entities could bring class actions. For example, with respect to personal data protection, trade unions or associations that have been duly registered for five years and whose articles of association so provide, may bring a class action.

In addition, French law also provides for other types of collective actions:

- Actions for the joint representation of consumers. An authorized association may, if expressly mandated by at least two individuals who have suffered damage resulting from the same cause, bring an action on their behalf. Such actions are permissible in the areas of: consumer law (Article L.622-1 of the Consumer Code); investment law (Article L.452-2 of the Monetary and Financial Code); and environmental law (Article L.142-3 of the Environmental Code) but they are rarely used.
- Actions brought in the collective interests of consumers. Under Article L.621-1 of the Consumer Code, authorized consumer associations may take legal action to seek compensation for harm caused by a criminal offence to the collective interest of consumers. The harm for which the association seeks compensation must be caused to the "collective interest of consumers."

D. KEY PROCEDURAL REQUIREMENTS

There are general procedural rules that apply to class actions in France, keeping in mind that specific rules may apply depending on the ground on which the claim is brought.

Consumer law class actions in France follow a four-step procedure:

- The first judgment on liability. First, the court assesses whether the requirements for a class action have been met (i.e., whether the consumers are in the same or similar situation, have been harmed by the failure of the same professional to comply with its obligations and claim compensation for economic losses) and whether the defendant is liable.
- The opt-in phase. After ruling that the action is admissible, the court first defines the group of consumers towards whom the defendant is liable, then determines how the consumers who suffered a loss will be informed and eventually determines the loss that can be compensated for each consumer that constitutes the group. After the consumers entitled to do so have decided to join the group, the court will issue a judgement and set the quantum and nature of damages.
- The liquidation of the assessed loss. The consumer association will handle the transfer of the financial compensation awarded by the court through an escrow account.
- Possible second judgment on liquidation. A second judgment might be issued in case of any difficulties arising during the liquidation phase.

French law also provides for a simplified procedure, which is applicable when: (i) the identity and the number of affected consumers are known; and (ii) all the affected consumers suffered a loss of the same amount. In that case, the court can, after having ruled on the liability of the professional, compensate directly and individually the consumers.

In the event where a class action would fail, consumers may still seek individual redress.

E. BINDING OTHERS

The French class action system is an opt-in system, meaning that individuals who want to take part in the class action have to come forward to join the procedure. Consumers wishing to take part in the class action must express their willingness to do so (depending on the requirements set by the court, the consumers will either give their names to the accredited consumer association or to the designated entity).

The court determines how to inform potential consumers of its decision. Depending on the group size, on whether the consumers are identified or not, and on the defendant's financial means, the court will choose the more appropriate measure (e.g., the sending of a letter to each consumer, the publication in the press or on the internet). The court will also set a deadline to join the proceeding.

As a result of this opt-in system, non-parties cannot be bound by the court's final decision.

F. REMEDIES AVAILABLE

The French principle of full reparation of damages implies that the person responsible for the damage must compensate all the damage and only the damage, without impoverishing or enriching the victim. It is a principle of strict equivalence between the compensation and the damage.

Initially, class actions were only aimed at compensating material loss suffered by consumers.

With respect to consumer law, the Law adopted on March 17, 2014, only provides for the compensation of economic losses (and not non-pecuniary damages for moral or physical injuries) (Article L. 623-2 of the French Consumer Code).

However, the subsequent laws have increased the types of compensable injuries and remedies available. For example:

- With respect to health products or their application, claimants may recover damages for physical injuries;
- With respect to discrimination, claimants may recover damages for any loss suffered, moral or material;
- With respect to personal data protection, claimants may recover damages for moral or material losses.

As a general rule, damages are the main relief available, but injunctive relief can also be granted to stop misconduct in class actions related to environmental matters, discrimination, and breaches of personal data.

Punitive damages do not exist under French law but the unsuccessful party can be required to pay the costs and the legal fees incurred by the other party.

The French principle of full reparation of damages implies that the person responsible for the damage must compensate all the damage and only the damage, without impoverishing or enriching the victim.

G. SETTLEMENTS AND FINANCING

For consumer law claims, the association bringing the class action can participate in a mediation proceeding (Article L. 623-22 of the French Consumer Code). Any agreement reached on behalf of the group is subject to the approval of the court, which verifies whether the agreement is in the interest of said group. The agreement specifies the publicity measures required to inform concerned individuals of the possibility to opt-in, as well as the time limits to do so.

For now, there are no specific provisions regarding fee arrangements or third-party funding under French law. In practice, class actions are funded by the association bringing the claim. Under French regulations, attorneys' fees cannot be solely based on a contingency fee arrangement.

H. OTHER KEY CLASS ACTION ISSUES

Since their implementation into the French legislation, class actions have not had the impact some might have hoped. Most practitioners, commentators, and lawmakers have pointed out the low success rate of class action proceedings in France, particularly due to the lack of financial incentives.

Most practitioners, commentators, and lawmakers have pointed out the low success rate of class action proceedings in France, particularly due to the lack of financial incentives.

On June 11, 2020, the French Parliament published an "information report," listing 13 propositions to reform and improve the class action procedural framework. In particular, the Parliament suggests:

- To establish a common framework for all class action proceedings in civil matters;
- To broaden the number of associations entitled to initiate a class action;
- To authorize associations to advertise the class action they intend to initiate in order to facilitate the identification of the number of consumers harmed;
- To provide full compensation for damages, whatever their nature; and
- To provide for a civil penalty (i.e., the payment by the professional of a fraction of its turnover to the benefit of the French Public Treasury).

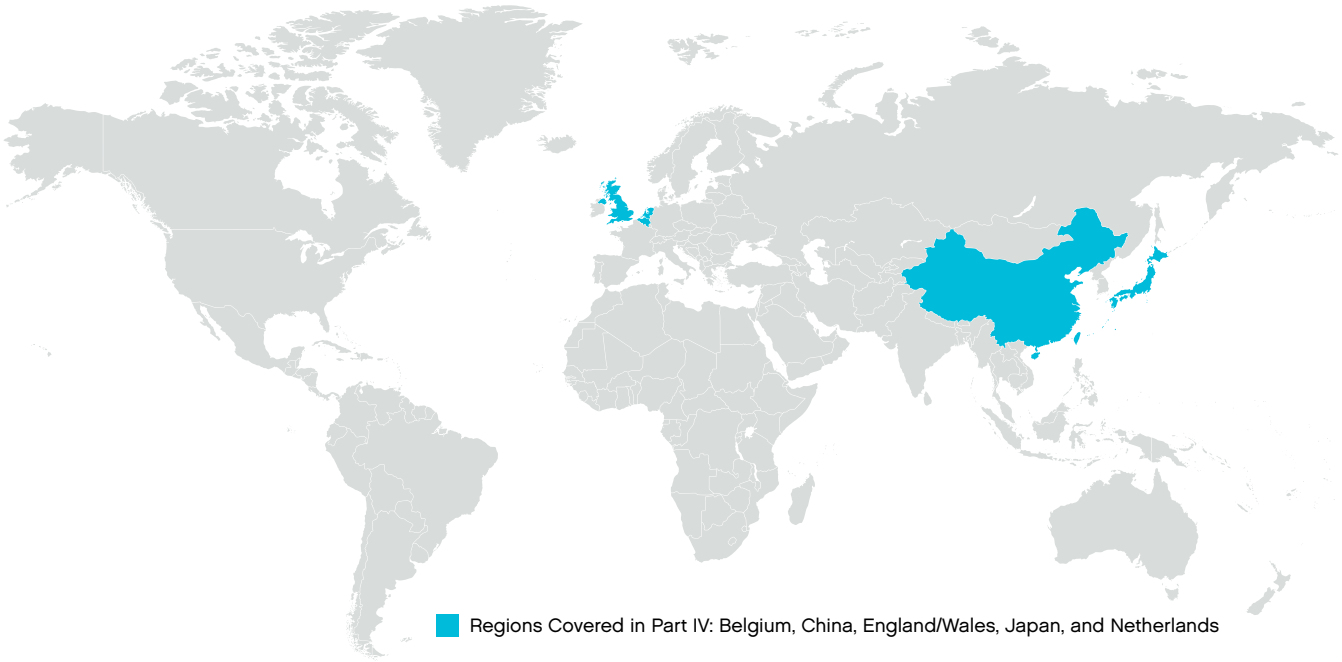
This lead to the adoption of the Bill, which is currently awaiting approval by the French Senate. Once passed into law, the Bill will eliminate existing disparities between preexisting sectoral class actions by providing a common procedural ground: the legal standing to initiate class actions will include a wider range of registered and *ad hoc* associations (which are made up of at least 50 physical persons or at least five companies or five local authorities) as well as the public prosecutor; there will be a 3% annual turnover civil penalty where there is deliberate misconduct by the offending party; the State will bear the costs of the proceedings when the action is of a serious nature.

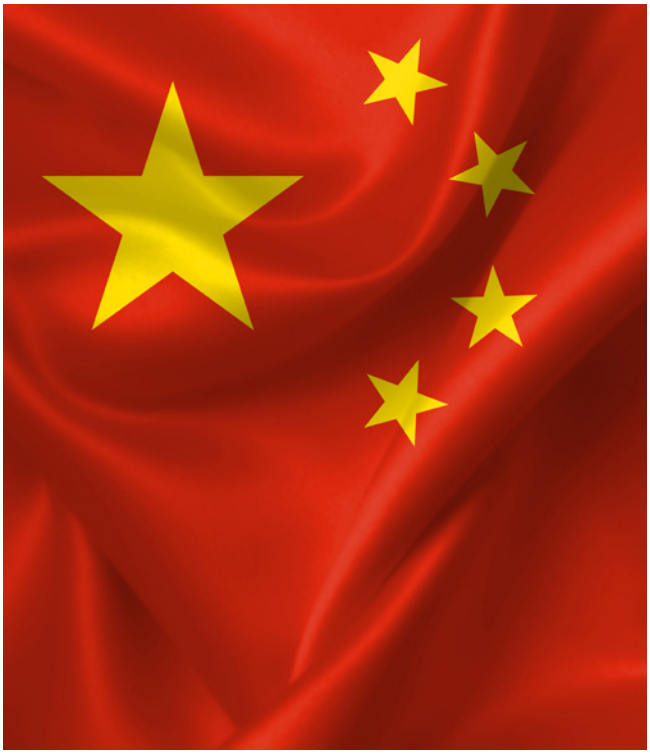
At the same time, the Bill ensures the transposition of the Directive on Representative Actions by extending legal standing to certain entities authorized in other Member States, authorizing French entities to bring cross-border actions, and regulating third-party funding. The Directive on Representative Actions changes do not appear fundamental in France (similarity of the characteristics).

Part IV: China, Japan, Belgium, The Netherlands, and England and Wales

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

Class Actions Jurisdictions





China

Section Authors:
Lillian He • Peter J. Wang

A. BRIEF OVERVIEW AND HISTORY

In April 1991, China promulgated a new Civil Procedure Law (the "CPL") creating a representative action mechanism. The 1991 CPL provides that lawsuits involving numerous litigants on either the plaintiff or defense side can proceed as representative actions. The parties, with the assistance of the court as necessary, select class representatives, but all changes to or waivers of claims, admissions regarding opponents' claims, or settlements require the consent of all represented litigants. The outcome of a representative action binds all represented litigants, as well as non-participating interested parties on the same subject matter. The 1991 CPL did not provide any opt-out mechanism even for individuals failing to receive notice or lacking information to determine whether they could assert a claim.

In July 1992, the PRC Supreme People's Court (the "SPC") issued Opinions on Certain Issues of Application of the Civil Procedure Law (the "1992 SPC Opinions"). The 1992 SPC Opinions provide that representative actions require more than 10 litigants on one side of the case. The 1992 SPC Opinions also provide that there should be two to five class representatives and that the representatives can represent either all litigants on the same side, or subgroups of these litigants. The court can also appoint representatives, and the 1992 SPC Opinions permit interested parties to join the litigation upon proving their legal relationship with the opponent and their damages.

These statutory standards for representative actions have remained unchanged since 1991, although both the CPL and the SPC Opinions have been amended.

Notwithstanding this statutory framework, representative actions are not common in China. Judges, already burdened by the pressure of excessive caseloads and evaluations based on case completion rates, appear unwilling to let cases go forward on a representative basis because representative litigation is difficult to administer.[1] In practice, the SPC may require the lower courts to report the class actions they accept to their superior courts. Courts in different geographic areas will then communicate internally and make unified decisions with the guidance of their superior courts. Moreover, the requirements for litigants' individual consents to settlement, the representative election or selection process, and public announcement and registration of litigants impose administrative burdens and costs on both the courts and litigants, making representative litigation expensive and time-consuming. Many courts and litigants disfavor representative actions because significant delays often arise from parties' failure to elect representatives or from their distrust of representatives.[2] One commentator has even said that representative actions involving unascertained litigants are "ignored in judicial interpretations and set aside in practice."[3]

However, a few exceptional representative actions have moved forward in major environmental pollution, product liability, or securities litigation.

For example, in *ZHANG Changjian et. al. v. Fujian Province (Pingnan) Rongping Chemical Co., Ltd.*',[4] 1,721 individuals sued Fujian Province (Pingnan) Rongping Chemical Co., Ltd. for Pingnan's excessive release or emission of waste gas and water into the environment. Five representatives litigated the case for the 1,721 plaintiffs, seeking RMB 13.53 million. The Ningde Intermediary People's Court found Pingnan liable for polluting the environment and causing damage, and ordered it to pay RMB 249,763 to the plaintiffs as compensation for dead plants and crops, and to remove the industrial residues deposited on and behind its facilities. The Fujian Provincial High People's Court affirmed, increasing the damages to RMB 684,178.20.[5]

In 2020, the SPC implemented the Provisions on Several Issues Concerning Representative Actions Arising from Securities Disputes (the "SPC 2020 Provisions"), expressly authorizing representative actions in cases brought by purchasers of securities. Chinese courts since have issued at least one judicial judgment based on the SPC 2020 Provisions.

In *China Securities Investor Services Centre v. Kangmei Pharmaceutical Co ("Kangmei")*[6], the Guangzhou Intermediary People's Court converted an ordinary representative litigation to a special securities representative action after more than at least 60 registered right holders had applied to the court to participate in the lawsuit against Kangmei. The court ruled that Kangmei should compensate 52,037 investors for a loss of RMB 2.46 billion;[7] that the actual controllers and some executives of Kangmei should bear 100% joint and several liability for compensation; and that other executives who made false statements should bear joint and several liability for 5% to 20% of the damages. At the same time, the accounting firm and auditor who signed off on false statements in the audit also should bear 100% joint and several liability together with Kangmei.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Chinese law does not restrict representative actions to specific types of disputes. Litigants can bring representative actions for all types of disputes, including tort, contract, or statutory disputes, as long as the litigants: (i) exceed 10 people; (ii) assert claims that "relate to the same subject matter or the same type of subject matters"; and (iii) consent to representative action; and (iv) the people's court deems that the disputes of all the litigants may be tried concurrently. (CPL Arts. 55-57; SPC Interpretation on the Application of the Civil Procedure Law (2022 Revision) (the "2022 SPC Interpretation") Art. 75).

In Shanghai and Hainan, legislative proposals have emerged advocating the inclusion of third-party funding in the legal framework. In practice, some financing companies have openly engaged in third-party funding, which is not limited to representative litigation.

In theory, representative actions in China also address the rights of unidentified or unnamed litigants albeit in a somewhat different manner than U.S.-style class actions. However, the existing mechanism does not allow an interested party to opt out, nor does it make an exception for an interested party lacking notice of the representative action or whose right to raise a claim was not clear at the time of the representative action.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Any participating litigant elected, selected, or appointed to be the group representative can litigate the case on behalf of the represented litigants.[8] There is no statutory restriction on the status of a group representative, and a group representative can be an individual, an organization, or a government entity as long as it is a member of the group.[9]

D. KEY PROCEDURAL REQUIREMENTS

The key procedures for bringing a representative action are:

- In a case involving more than 10 plaintiffs suing, or more than 10 defendants sued, some or all of the numerous plaintiffs or defendants may inform the court that they want their elected representatives to litigate the case on their behalf (*see* CPL Art. 56; 2022 SPC Interpretation Art. 76). If those plaintiffs or defendants are unable to elect their representatives, they may seek the court's intervention in facilitating the election of representatives, or in appointing representatives. Court approval is required before the case can go forward on a representative basis.
- The number of representatives may range from two to five (2022 SPC Interpretation Art. 78).
- The court may, but is not required to, publish an announcement describing the case and the asserted claims for a period of no less than thirty days in order to notify all interested parties of the litigation (CPL Art. 57; 2022 SPC Interpretation Art. 79). An interested party may register with the court to participate in the litigation. That party must prove its legal relationship with the opposing parties and the damages it has suffered (2022 SPC Interpretation Art. 80). However, the consent of the existing group members or group representatives are not required for the court to approve the addition of group members to the representative litigation.
- Before the representatives change claims, waive claims, admit to claims asserted by the opponents, or settle the case (the "Dispositive Acts"), the representatives must obtain consent from the represented litigants (CPL Art. 57). Since these Dispositive Acts require unanimous consent, a sole dissenter can prevent any of these acts from being undertaken. The requirement of obtaining unanimous consent from all represented litigants creates substantial disincentives to try to settle, and it is more likely these cases will go to trial and judgment once filed and accepted. However, in securities representative cases, the representative has a special one-time authorization. This mechanism allows the representative, once authorized, to directly represent the litigants in changing, waiving, or admitting to claims, reaching settlement agreements, filing or withdrawing appeals without seeking additional consent. With such one-time authorization from multiple investors, the representative centralizes investors' rights, streamlining the litigation process and boosting efficiency. (SPC 2020 Provisions Art. 7).[10]

Other than those listed in the bullets above, a representative action is not different from a regular civil action.

E. BINDING OTHERS

Any decision made in a representative action binds all of the participating litigants and any non-participating interested party who brings action on the same or same type of subject matter (CPL Art. 57).

If an interested party tries to participate in the litigation but is denied registration, that party may choose to sue in a separate action (2022 SPC Interpretation Art. 80). If an interested party qualifies as a co-litigant but does not register to participate in the litigation, the court's decisions in the representative action will bind that party if it later files a separate lawsuit on the subject matter addressed in the representative action (CPL Art. 57 & 2022 SPC Interpretation Art. 80).

An interested party does not have the option to opt out of a representative action. If he or she files a separate action on the same subject matter, he or she will be bound by the judgment in the representative action. The statute also provides no exception for interested parties having no notice of the representative action or unsure of their right to raise claims at the time of the representative action. If they sue later, they too will be bound by the judgment in the representative action.

F. REMEDIES AVAILABLE

There are no special remedies for representative actions, and the remedies available to plaintiffs are the same as those available in standard civil actions. For example, in a representative action involving contract claims, plaintiffs can usually recover only compensatory damages. For tort claims, remedies include damages to compensate for losses and mandatory injunctions precluding further harm or requiring the removal of impediment, elimination of danger, return of property, restitution, apologies, or rehabilitation of reputation (PRC Civil Code Art. 1167). Declaratory relief is available in the form of "confirmation of rights or facts."

Punitive damages are generally unavailable except in a few statutory claims. For example, Article 55 of the Consumer Rights Protection Law (2014) ("2014 CRPL") provides that a business operator who commits fraud in the course of selling goods or providing services must pay "enhanced compensation" of three times the price of the purchased commodity or services, or RMB 500 if the enhanced damages are lower than RMB 500 (2014 CRPL Art. 55). The same statute authorizes punitive damages up to twice the victim's loss if a consumer or a third person suffers death or health damage from defective commodities or services (2014 CRPL Art. 55).

G. SETTLEMENTS AND FINANCING

Article 57 of the PRC Civil Procedure Law requires the consent of every represented litigant for settlement of representative action claims. Any one litigant can veto a settlement.

Article 194 of the 2022 SPC Interpretation provides that litigants are not required to pre-pay court filing fees upon filing of a representative action, and the losing party must pay the court filing fees at the conclusion of the litigation. In fact, Article 29 of the Measures for the Payment of Litigation Fees (2006) requires the losing party to pay all litigation costs, defined as case filing or application fees; witness, transportation, and hotel expenses; per diem stipend; and lost wages incurred by witnesses, examiners, interpreters and accounting personnel for attending court hearings.

Article 12 of the Attorney's Fee Administrative Measures (2006) forbids contingency fee arrangements for representative actions.

There is no law or regulation expressly permitting or prohibiting third-party funding in representative litigation. In Shanghai and Hainan, legislative proposals have emerged advocating the inclusion of third-party funding in the legal framework.[11] In practice, some financing companies have openly engaged in third-party funding, which is not limited to representative litigation.[12]

H. OTHER KEY CLASS ACTION ISSUES

In 2013, China amended its Consumer Rights Protection Law to allow consumer protection associations at the national or provincial level to bring actions on behalf of consumers against defective goods and service providers. In 2016, the SPC issued an interpretation[13] offering further guidance to consumer protection associations about such actions, including but not limited to clarifying the procedure, the jurisdiction, and the standing to sue.[14]

In 2014, China amended its Environmental Protection Law authorizing duly registered public interest organizations to bring actions in environmental protection cases. It is anticipated that with public interest groups spearheading suits against consumer rights violators and environmental polluters, representative actions in these two areas will increase. Finally, in 2016, China issued a regulation expressly authorizing prosecutors to bring civil actions on behalf of the public for misconduct that infringes the public's welfare, such as environmental pollution and defective goods."[15]

In 2019, China amended its Securities Law (the "SLC") to introduce the mechanism of special securities representative actions to promote investor protection ("SSRA") (SLC Art. 95). According to the revised SLC, investors with similar circumstances who file securities-related civil lawsuits against the same wrong may elect representative[s] to participate in the lawsuit on their behalf. The SPC 2020 Provisions provided further judicial interpretation of the SSRA mechanism, specifying

that securities representative actions with an investor protection institute ("IPI") serving as the litigation representative on behalf of involved investors are defined as SSRAs, while actions without IPI representatives are considered as ordinary securities representative actions (OSRAs).

Significant reform, however, is needed before representative actions become prevalent in China. First, the unanimous consensus requirement for case settlement imposes huge administrative burdens and costs in reaching consensus among the represented litigants and disincentivizes representative litigation. Second, the current representative action regime gives courts broad discretion in deciding whether to entertain or refuse representative actions. And, third, prohibiting contingency fees in representative actions makes funding a challenge. Unless reforms are made to these procedures, the class action device is likely to remain limited in China.

ENDNOTES

1 *See* LI Xiuwen & SUN Liuyi, "Problems of the Representative Litigation System and Proposed Solutions."

2 WU Yingzi, "Defects in the Design of China's Representative Action System," published in *The Jurist* (2nd Issue, 2009).

3 ZHENG Lanxi: "Reform of China's Securities Litigation Mechanism,"published in China Securities and Commodities (Issue 6, 2013).

4 Ningde Intermediary People's Court, 2003 Ningde Civil Initial No. 1. (2003) 宁民初字第1号.

5 Only RMB 400 per person, or about $60.

6 Guangzhou Intermediate People's Court, 2020 Yue Civil Initial No. 2171, (2020) 粤01民初 2171号.

7 Approximately RMB 4,727 per person, or about $680.

8 CPL Arts. 56-57; 2022 SPC Interpretation Arts. 76-78.

9 *See* 2022 SPC Interpretation Art. 77, authorizing the court to appoint a representative from among the plaintiffs if the plaintiff group cannot elect a representative on its own.

10 *See* Jingyu Ma, "Court issues judicial interpretations to address various practical challenges in special representative litigation."

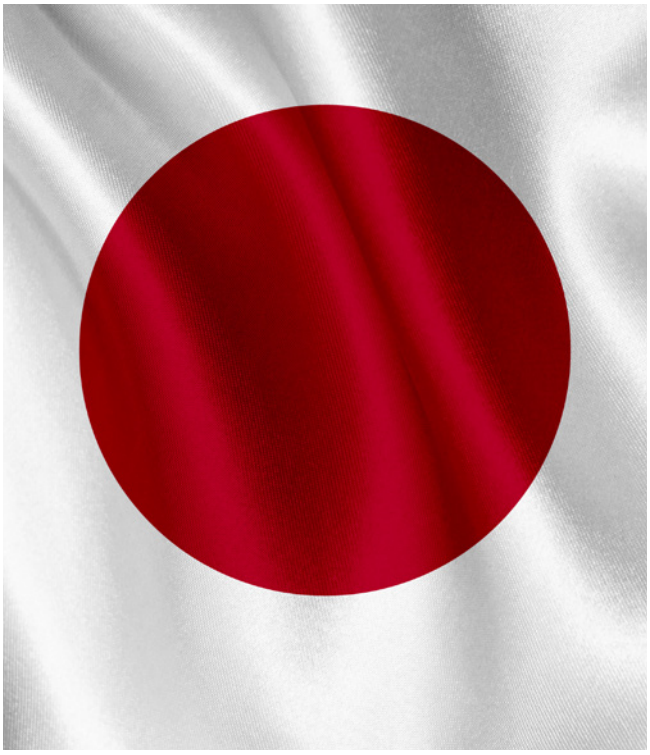
11 *See* Jiang Lili, Secretary of Beijing Arbitration Commission/Beijing International Arbitration Center.

12 深圳前海鼎颂投资有限公司, http://dslegalcapital.com/, visited on November 2, 2023; 厚助投资, houzhcapital.com, visited on November 2, 2023.

13 The Interpretation was amended in 2020, but the relevant standards remain unchanged.

14 SPC's Interpretation on Hearing Consumer Protection Civil Public Interest Litigation.

15 Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigation Cases Instituted by People's Procuratorates.



Japan

Section Author:
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A. BRIEF OVERVIEW AND HISTORY

The Japanese Class Action System was established by the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers ("Act"), enacted in 2013 and effective in 2016. The establishment of the Japanese Class Action System aimed to allow consumers to recover damages collectively for breaches of contractual and certain other obligations. As of October 2023, seven class actions have been filed since 2016.

As structured under the Act, the Japanese Class Action System consists of two stages. At the first stage ("Litigation Seeking Declaratory Judgment on Common Obligations"), only a Specified Qualified Consumer Organization ("SQCO") can file a complaint. SQCOs are organizations that have received certification from the prime minister. In order to receive certification, an organization must meet several requirements set forth in the Act related to, among other things, how SQCOs are organized, who can be directors, whether they have expert knowledge, and whether they have financial basis.

Accordingly, at the first stage of the class proceedings, the SQCO seeks a declaratory judgment confirming that consumers have collective rights to pursue a claim under the Act. If the SQCO wins the first step and a court issues a declaratory judgment, the SQCO must file a petition to proceed to the second stage ("Simple Determination Proceedings"). At the second stage, individual consumers who delegate powers to the SQCO can join the proceedings and claim damages for the alleged violation of the legal right confirmed by the court during the first stage. The defendants, i.e., business operators, cannot dispute the existence of such right during the second stage. The second stage is just to calculate and determine the amount of damages to be recovered for each individual.

In the first class action filed in Japan, the plaintiff SQCO partly won at the first stage in March 2020, and the second stage proceeding started in July 2020. Subsequently, it reached settlement on July 2021.

Supplementary provisions of the Act provided that, after three years of the date of the promulgation of the Act, the government should review the provisions and implementation of the Act, including the scope of claims and damages under the Act, and if necessary, take action based on the results of the review. The government started review and consideration to amend the Act under such supplemental provision in March 2021, and concluded that the Japanese Class Action System was not utilized and did not fully function as originally expected. Then, amendments were made to the Act on May 2022 ("Amendment"), which generally came into effect as of June 1, 2023, and in part on October 1, 2023. The Amendment intends to evolve the Japanese Class Action System into one that is easier to remedy consumer damages

and easier for consumers to use, as well as to establish an environment that facilitates the activities of SQCOs by implementing the features as follows:

- Expanding the scope of claims and recoverable damages;
- Allowing settlements between SQCO and a business operator with more flexible terms;
- Enhancing the ways to notify consumers of the pending class action; and
- Relaxing SQCO's obligations by implementing the certification of entity to support the activities of SQCO and taking other measures.

In the following sections, references are made to new features implemented by the Amendment.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Claims under the Japanese Class Action System arise from consumer contracts, which are any contracts between an individual and a business operator. The claims must be:

- A claim for performance of a contractual obligation;
- A claim pertaining to unjust enrichment;
- A claim for damages based on nonperformance of a contractual obligation;
- A claim for damages based on a warranty against defects; or
- A claim for damages based on a tort (limited to a claim based on the provisions of the Civil Code).

The Amendment has expanded the scope of the defendants under the Japanese Class Action System to include some individuals, such as a business operator's employee, as an additional defendant in tort cases caused by such individuals intentionally or with gross negligence.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Under the Japanese Class Action System, only SQCOs are qualified to bring lawsuits. Although they appear to act as a representative of consumers, at the first stage, the SQCOs are theoretically an independent party, not a representative of consumers. At the second stage, they act as a quasi-representative of the consumers who delegate power to the SQCO. As of August 2023, four organizations have been certified as SQCOs.

D. KEY PROCEDURAL REQUIREMENTS

Under the Japanese Class Action System, a class action can be brought, among other things, in cases where: (i) a considerable number of consumers incur damages in connection with identified claims under a consumer contract (see Section B above); and (ii) common factual and legal issues determine the defendant business operator's liability. Claims must relate to damages owed to a "considerably large number" of people, must be of "common obligations," and individual issues cannot predominate such that "appropriate and swift determination of individual claims" would be realized.

For example, in cases where a business operator is alleged to have entered into the same arguably fraudulent contract with a number of consumers and has a contractual obligation to repay monies to consumers, courts are likely to find that the case meets the above-described requirements. If, however, the plaintiff SQCO cannot prove the facts regarding these requirements, or if the court finds it would be difficult at the second stage of the proceedings to determine whether consumers' rights were violated or damages incurred, the court can dismiss, in whole or in part, the first stage action for Declaratory Judgment on Common Obligations.

E. BINDING OTHERS

If a plaintiff SQCO wins at the first stage, that SQCO, all other SQCOs, and consumers who participate in the second stage by delegating powers to the SQCO, are bound by the first stage result (opt-in). If a plaintiff SQCO loses in the first stage, the decision binds only that SQCO and other SQCOs in Japan and does not bind consumers. Consumers can still jointly or independently bring new lawsuits.

After a successful first stage decision, the plaintiff SQCO notifies all "known consumers" by mail or email and also provides general public notice through the internet and newspapers. (The notice includes general information of a class action, a court's final judgement (in case of acknowledgement by

a business operator or settlement, its terms), recoverable claims, and consumers entitled to recover, etc.) Under the Amendment, a business operator is also required to notify all "known consumers" by mail or email at the SQCO's request. Consumers then must elect to opt in and delegate authority to recover damages to the SQCO. In order to secure information on consumers possessed by a business operator from deletion or destruction, the Amendment has provided the court may issue a provisional order obligating a business operator to disclose the consumer information even during the first stage.

The Amendment provides the settlement between plaintiff SQCO and a business operator with the term not to file class action again would bind other SQCOs, which didn't participate in the class action.

F. REMEDIES AVAILABLE

As explained above, under the system, an SQCO seeks a declaratory judgment on common obligations to consumers at the first stage. At the second stage, there is no minimum claim amount. Only compensatory damages are available. Punitive damages are not permitted. Moreover, for tort claims, damages relating to secondary loss, lost earnings, or damages for personal injury/death are not recoverable. Under the Amendment, damages for pain and suffering, which was not recoverable under the Japanese Class Action System, could be recoverable in the cases of some factual and legal backgrounds.

To preserve a defendant's assets for future enforcement, SQCOs may file a petition for provisional attachment, and each consumer entitled to recover damages at the second stage may enforce the judgment. SQCOs cannot, however, seek other remedies such as injunctive relief.

G. SETTLEMENTS AND FINANCING

An SQCO may reach a settlement with business operators at the first stage. When a business operator admits an obligation to pay damages to consumers, the plaintiff SQCO, other SQCOs in Japan, and consumers who participate in the second stage by delegating powers to the SQCO, are bound by the settlement. While the original Act had strict restrictions on SQCO's authority to make settlement, the Amendment abolished such restrictions, thereby allowing a wider variety of settlement terms, including the term to pay settlement money without a business operator's acknowledgement of its liability, the term to perform something other than monetary payment, and the term to distribute the settlement money to consumers without going through the second stage.

Contingency fee arrangements are allowed, and small firms traditionally receive initial fees and contingency fees. However, the Act requires that to obtain certification as an SQCO, any remuneration or expenses must not be unreasonable from the viewpoint of protecting consumer interests. Additionally, the guidelines on SQCO certification, published by the Consumer Affairs Agency of Japan, provide that at least 50% of the amounts collected from business operators must be returned to consumers. Contingency fee arrangements are not prohibited by the Act, but must conform to these guidelines.

Third-party funding has not, to date, been addressed under the Japanese Class Action System, and more generally, there are no mechanisms for third-party litigation funding in Japan.

H. OTHER KEY CLASS ACTION ISSUES

In addition to those stated in the above sections, the Amendment has alleviated the obligations imposed on SQCO under the original Act, as described below:

- Implementation of the government's certification to the entities, which are to support SQCO's activities. SQCO can outsource part of its activities, such as notification to consumers, to the certified entities.
- Extension of the deadline for SQCO to file for the second stage from one month to four months. The deadline can be further extended to eight months when SQCO files for petition and the court approves it.
- Extension of the period for the government's certification of SQCO from three years to six years.

Belgium

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A. BRIEF OVERVIEW AND HISTORY

The Belgian law on class actions, found in Section 2 of Book XVII of the Code of Economic Law, went into effect on September 1, 2014 (the "Law"). Since its entry into force, only 11 class actions have been filed in relation to various sectors such as transports, telecommunications, energy, and data protection. Most of these cases were brought by the main Belgian consumer protection organization, Test-Achats/Test-Aankoop.

On March 18, 2024, the Belgian Government submitted to the Parliament a draft bill aiming at transposing the Directive EU 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the "Directive on Representative Actions") (the "Bill"). Indeed, as part of the "New Deal for Consumers," a new Directive on Representative Actions was published on November 25, 2020, which had to be implemented by December 25, 2022. The Bill is under review by the Parliament with possible amendments before its adoption.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The Belgian class actions can be initiated by a group of consumers or small and medium-sized enterprises ("SMEs") in relation to alleged breaches by corporations of certain specifically enumerated European and Belgian laws and regulations. The most important of those specifically-enumerated provisions include competition, product liability, trade practices and consumer protection, drug, transport of persons, health protection, data protection and privacy, electronic communications, and payment and credit services.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

In contrast to U.S. class actions, a class in Belgium cannot be represented by an individual class member (nor commercial companies, trade unions, or law firms), but must instead be represented by:

- For a class of consumers, a consumer protection association that is a member of the Consumer Council or that is recognized by the Minister of Economic Affairs. For a class of SMEs, an interprofessional association that: (i) defends the interests of SMEs; and (ii) is a member of the High Council for Self-Employed and SMEs or recognized by the Minister of Economic Affairs;
- A nonprofit organization that has existed for at least three years and is recognized by the Minister of Economic Affairs. The nonprofit organization: (i) must have a purpose that is directly linked to the collective damage suffered by the class; and (ii) cannot pursue an economic goal; or

- A nonprofit entity recognized by an EU Member State having: (i) a purpose directly linked to the alleged infringement of rights granted under EU law; and (ii) sufficient financial and HR capacity as well as the legal expertise to represent multiple claimants acting in their best interest.

These class representatives can, of course, be assisted and represented by external counsels.

The class of consumers (excluding SMEs) can also be represented by the Belgian federal mediator for consumers, but only in the negotiation phase, as opposed to the litigation phase, as explained further below.

D. KEY PROCEDURAL REQUIREMENTS

Brussels courts have exclusive jurisdiction over class actions in Belgium, and the Law sets class proceedings in four successive phases:

1. **Admissibility**. Within two months of the filing of the proceedings, the court rules upon the admissibility of the class claim. In so doing, the court assesses whether the alleged breaches raised by the class representative fall with the material scope of the Law, whether the class representative is authorized to act in that capacity and deemed adequate, and whether the class procedure will be efficient. In its discretion, the court may declare the claim inadmissible if it finds that a class action is not more efficient than standard court proceedings. In the admissibility decision, the court must also decide certain specific issues such as the description of the class, the opt-in/opt-out system and the modalities thereof, and the length of the settlement negotiation phase (minimum of three months to maximum of 12 months).
2. **Negotiation**. The parties must then explore settlement during the period set forth in the admissibility ruling. Any settlement must comply with the formal requirements set forth in the Law (14 mandatory elements, including the appointment of a trustee for the enforcement of the settlement). The settlement must also be submitted to the court for approval. The court must reject the settlement if:
   - Compensation to the consumers is manifestly unreasonable;
   - The chosen opt-in/opt-out system and the modalities thereof are manifestly unreasonable; or
   - The fees to be paid to the class representative exceed the reasonable costs allowed.

   Notably, a class settlement does not constitute an admission of liability by the defendant.
3. **Review and decision on the merits**. If no settlement is reached or if a proposed settlement is rejected, the parties exchange written pleadings pursuant to a timetable set forth by the court. Argument then occurs. After the oral argument, the court issues a decision that must comply with the formal requirements set forth in the Law (10 mandatory elements). If the claim is declared founded, the court appoints a trustee for enforcing the judgment. The decision of the court is subject to appeal.
4. **Enforcement**. The appointed trustee enforces the settlement or judgment. The trustee must submit quarterly reports to the court. At the end of his or her mission, the trustee submits a final report to the court.

E. BINDING OTHERS

Under the Law, the initial application to the court must propose an opt-in or opt-out procedure. In the decision on admissibility during the first phase of the proceedings, the court determines the appropriate system for that case and how the system will be employed. The opt-in system is however mandatory: (i) for consumers who are non-Belgian residents and SMEs whose main establishment is not located in Belgium; and (ii) if the class action aims at compensating physical or moral collective damage. The admissibility decision must be published at least in the Official State Gazette and on the website of the Ministry for Economic Affairs.

F. REMEDIES AVAILABLE

Class members are entitled to full monetary compensation of their actual damage. Punitive damages are not allowed under Belgian law. Declaratory and injunctive relief are excluded.

G. SETTLEMENTS AND FINANCING

The Law does not deal specifically with the financing of class actions. The requirement that the class be represented by an authorized nonprofit entity seeks to limit any excessive legal fees.

Full contingency fee arrangements are prohibited under Belgian law, but success fees are allowed.

Third-party funding is not prohibited, as such, but is not commonly used in practice.

H. OTHER KEY CLASS ACTION ISSUES

The amendments proposed by the Bill: With only 11 class action cases launched since 2014 and only one decision on the merits, the current Belgian representative action legal framework did not have much success. The Bill aims to amend this framework not only to transpose the new Directive on Representative Actions but also to correct the flaws and weaknesses of the Law.

The main changes of the Bill are as follows:

- **Broadening of the material scope of class action**. Class actions will also be available in relation to: (i) commercial agency contracts, commercial cooperation contracts, distribution contracts, transportation contracts; (ii) consumers debts; (iii) sales of travels and related services; (iv) late payment of commercial transactions; and (v) provisions of EU law listed in Annex I to the new Directive on Representative Actions and the Belgian provisions implementing them.
- **Broadening of the reliefs available.** Class actions may be initiated in order to obtain cease-and-desist orders aiming at protecting the interest of consumers or SMEs in case of an alleged breach of certain specifically enumerated European and Belgian laws and regulations (see point B above and the extension of the material scope of class action suggested by the Bill as described in the bullet point above).
- **Modification of the requirements applicable to class representatives**. For class of consumers, the representative must be: (i) an entity approved by the Belgian Ministry in charge of consumer protection, which requires to be an independent and not insolvent (or subject to insolvency proceedings) nonprofit organization active on consumer protection for more than 12 months prior to approval application; or (ii) an entity in charge of representing the collective interest of consumers approved in another EU Member State. If the entity is not approved, it may still act as representative in a specific case subject to the verification by the Court that the other conditions listed under (i) above are satisfied. For class of SMEs, the representative must be an entity approved: (i) by the Belgian Ministry in charge for middle classes; or (ii) by another EU Member State, which requires it to be an independent and not insolvent (or subject to insolvency proceedings) nonprofit organization defending SMEs' interest for more than twelve months prior to approval application. If the entity is not approved, it may still act as representative in a specific case subject to the verification by the court that the conditions listed above are satisfied. Also, any interprofessional organization in charge of defending SME's interest that is a member of the council of self-employed and SMEs may act as class representative. The list of approved representatives for consumers or SMEs must be published on the website of the Federal public service for Economy. The approval of representatives must be reviewed by the competent Ministry at least every five years.
- **Cross-border class actions.** The representatives for consumers approved in Belgium are allowed to initiate class actions before jurisdictions of other EU Member States.
- **Transparency on the financing of class action**. The application for class action must indicate the intervention of any third-party funder(s), and of so it must: (i) identify it/them; and (ii) specify the funded amount.
- **Shortening of the admissibility phase**. Except if otherwise agreed between the parties, the debate on the admissibility must be conducted on an expedite basis within a maximum of six months from the filing of the application.
- **Modification relating to the composition of the class**. For the negotiation phase the parties have full flexibility and may decide between opt-in and opt-out (except for: (i) consumers non residing in Belgium; and (ii) SMEs not having their main establishment in Belgium, for which opt-in applies). For the litigation phase, the opt-in system applies and the prejudiced parties have four months from the day after the publication of the decision on defendant's liability to notify their decision to join the class.
- **Suspension of the statute of limitation for individual actions**. The statute of limitation for individual damage claims is suspended from the filing of the class action application until publication of the judgment.

At this stage, there is no visibility on the timing of the adoption of the Bill, but it can be reasonably expected that it will be adopted before the upcoming legislative elections in June 2024.

Netherlands

Section Authors:
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A. BRIEF OVERVIEW AND HISTORY

The Netherlands has become an important venue for the (international) collective settlement of claims. An important factor in this respect is the new Class Actions Act (*Wet afwikkeling massaschade in collectieve actie*, the "WAMCA"), which entered into force on January 1, 2020. This act has broadened the scope of section 3:305a Dutch Civil Code (the "DCC") by enabling representative entities to bring damages claims on behalf of (international) parties in a class action before any district court in the Netherlands. The WAMCA introduced a central public register in which all pending collective actions are required to be recorded (Central Registry). The claim organization must submit a copy of the writ of summons to the court registry and the Central registry within two days after the service of the writ of summons. It follows from the Central Registry that an increasing number of collective proceedings have been initiated over the past two years in the Netherlands.

Prior to the WAMCA, there was no possibility to seek monetary damages in a collective action. The representative entity could merely ask the court for a declaratory judgment regarding the liability of the defendant or seek injunctive relief. A declaratory judgment could then be used as a basis for claiming damages in individual proceedings or for a collective settlement pursuant to the Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*, the "WCAM"). Although the Netherlands was already an attractive forum for facilitating collective settlement of mass claims through the WCAM, the entry into force of the WAMCA—allowing damages to be claimed by the representative entity as well—made the Netherlands the leading EU forum for collective redress.

High-profile collective actions that have been initiated before the Dutch courts include a case against Trafigura in connection with the toxic waste dump in Ivory Coast (*Probo Koala*) and a case against BP in connection with the Deepwater Horizon disaster in the Gulf of Mexico. A collective action against Fortis in connection with losses incurred by its shareholders in 2018 resulted in a massive €1.2 billion (USD$1.3 billion) settlement, making it one of the highest settlements worldwide. Another high-profile class action is the case against Royal Dutch Shell ("RDS"), in which the environmental NGO "Milieudefensie," sued RDS, and is looking for an order to drastically reduce RDS's greenhouse gas emissions in line with international climate goals. The district court of The Hague awarded the claim and ruled that RDS had a duty of care to reduce its carbon emissions in accordance with the Paris Climate Agreement's objectives. This judgment is a landmark case for climate litigation, and is currently being appealed at the The Hague Court of Appeal.

Besides collective actions and/or settlements initiated by representative entities under the WAMCA or WCAM, collective

claims can also be brought before the court by a special purpose vehicle to which claims are assigned or powers of attorney to act on behalf of the aggrieved parties have been granted ("group action"). In recent years, many antitrust follow-on claims have been brought using the assignor-model.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The collective action for damages and the collective settlement apply to all civil law subject matters, including claims relating to consumer, securities, and competition law. The new collective action regime only applies to class actions initiated on or after January 1, 2020, and that relate to events that took place on or after November 15, 2016. In these class actions, the representative entity is allowed to also claim damages on behalf of the aggrieved parties.

The old collective action regime will continue to apply to actions relating to events that took place before November 15, 2016. Where this regime is still applicable, the representative entity will have to ask the Dutch court for a declaratory judgment regarding the liability of the defendant. If the liability of the defendant is established by the court, each aggrieved party can then separately bring its own claim for compensation on that basis or the parties could try to reach a collective settlement pursuant to the WCAM. Historically, Dutch Courts assumed jurisdiction without much hesitation under the old regime. Typically, jurisdiction would be achieved by including one Dutch subsidiary who would then function as anchor defendant for other defendants.

Collective settlement proceedings enable the parties to a settlement agreement to jointly ask the Dutch court to declare the settlement binding on all aggrieved persons on an opt-out basis. These proceedings have proven useful in cases involving multiple jurisdictions, as the Dutch court has in the past declared settlement agreements binding on aggrieved parties not residing in the Netherlands, notably in *Shell* (2009) and *Converium* (2012). Both cases involved financial losses of shareholders allegedly caused by misleading statements of the companies in a certain timeframe. In *Shell*, one of the two Shell entities was established in the Netherlands and its stock was listed on the Amsterdam Stock Exchange. The majority of the aggrieved shareholders did not reside in the Netherlands during the relevant period. In *Converium*, both involved entities were Swiss and neither had its stock listed on the Amsterdam Stock Exchange. Only a very small percentage of the stockholders resided in the Netherlands during the relevant period. In both cases, the Dutch court accepted international jurisdiction to hear the case.

The new WAMCA provides that collective actions must be sufficiently closely connected to the Dutch jurisdiction (the scope rule). This is the case if: the majority of the potential claimants are domiciled in the Netherlands; the defendant is domiciled in the Netherlands and additional circumstances show a sufficiently close link to the Dutch jurisdiction; or the event from which the damage resulted took place in the Netherlands. In spite of the scope rule, case law demonstrates that Dutch courts assume jurisdiction very swiftly. Consequently, the Netherlands has become a viable gateway for the settlement of cross-border claims on the basis of both the WCAM and WAMCA.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

A claim organization representing a certain group of similar interests may initiate a collective action. Such claim organization can only be a foundation (*stichting*) or association (*vereniging*) with full legal capacity. Section 3:305a DCC sets certain standards for representative entities, which must be met in order for the representative entity to have standing. The requirements mainly concern transparency and governance of representative entities, but also the requirement that the representative entity has sufficient resources to bear the costs of bringing a class action.

This requirement applies if the proceedings are self-funded by the representative entity, but also if a third-party funder is involved. For purposes of reviewing the representative entity's funding structure, the court may request disclosure of funding agreement. While third-party funding is allowed, the representative entity should have the final word in any decisions concerning the collective action and a possible settlement. For the purpose of assessing—*ex officio*—the degree of influence a possible third-party funder may have on the proceedings or on the representative entity, the court can also request and review the financing agreement in this context.

The representative entity will only have standing if the claim to be instigated has a sufficient connection to the Netherlands, which is true if the majority of the aggrieved parties and/or the defendant reside(s) in the Netherlands or if the event(s) giving rise to the damage occurred in the Netherlands and there are additional circumstances that point towards a sufficient connection to the Netherlands. Furthermore, the representative entity does not have standing if it has not made sufficient efforts to reach a settlement with the defendant before starting the class action. There are additional requirements for the courts to accept jurisdiction, such as plausibility that the collective action will be more efficient and more effective than instigating individual proceedings.

If there is more than one representative entity bringing a collective action in relation to the same subject matter, the different actions will be joined and the court will appoint an Exclusive Representative to represent the interests of all the aggrieved parties in the action.

A collective action can also be brought by the State and governmental bodies, as well as by European consumer organizations placed on a specified list.

D. KEY PROCEDURAL REQUIREMENTS

Dutch law does not provide defined requirements that must be met to certify a class. However, for an entity to be allowed to bring a representative collective action, the entity must be sufficiently representative. This requirement will generally be met if an entity's articles of association provide that it seeks to protect the interests of the group of the aggrieved persons. In addition, the new standards laid down in section 3:305a DCC for representative entities (mainly concerning transparency and governance of representative entities) must be met. The interests of the represented aggrieved parties must also be similar.

The requirement of representativeness is similarly important in class settlement proceedings. A group of aggrieved parties can establish an association or foundation which, pursuant to its articles of association, represents their interests. This may be the same entity that initiated legal proceedings in the representative collective action.

E. BINDING OTHERS

For proceedings under the new collective action regime, the court will offer aggrieved parties residing in the Netherlands the option to opt out of the proceedings. However, unless decided otherwise by the court, aggrieved parties who are not domiciled in the Netherlands will have to expressly opt in to the collective action for a judgment to have a binding effect on them. Parties will be able to request the court to order that the opt out mechanism also applies to foreign aggrieved parties in the interest of, for example, finality. Under the old collective action regime, each individual party has to commence its own separate action to benefit from the court decision in the proceedings brought against the defendant by the representative entity.

In collective settlement proceedings, once a settlement is reached between the representative entity and the defendant, the parties to the settlement agreement must submit a formal request to the Amsterdam Court of Appeal to declare the settlement binding. The Court of Appeal then schedules a hearing where the parties, the intended beneficiaries of the settlement, and other interested parties are heard. The parties bringing the proceedings must notify all known interested parties in writing in accordance with applicable treaties, regulations, rules of civil procedure and, usually, specific instructions from the Court of Appeal. These instructions can include the publication of advertisements in newspapers.

Once the Court of Appeal declares the settlement agreement binding, the final terms and conditions must be published as specified by the Court of Appeal. The Court of Appeal decides upon a period of time of at least a year during which the intended beneficiaries can file a claim, pursuant to which they are entitled to receive compensation under the settlement. Intended beneficiaries also have the option to opt out of the settlement within a court-set period of at least three months.

The WAMCA provides more room for reaching a "voluntary" collective settlement. Under the WAMCA, the court can order both the representative entity and the defendants to submit proposals for a collective settlement of damages. Based on such proposals, the court can establish a binding collective settlement of damages.

If the parties reach a settlement during the procedure, the same conditions as settlements under the WCAM will apply.

F. REMEDIES AVAILABLE

For collective actions filed after January 1, 2020, relating to an event or events which occurred on or after November 15, 2016, all forms of relief, including damages, can be claimed.

There is no rule that prohibits injunctive relief proceedings on behalf of a group of aggrieved parties, however, the case should be suitable for such proceedings. As mentioned above under the new regime, the main aim of collective actions will be to reach a collective settlement, either voluntarily between the parties to the proceedings or by decision of the court on the basis of the WCAM.

As mentioned above, for collective actions filed before January 1, 2020, and/or which relate to an event or events occurring before November 15, 2016, the representative entity cannot ask the Dutch court for compensation of damages in a collective claim but only for a declaratory judgment regarding the liability of the defendant. In such cases the old collective action regime applies.

Dutch law generally provides that all damages are recoverable without any specific limit. However, the concept of punitive damages as applied in the United States is unknown in the Netherlands. While there may be some damages that could be considered punitive because they go beyond compensation alone, it is not possible to claim punitive damages in Dutch proceedings.

G. SETTLEMENTS AND FINANCING

Funding of the representative entity is usually provided by the aggrieved parties or a third party. It is possible for a representative entity to agree on a reasonable success fee with the parties it represents.

Pursuant to the ethical rules applicable to Dutch lawyers, fee arrangements that are contingent on the outcome of the proceedings are only permitted to a very limited extent. As a result, lawyer fees for the large part cannot be paid from the proceeds of a collective claim or settlement.

In *Converium*, the Amsterdam Court of Appeal held that in the context of determining the fairness of a class settlement, the court can take into account customary U.S. fee practices if U.S. law firms are involved and the legal services provided by them were predominantly rendered in the United States. It subsequently held that a fee of 20% of the settlement amount was not unreasonable.

There are no rules prohibiting third-party funding as long as the independence of the representative entity is not compromised in any way.

H. OTHER KEY CLASS ACTION ISSUES

The "New Deal for Consumers" introduced by the European Commission, which includes a proposal for the directive on representative actions for the protection of the collective interests of consumers ("Directive"), also provides for a system to obtain collective redress in a mass consumer harm situation. The Directive imposes the obligation on Member States to: (i) introduce a consumer collective redress action; and (ii) establish a list of representative entities that can bring cross-border consumer collective actions. Only representative entities on the list can commence collective actions for consumers in another Member State.

As a result, the Dutch new collective action regime was amended as per June 25, 2023, bringing it in line with the Directive. These amendments include, among other things, barring a representative entity from bringing a consumer class action against a competitor of its funder or against a party on which its funder depends. The rationale behind this is that a competitor could have an economic interest in the outcome of the collective action that does not correspond to the interest of the consumers for whom the collective action is brought.
In addition, to be designated by the Dutch Minister of legal protection as a Dutch representative entity to bring consumer collective actions in another Member State, the representative entity must meet certain (additional) requirements such as that: (i) the representative entity has actually performed activities for at least 12 months to protect the consumer interests concerned; (ii) the representative entity has not been declared bankrupt and that no petition for bankruptcy is pending against it nor that a suspension of payments has been granted to the entity; and (iii) the representative entity must disclose its general sources of funding.

England and Wales

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A. BRIEF OVERVIEW AND HISTORY

The English courts are handling an increasing number of high-profile group litigation actions. Claims relating to employment, product liability, financial products, antitrust, and personal injury continue to be mainstays of group litigation in the UK, but in recent years we have also seen a significant growth in both data-related and Environmental, Social & Governance ("ESG") related group actions.

These trends look to continue. With contingency fee arrangements, damages based agreements, and legal expense insurance all permitted and fairly common in English court litigation, the litigation funding market is booming. Litigation funder assets in the UK have significantly increased in the last decade, from just under £200 million in 2011/2012 to £2.2 billion in 2020/2021. Claimant-focused law firms have also spotted the opportunity, with a number of traditional U.S. plaintiff firms establishing UK outposts, and UK-based claimant law firms gaining expertise with these sorts of claims.

As is common in the United States and other markets in which class action regimes are longer established, claimant law firms are working hand in hand with litigation funders to identify potential causes of action and then advertise for and build books of potential claimants, prior to the claim itself being filed. With advertisements on the London Underground, national newspapers, and social media, they are recruiting interested or indicative claimants, to illustrate the viability of a claim to the court. They devise a litigation plan—including funding, communication and procedural steps—and drive the case forward.

This combination of claimant law firms and funders are also seeing export opportunities, looking to build on the success of existing judgments in the United States or elsewhere, and exporting their case theories and evidence directly to the UK on behalf of claimants based here. Local experts that can speak to arguments that have already been established in other jurisdictions are also being actively sought.

Three bespoke procedures are available for group actions before the courts of England and Wales: (i) collective proceedings in the Competition Appeal Tribunal ("CAT"); (ii) representative proceedings in the High Court; and (iii) group litigation orders ("GLOs") in the High Court. The English courts also have a number of procedural tools which allow similar or related claims by multiple claimants to be case managed and tried together on an *ad hoc* basis, but which are not covered in this Guide.

Collective Proceedings

In October 2015, the Consumer Rights Act 2015 significantly enhanced collective actions for infringements of competition

law. A collective action can now be brought in the CAT by a class representative:

- On an opt-in or an opt-out basis;
- On behalf of a class comprised of consumers, businesses, or any other group of claimants; and
- Formulated either as a standalone claim for breach of competition law or as a "follow on" claim (being an action to recover damages following on from a decision of a relevant competition authority).

The first class action to be certified under this new regime was filed in September 2016 against Mastercard by Walter Merricks, the former Chief Ombudsman of the Financial Ombudsman Service, seeking £14 billion on behalf of approximately 46 million UK consumers. The action follows a long-running legal battle between Mastercard and the European Commission and is based on a European Court of Justice ruling that Mastercard breached competition law by imposing unlawful interchange fees on cross-border credit and debit card payment transactions. The class action alleges that this cost was passed on by retailers to consumers in the form of higher prices for goods and services.

Mr. Merricks' application for the claim to be certified as an opt-out collective action was initially rejected by the CAT on the basis that the claims were not suitable for an award of aggregate damages.[1] On appeal, the Court of Appeal overturned the CAT's decision on the basis that the CAT had set the bar too high for the initial certification stage by effectively conducting a "mini-trial"; the class representative only has to demonstrate that the claim has a real prospect of success.[2] This decision was upheld by the Supreme Court in a judgment which clarified and simplified the threshold test for certification.[3] The Merricks CPO was eventually certified in August 2021.

As anticipated, the Merricks CPO has encouraged and inspired other claimant groups who had been waiting and watching the English court's developing approach to opt-out class actions before the CAT. Thirteen new applications for CPOs were made in 2022 alone, and the CAT has now certified class claims against major financial institutions, rail companies, global tech companies and telecommunications providers.

Representative Proceedings

Civil Procedure Rule ("CPR") 19.8 empowers a representative claimant to bring a claim in the High Court on its own behalf and on behalf of any person that has the "same interest" in the relevant claim. A representative action can be brought on an opt-in or opt-out basis, and is potentially available whatever the underlying cause of action.

As is common in the United States and other markets in which class action regimes are longer established, claimant law firms are working hand in hand with litigation funders to identify potential causes of action and then advertise for and build books of potential claimants, prior to the claim itself being filed.

The "same interest" requirement has historically been interpreted narrowly, making this an ineffective mechanism for most consumer class claims. The English courts have, however, recently opened the door to this mechanism being used for opt-out class actions in appropriate circumstances. Although in *Google LLC v Lloyd* [2021] UKSC 50 the Supreme Court ultimately found that a claim brought on behalf of 4 million iPhone

users alleging that Google had collated and misused their personal data was not suitable to proceed as a representative action pursuant to CPR 19.8, the court confirmed that:

- CPR 19.8 did in principle facilitate opt-out class claims. It was not necessary for members of the represented class to opt in to the representative action; indeed, a person could be a member of the represented class—and bound by the result—without even being aware that the claim was being brought.
- Representative actions would not typically be suitable for claims where individual claimants suffered different loss (unless it could be calculated on a basis that was common to all members of the class). However, a bifurcated process might be appropriate, in which issues of liability would be dealt with on a class-wide basis and then individualized issues such as damages would be determined in a series of mini-trials.

It remains to be seen whether this will encourage the use of representative proceedings for class claims outside the antitrust sphere. Subsequent judgments have provided mixed indications. In *Commission Recovery Ltd v Marks and Clerk LLP* [2023] EWHC 398 (Comm) the High Court approved a representative action in respect of alleged secret commissions even though the size of the class and its precise composition were uncertain at the time of the application. In contrast, in *Wirral Council v Indivior Plc and others* [2023] EWHC 3114 (Comm), the High Court rejected an attempt to try "common issues" by way of representative proceedings (with individualized issues such as standing to sue, causation, and quantum excluded from the claim), on the basis that it would give the court greater flexibility if the proceedings were brought as individual claims case managed together.

Group Litigation Orders

The English court may also make a GLO in respect of claims (whatever their underlying cause(s) of action) that give rise to common or related issues of fact or law. This formal case management regime requires claimants to opt in (usually by being entered on a group register by a particular date), and judgment on any GLO issues will typically then bind the parties to all other claims on the group register.

This mechanism is proving popular with claimants, funders, and claimant-focused law firms. In recent years, the High Court has seen an increasing number of high-profile collective actions brought under the GLO regime. These include the Volkswagen emissions litigation,[4] the first UK "shareholder class action" in the Lloyds/HBOS litigation,[5] claims against a number of multinational businesses following environmental incidents,[6] and an increasing body of claims relating to mass data breaches.[7]

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Collective Proceedings in the CAT are limited to alleged infringements of competition law. Following reforms in 2015, Collective Proceedings are no longer restricted to consumer claims and follow on actions arising out of liability decisions of the European Commission. A Collective Proceeding can now be brought on a standalone or follow on basis, on behalf of a class comprised of consumers, businesses, or any other claimants.

In the High Court, there are no subject matter limitations on Representative Proceedings or GLOs. Accordingly, various types of claims have been brought using these mechanisms, including claims alleging personal injury and negligence, pensions matters, product liability disputes, environmental issues, financial services matters and, increasingly, issues relating to ESG and to data privacy and data breach.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Collective Proceedings

A class member or a third-party representative (where the CAT authorizes it to do so) can seek a Collective Proceedings Order to bring a claim on a representative basis in the CAT. To be certified the claims must meet the tests for eligibility and authorization (see Section D below).

Representative Proceedings

Representative Proceedings can be brought where more than one person has the "same interest" in a claim. A claim can

be issued on a representative basis—there is no need for a certification or approval stage—but such claims often face applications to strike them out on the basis that they are not suitable to be brought as a Representative Proceeding, which can in effect operate as a reverse certification process.

Group Litigation Orders

A GLO requires only that more than one claimant has a cause of action raising common or related issues of fact or law. The GLO can be applied for by either the claimants seeking to bring a group action, or the defendants facing multiple claims that they wish to have formally case managed together.

D. KEY PROCEDURAL REQUIREMENTS

Collective Proceedings

The CAT will consider whether to certify a claim as a Collective Proceeding by reference to the tests for eligibility and authorization. The claims will be eligible if the Tribunal is satisfied that they are brought on behalf of an identifiable class of persons, raise common issues, and are suitable to be brought as collective proceedings (taking into account, for example, the costs and benefits of doing so, the size and nature of the class, and whether aggregate damages can be awarded). The test for authorization is whether the CAT considers it just and reasonable for the representative to act for the class (or subclass), taking into account factors such as whether the proposed representative:

- Can fairly and adequately act in the interests of the class members;
- Has any material conflict of interest with the class members;
- Has a plan as to how it will govern and consult with the class; and
- Can pay the defendant's recoverable costs if ordered to do so.

If the CAT allows class proceedings to progress, the CPO will authorize a class representative, identify the class and the claims that are certified, and specify whether the proceedings are opt-in or opt-out along with the manner for doing so. There is no minimum number of class members.

Representative Proceedings

Representative actions must pass the "same interest" test. A claimant does not require the permission of the court to bring a claim as a representative action; a claimant can appoint themselves as a representative even if the purported class members have not authorized this.

Group Litigation Orders

Parties can apply for a GLO or the court may make an order of its own initiative. A GLO application can be made at any time before or after the relevant claims have been issued. If the GLO is granted, the court will specify the issues covered by the GLO and provide directions for the establishment of a group register on which the claims managed under the GLO will be entered.

E. BINDING OTHERS

Collective Proceedings

Judgments and orders in Collective Proceedings are binding on members of the represented class. The CAT has both opt-in and opt-out procedures, and the CAT will decide, at the outset of the class proceedings, how to manage the claim and therefore who will fall into the class bound by any orders or judgments:

- Opt-in proceedings are brought and maintained on behalf of each class member who opts in by notifying the class representative that their claim should be included.
- Opt-out proceedings are maintained on behalf of each member of the defined class domiciled in the UK save for those who opt out by notifying the class representative. Class members who are not domiciled in the UK must specifically opt in to have their claim included in the proceedings. Where a class member opts out (or where a foreign class member does not opt in), the proceedings are not maintained on their behalf and such persons will not be bound by any subsequent judgment in the proceedings.

Representative Proceedings

In representative actions, judgments and orders bind "all persons represented" (who need not be a party to the actions), albeit they are enforceable only with the court's permission.

Group Litigation Orders

The GLO regime is an opt-in regime. The court ultimately controls whether claims are added to or removed from the group register, which records who has opted into the claim. Any judgment or order in a claim on the group register in respect of any GLO issues will bind the parties to all other claims on that register, unless the court orders otherwise.

F. REMEDIES AVAILABLE

Both the High Court and the CAT have the power to grant injunctive relief and/or to award damages.

Under English law, damages typically restore the injured party to their position before the tortious act. Unlike in the United States, there is no equivalent to "treble" damages, and punitive damages are typically not available.

Declaratory relief is available in the High Court, but not in the CAT.

G. SETTLEMENTS AND FINANCING

Settlements

Any settlement of opt-out Collective Proceedings must be approved by the CAT. Once approved, it is binding on all class members unless they have opted out within the specified time. The opt-out nature of the settlement will apply only to claimants domiciled in the UK, but claimants outside the jurisdiction are typically able to opt into it. In December 2023, the CAT approved the first application to settle in a Collective Proceeding since the regime began, in *Case 1339/7/7/20 Mark McLaren Class Representative Limited. v MOL (Europe Africa) Ltd and others* (the case continues against the remaining Defendants).

Parties can settle Representative Proceedings and proceedings subject to a GLO without court authorization, although the parties must inform the court of settlements in pending proceedings.

Contingency Fee Arrangements and Third-Party Funding

Contingency fee arrangements are generally permitted under English law. One type of contingency fee arrangement, the "damages-based agreement," is unenforceable in opt-out collective proceedings in the CAT, but can be used in opt-in cases.

Third-party litigation funding is also allowed, and third-party funders can earn a share of litigation proceeds, unless the funding arrangement constitutes champerty or maintenance. As set out in Section A above, the litigation funding market is booming in the UK. Third party funding is common in group claims, and is a key driver of their growing number, sophistication and complexity.

The decision of the Supreme Court in July 2023 in *R (PACCAR Inc and others) v Competition Appeal Tribunal and others*[8] cast doubt over the enforceability of a number of existing funding arrangements. The court found that litigation funding arrangements where the funder is entitled to recover a share or percentage of any damages recovered by the claimants are "damages-based agreements" and therefore: (i) are not permitted to fund opt-out Collective Proceedings; and (ii) to be enforceable in respect of any claim, must comply with the specific requirements of the Damages Based Agreement Regulations 2013. This has led to a series of satellite applications asking the court to consider whether existing and in some cases restructured funding arrangements are compliant.

ENDNOTES

1 *Walter Merricks CBE v Mastercard Incorporated and others* [2017] CAT 16

2 *Walter Merricks CBE v Mastercard Incorporated and others* [2019] EWCA Civ 674

3 *Mastercard Incorporated and others v Walter Merricks CBE* [2020] UKSC 51

4 The VW NOx Emissions Group Litigation

5 Lloyds/HBOS Group Litigation

6 The Bille and Ogale Group Litigation; The Nchanga Copper Mine Group Litigation

7 The British Airways Data Event Group Litigation; *Wm Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12

8 [2023] UKSC 280

Part V: Argentina, Brazil, and Taiwan

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Spain, The Netherlands, and Taiwan), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

Class Actions Jurisdictions

Argentina

Section Author:
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A. BRIEF OVERVIEW AND HISTORY

The 1994 Reform to the Argentine Constitution incorporated collective rights—also called "third-generation rights," including substantive protections to the environment and consumers.[1] This protection to collective rights was bolstered in Argentina when the country gave constitutional status to several international treaties entered into by Argentina, which also incorporate new "rights," such as the right to housing or to an adequate living standard.[2]

As part of that constitutional amendment, the Argentine Constitution introduced the possibility of bringing lawsuits to protect collective rights. Under Article 43 of the Argentine Constitution, the affected individuals, a governmental institution labeled Ombudsman, and certain associations are entitled to bring a summary action ("*amparo colectivo*") in the event of "all forms of discrimination and for the protection of the environment, competition, users and consumers, and rights of collective impact in general."[3] In line with this constitutional provision, the Argentine Civil and Commercial Code enacted in August 2015 expressly recognized the existence of collective rights.[4]

In spite of these legal improvements, Argentina has not yet enacted a comprehensive regulatory framework regarding class actions ("*acciones de clase*") at a federal level. While the General Environmental Act[5] and the Consumer Protection Act[6] provide for class actions, they only contain certain isolated procedural provisions that are in principle limited to those specific areas of law. During the past decades, several class action bills have been introduced in the Argentine Congress with the intention of broadly regulating class actions, but none of those bills have passed to date.

In an attempt to provide a solution to the lack of a proper class action regime, the Argentine Supreme Court has developed certain admissibility rules and procedural guidelines regarding class actions, identifying the requirements of adequacy of representation, numerosity, and commonality that must be met to allow these types of proceedings. However, as in most civil law countries, Argentina does not apply the principle of *stare decisis*, thus creating uncertainty regarding the rights that may be protected by collective actions and the effects of the judgment issued in this type of lawsuit.

The landmark decision and gateway to class actions in Argentina is the Argentine Supreme Court ruling in *Halabi v. Executive Branch* (2009).[7] In this case, the majority reaffirmed that regardless of a law regulating class actions, Article 43 of the Argentine Constitution is fully operative and class actions (labeled as "*acciones colectivas*") are admitted under Argentine law with "*analogous characteristics and effects as those existent under US laws*." The *Halabi* decision identified three different categories of rights in Argentina: (i) individual

rights; (ii) collective rights related to collective interests as subject matter (e.g., environmental claims); and (iii) collective rights related to homogeneous individual interests (e.g., product liability claims). In *Halabi*, the Argentine Supreme Court also established the requirements for filing collective actions to protect rights described in items (ii) and (iii).

Following the decision in *Halabi*, the Argentine Supreme Court has issued other significant rulings in the area of class actions, such as the *Padec v. Swiss Medical* (2013).[8] In *Padec*, the Argentine Supreme Court recognized a consumer rights protection association's standing to file a class action on behalf of a group of consumers. Another important decision was issued in the *Loma Negra* (2015)[9] case. In *Loma Negra,* the Argentine Supreme Court denied standing to an NGO due to the overbroad definition of the class.

In absence of regulation from the Argentine Congress, these guidelines set by the Argentine Supreme Court have been in general closely followed by lower courts and practitioners when it comes to class actions. These court decisions ultimately led the Argentine Supreme Court to enact several administrative regulations ("*acordadas*") applicable to federal and national courts, which replicated many of the parameters outlined in *Halabi* and the subsequent rulings, aiming to improve certainty, publicity, and transparency in class actions. The most significant rulings in this regard are as follows:

- *Ruling No. 32/2014*, which created the Collective Proceedings Public Registry and required that, prior to identifying an action for the Registry, judges must issue a decision addressing whether all formal requirements for the collective action have been met, among other requisites.
- *Ruling No. 12/2016*, which set forth the "Class Actions Proceedings Regulation," including rules governing the proceedings in these suits in all the courts within the Argentine Federal Judiciary. The Regulation set some guidelines on how to register class actions in the Registry, the certification order that the court must issue after defendants answer the initial complaint, and the consolidation of collective proceedings with the same or similar purposes filed with different courts, among other issues.

The Argentine Supreme Court has clarified that, even in the presence of typically individual rights, class actions will also be available when there is a strong state interest in their protection.

In summary, the framework governing class actions in Argentina is mainly contained in case law, the rulings of the Argentine Supreme Court, and specific provisions of the Consumer Protection Act and other laws related to collective rights.

However, at a local level, certain jurisdictions have also begun to approve legislation with significant regulations regarding class actions. In March 2021, the Legislature of the City of Buenos Aires passed the Code of Procedure in Consumer Relations,[10] which establishes how consumer relation procedures will be carried out in the Consumer Courts of the City of Buenos Aires. It has been in force since April 19, 2021, and it will govern proceedings of new cases filed with Administrative, Tax, and Consumer Courts until the Argentine Consumer Relations Courts are transferred from the Federal Administration to the Government of the City of Buenos Aires. The new Code of Procedure in Consumer Relations includes provisions regarding consumer collective claims, including admissibility requirements, standards of adequate representation, potential scopes of the claim, publicity, *res judicata,* and settlement rules.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Under Argentine law, class actions can be filed in all areas of law involving the enforcement of collective rights or rights with collective impact—also known as "diffuse rights"—which protect the indivisible interests of an indeterminate number of persons. These types of lawsuits may then refer to environmental claims, governmental assets, labor rights, consumer protection rights, antitrust, human rights, public utilities, financial services, unilateral changes of contractual provisions, and data privacy. Conversely, class actions are not suitable to protect merely individual rights or the rights of individuals based on different underlying factual circumstances. As asserted in *Halabi*, the general rule of standing provides that individual rights must be exercised by the holder of that right.

Ruling No. 12/2016 of the Argentine Supreme Court, effective October 2016, specifies the admissibility requisites that any complaint concerning collective rights (except for environmental and criminal cases) must contain, apart from those stated in the Federal Procedural Code. Following the criteria set in *Halabi*, it distinguishes between rights with a collective impact regarding collective interests and individual but homogeneous interests. In all such cases, the Argentine Supreme Court has stressed that it is essential to corroborate that there is a "case" pursuant to Article 116 of the Argentine Constitution, as an action aimed at merely controlling the legality of a legal provision cannot be admitted.

1. **Class actions that concern collective assets**. This category refers to rights that are indivisible and correspond to the entire community, covering public goods, which are non-excludable and non-rival (such as the environment). Under these rights, single remedies are not feasible and plaintiffs are required to state: (a) the collective interest whose protection is sought; and (b) that the claim is focused on the collective nature of the right.
2. **Class actions concerning individual but homogeneous interests**. In these cases, there is no collective interest given that the rights affected are individual rights, rather than collective. However, there is a single, continued event causing the harm to each individual, and there is an identifiable, homogeneous factual cause of the individual's injury (such as may be the case of personal or monetary rights resulting from harms to the environment and competition, consumer rights, and rights of discriminated people). In this type of rights case, plaintiffs are required to state: (a) the existence of a common factual basis that causes an injury to a relevant number of individual rights; (b) that the claim is focused on the common effects of that injury's cause; and (c) that the right of access to justice of the members of the class is affected (i.e., that individual actions are not justified).

Notwithstanding the above, the Argentine Supreme Court has clarified that, even in the presence of typically individual rights, class actions will also be available when there is a strong state interest in their protection, whether this is because of their social relevance or due to the special features of the affected parties.[11]

Additionally, Ruling No. 12/2016 provides that either for item 1 or 2 above, plaintiffs must: (i) identify the group involved in the case; (ii) justify the adequate representation of the class; (iii) indicate that it is registered in the National Registry of

Consumers Associations; (iv) disclose whether it has initiated other actions that substantially resemble the impact on rights of collective incidence; and (v) consult the Public Registry of Collective Proceedings created by Ruling No. 32/2014 regarding the existence of another pending proceeding which claim may have a substantial similarity.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Collective actions can be filed before judicial courts or administrative authorities by: (i) legal entities with authority to represent collective rights (e.g., consumer associations, NGOs or similar associations); (ii) individuals entitled to protect collective rights, such as attorneys-in-fact acting as proxies with powers to represent a class; (iii) the *Defensor del Pueblo*, which is an autonomous governmental authority linked to the Federal Congress responsible for overseeing constitutional rights; (iv) public prosecutors; and (v) the Secretary of Trade.[12] Applicable statutes and regulations in effect in Argentina are not clear as to whether individuals may file collective actions on behalf of a class.

Regarding consumer associations, the Consumer Protection Act and Rulings contain certain requisites that such entities must meet to represent the interests of users and consumers, including to be formed as a legal entity, not participate in politics, be independent from professional or commercial interests, not receive contributions from business companies, and carry no advertising in their publications.[13] Moreover, associations are also entitled to appear as co-plaintiffs when collective rights are involved in a lawsuit.[14]

D. KEY PROCEDURAL REQUIREMENTS

Before discussing the procedural requirements per se, it is worth noting that Ruling No. 32/2014 created the Collective Proceedings Public Registry, a database operated by the Secretary of the Supreme Court, where all pending collective actions must be registered in order of appearance. This database is publicly accessible and free of charge.[15] In principle, the Registry was meant to be operative for national and federal courts; however, the intention of the supreme court is to conclude cooperation agreements with the Supreme Courts of the Provinces and of the city of Buenos Aires for reciprocal sharing of the information registered therein.

The purpose of the Registry is to publicize the class actions and prevent duplicated cases with similar or identical subject matter being handled by different judges as this could inevitably lead to contradictory judgments. In fact, the Registry was created following the decision in *Municipalidad de Berazategui v. Cablevisión*, in which the Argentine Supreme Court warned about an increase in collective actions with identical or similar matters of law or fact being tried in different courts across the country.[16] In *Asociación Civil DEFEINDER v. Telefónica* (2014)[17], the Argentine Supreme Court ruled that enrollment in the Registry is a necessary and exclusive condition for consumer associations to be brought on behalf of the interests of users and consumers.

There are no specific procedural laws enacted by the Argentine Congress regulating class certification on collective actions. Judges usually define the scope of the class on a case-by-case basis in light of the precedents issued by the Argentine Supreme Court. The key procedural steps regarding these types of proceedings are contained in Regulations No. 32/2014 and 12/2016 of the Argentine Supreme Court.

First, if the judge preliminarily finds that the complaint verifies the admissibility requirements for collective actions, he or she will require the Collective Proceedings Public Registry to report the existence of a similar class action that is already filed. This preliminary finding is made prior to listing the collective action in the Collective Proceedings Public Registry, and it works similarly to the class certification phase of actions in the United States.

The court may request further clarifications to the plaintiff until legal requirements are complied with. The court may also take measures to organize the proceedings. Even if the claim is not filed as a collective lawsuit, the court may determine that the proceedings continue as such if the requirements of Regulation No. 32/2014 are met. Collective proceedings with the same or similar purposes filed with different courts must

be consolidated at the court where the case was first listed on the Collective Proceedings Public Registry.

Second, should the Registry confirm that there is no other similar class action pending, the judge shall issue a Provisional Registration Resolution, before ordering service of the complaint to defendants. The Resolution of Registration must decide: (i) the provisional identification of the class; (ii) the subject-matter of the claim; (iii) the identification of defendants to the case; and (iv) order registration before the Registry. The Resolution of Registration is not subject to appeals but may be reviewed in an appealable decision after the defendant files its answer to the initial complaint.

Third, after the defendant answers the complaint, the court must issue a Certification Order ("*certificación del colectivo*") together with the decision of the preliminary motions or before the evidence hearing. The Certification Order must decide: (i) to ratify or modify as needed the Resolution of Registration; and (ii) set forth mechanisms to ensure the proper notice of all those persons who may have an interest in the outcome of the proceedings and their opt-out rights. The Certification Order is subject to appeal.[18]

Finally, the court must keep the Collective Proceedings Public Registry informed of every relevant decision issued in collective actions or any injunctions granted in connection with a future collective action that has yet to be registered with the Collective Proceedings Public Registry.

E. BINDING OTHERS

Non-parties can be bound to the result of the collective action. As previously noted, Regulations No. 32/2014 and 12/2016 provide that collective actions must be registered with the Collective Proceedings Public Registry to allow potentially interested parties to exercise their opt-out rights. Additionally, when making a preliminary assessment on whether the case should proceed as a collective action, the judge must consider the mechanisms that will best ensure that potentially interested parties can be notified and preserve opt-out rights. These regulations do not apply to collective cases dealing with environmental and criminal law. The Consumer Protection Act further provides that final judgments that grant claims in collective actions apply indistinctively to individuals in the protected class (or, in other words, have *erga ormes* effects) but for consumers who exercised their opt-out rights prior to the judgment.[19]

F. REMEDIES AVAILABLE

Plaintiffs can recover damages, lost profits, and any other damages caused directly by the defendant. There is no cap on the amount of damages that can be recovered.

Punitive damages are generally not accepted in Argentina. However, the Consumer Protection Act provides that—independently from other indemnifications—consumers can request judges to impose a civil fine to suppliers who breach their legal or contractual obligations.[20] When more than one supplier is responsible for the breach, they may all be considered joint and severally liable. Courts have discretionary authority to assess punitive damages in consumer cases, but the amount of punitive damages is capped at approximately ARS 2,075,963,253[21] (approximately USD 2,110,791[22]).

Declaratory relief in Argentina is available only at the end of the lawsuit. Injunctions and interim relief are available at all times during proceedings.

G. SETTLEMENTS AND FINANCING

There are no specific settlement rules applicable to collective actions in Argentina. If a settlement is reached once proceedings have commenced, the court should be informed. Local civil procedure rules also provide for compulsory private mediation between opposing parties in order to settle the dispute before going to court or, if applicable, during the case.

If the class action involves a settlement, the judge must establish guidelines in connection with the procedure to pay monetary damages for the benefit of the entire affected class.

Absent a specific regulation, class action costs are in principle regulated by the local rules applicable in the jurisdiction where the collective action is pending. Class action costs comprise

all reasonable expenses arising from court proceedings as well as costs incurred to avoid proceedings. Generally, class action costs include: (i) court taxes; (ii) attorney's fees; and (iii) expert's fees.

Under the loser-pays rule, the losing party bears all the costs in the amount established by the court. For claims filed under the Consumer Protection Act, however, courts automatically grant claimants the benefit to litigate without costs or, at a minimum, without paying court taxes.[23] Moreover, the Argentine Supreme Court recently held in *ADDUC y otros c/ AySA y otro s/ proceso de conocimiento* that consumer associations that file class actions under the Consumer Protection Act are automatically granted the legal aid benefit (which covers all costs of the judicial proceeding, including court taxes).

Additionally, as a general rule, attorney's fees are estimated by courts based on the minimum and maximum fees stated in the local attorney regulations, which vary according to their performance during the case. At federal and national levels, attorney's fees in pecuniary matters for lower court work would range from 16.8% to 21% of the value of the claim.[24]

Third-party funding is not regulated in Argentina.

H. OTHER KEY CLASS ACTION ISSUES

The issue of statute of limitations in Argentine collective actions is governed by the general rules in the Argentine Civil and Commercial Code, or by specific legislation depending on the subject matter. Under the Argentine Civil and Commercial Code, the general statute of limitations period in civil and commercial matters is five years, while the statute of limitations period for claims seeking damages arising from civil liability is three years. Current case law has applied these statute of limitations terms in a similar fashion to consumer class actions brought in Argentina.

Additionally, there are several bills of law seeking to regulate class actions pending in the Argentine Congress. The Argentine Congress, however, has been reluctant to enact comprehensive laws giving procedural guidance on class actions. As seen above, with the congress's inaction, the Argentine Supreme Court has been trying to deal with issues surrounding class actions by issuing its own regulations.

The author would like to thank Rodrigo F. García for his contributions to this section.

ENDNOTES

1 *See* Article 41 of the Argentine Constitution (providing that "all inhabitants enjoy the right to a healthy environment"); and Article 42 (aimed at protecting all consumers of goods and users of public utilities).

2 *See* Argentine Constitution, Article 75, § 22. This provision recognized, *inter alia*, the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations in 1948).

3 The Consumer Protection Act, enacted in 1993, granted standing to associations of consumers to defend the interests of consumers when these were threatened or affected.

4 *See* Article 14 of the Argentine Civil and Commercial Code (acknowledging the existence of both individual and collective rights, and preventing the exercise of individual rights that can negatively affect the environment and collective rights in general).

5 *See* Law No. 25,675, as amended.

6 *See* Law No. 24,240, as amended.

7 *See Halabi Ernesto v Poder Ejecutivo Nacional (PEN) Ley 25873 re Amparo Ley 16986,* February 24, 2009, (*Fallos* 332:111).

8 *See Padec v Swiss Medical S.A. re nulidad de cláusulas contractuales*, August 21, 2013, (*Fallos* 336:1236).

9 *See Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía. Industrial Argentina S.A. y otros*, February 10, 2015, (Fallos 338:40).

10 *See* Law No. 6,407 of the City of Buenos Aires.

11 *See Halabi*, § 6.

12 *See* Consumer Protection Act, Articles 52 and 55.

13 *See* Consumer Protection Act, Articles 56 and 57. These requirements are supplemented by rulings No. 32/2014 and No. 12/2016 of the Argentine Supreme Court.

14 *See* Consumer Protection Act, Article 52.

15 *See* Argentine Supreme Court's website.

16 *See Municipalidad de Berazategui v. Cablevisión S.A. re amparo*, September 23, 2014, (M. 1145. XLIX).

17 See *Asociación Civil DEFEINDER y otros v Telefónica de Argentina S.A. re proceso de conocimiento*, November 27, 2014, (A. 803. XLVI).

18 *See* Regulation No. 32/2014.

19 *See* Consumer Protection Act, Article 54.

20 *See* Consumer Protection Act, Article 52 bis.

21 Pursuant to Article 47(b) of the Consumer Protection Law, the maximum is 2,100 Total Basic Food Baskets (TBFB) as defined by the National Institute of Statistics and Censuses (abbreviated as 'INDEC' in Spanish). The TBFB is valued at $988,553.93 as of August 2024.

22 Calculation based on the selling exchange rate of the U.S. dollar quoted by the Banco de la Nación Argentina as of September 19, 2024.

23 *See* Consumer Protection Act, Section 53, last paragraph.

24 *See* Law No. 27,423 enacted in 2017.

Brazil

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A. BRIEF OVERVIEW AND HISTORY

In contrast to common law systems like the United States, civil law countries like Brazil do not have a long history of using class actions to litigate. Brazil has experienced a significant growth in class action proceedings only in the last 40 years. But even so, what is known in Brazil as a "class action" differs significantly from the class action proceedings available in common law countries both in terms of process and interests involved.

With the enactment of Law No. 7,347 in 1985, Brazilian legislators authorized certain public and private organizations to file class actions. Class actions in Brazil are generally limited to protecting public interests and are primarily designed to protect collective rights, diffuse rights, and certain individual homogeneous rights—all of which are broadly defined by law.

Generally, diffuse rights apply to a non-identifiable group of people linked by factual circumstances. On the other hand, collective rights apply to a more specific group of people connected by legal privity. Lastly, individual homogeneous rights are individual rights that have a common origin (e.g., with a similar factual or legal foundation). The main device used to protect these interests is a public civil class action (*ação civil pública*).

The following are the main federal laws that contain provisions regarding the protection of diffuse and collective rights in Brazil:

- Law No. 7,347/1985 regulates the material and procedural aspects of public civil class actions.
- Law No. 7,853/1989 regulates enforcement of rights of the handicapped through public civil class actions.
- Law No. 7,913/1989 regulates enforcement of rights of investors in securities markets through public civil class actions.
- Law No. 8,069/1990 regulates enforcement of children's rights through public civil class actions.
- Law No. 8,078/1990 (the "Brazilian Consumer Rights Code") regulates enforcement of consumer rights through public civil class actions.
- Law No. 10,741/2003 regulates enforcement of rights of the elderly through public civil class actions.
- Law No. 13,709/2018 (the "Brazilian General Data Protection Act") regulates enforcement of rights of consumers and data holders through public civil class actions.
- Law No. 14,230/2021 amended Law No. 8,429/1992 (which regulates acts of administrative improbity committed by Brazilian government officials) to expressly allow prosecutors to use public civil class actions in certain situations involving acts of administrative improbity.

Based on these laws, key recent cases include the following:

- In July 2024, the Federal Prosecutor's Office from the State of São Paulo and the Consumer Protection Institute ("IDEC") filed a public civil class action against WhatsApp LLC and the Brazilian National Data Protection Agency ("ANPD") before the Federal Court of São Paulo seeking, among other reliefs, a compensation from WhatsApp in the amount of BRL 1.7 billion for collective moral damages arising from WhatsApp's alleged improper revision to its data privacy policy in 2021. Additionally, plaintiffs also sought an injunction to prevent WhatsApp from sharing personal information gathered through the app with other companies owned by the Meta Group, and creating a system that allows WhatsApp customers to "opt-out" from sharing their personal information. On August 14, 2024, the 2nd Federal Court of São Paulo partially granted the injunction to prevent WhatsApp from sharing personal information gathered through the app with other companies owned by the Meta Group, and creating a system that allows WhatsApp customers to "opt-out" from sharing their personal information. The case is ongoing.
- In February 2021, a civil association called ANCED (*Associação Nacional dos Centros de Defesa da Criança e do Adolescente*) filed several public civil class actions before the Court of Children and Teenagers of the Federal District against videogame manufacturers (i.e., Ubisoft; Riot; Tencent; etc) and platforms (i.e., Apple; Microsoft; etc) claiming that loot boxes available in some games would violate Brazilian consumer and infant laws. Based on such allegations, ANCED requested injunctions to suspend the loot boxes used in those games until a final decision on the merits. ANCED also requested the ban of the game's loot boxes and that each defendant be sentenced to pay compensations in the amount of: (i) BRL 1.5 billion for collective moral damages; and (ii) BRL 1,000 to each child or teenager exposed to loot boxes. The injunction was denied, and the cases are ongoing.
- On November 25, 2020, the Rio Grande do Sul State Public Defender's Office filed a public civil class action against the French supermarket chain Carrefour claiming collective moral and social damages in the amount of BRL 200 million arising from the murder of a consumer within one of Carrefour's stores located in the State of Rio Grande do Sul. The murder of this consumer allegedly had a racial discrimination component. According to the Public Defender's Office, damages should be reverted to funds that focus on the fight against racial discrimination and enhancing consumer's rights. Additionally, the Public Defender's Office is asking the court to oblige Carrefour to develop a plan against racial discrimination focusing on employee and third-party vendor training. On June 11, 2021, Carrefour entered into a BRL 115 million settlement with multiple Brazilian authorities, including the Public Defender's Office, by which Carrefour agreed to create internal policies against racism and compensate collective damages in exchange for the withdrawal of the public civil class action.
- On September 21, 2020, the Federal District Prosecutor's Office brought the first public civil class action in Brazil under the Brazilian General Data Protection Act against two defendant companies, seeking to enjoin the illegal treatment of data through the sale of personal information of multiple Brazilian citizens. This lawsuit remains ongoing. Following the filing of this leading case in the Federal District of Brazil, there have been several other similar lawsuits brought by Brazilian prosecutors across the country.
- On December 18, 2019, the São Paulo State Prosecutors brought a public civil class action against Brazil-based cryptocurrency investment company Genza and its entities/shareholders seeking a BRL 1 billion compensation on behalf of Genza's approximate 45,000 investors who were allegedly harmed by Genza's supposed fraudulent transactions. The São Paulo State Prosecutors also requested the freezing of Genza's assets, Genza's dissolution, and the piercing of the corporate veil to reach Genza's shareholders. On February 14, 2020, the São Paulo State Court issued an order against Genza and its entities/shareholders ordering the freezing of BRL 800 million. Given the extremely large number of defendants, this lawsuit remains in a preliminary stage.
- On January 25, 2019, a mining dam based in the city of Brumadinho, Minas Gerais, managed by Vale, collapsed. Approximately 13 million cubic meters of tailings were spilled over, causing environmental damage and killing hundreds of individuals. State prosecutors, federal labor prosecutors, and employee associations filed separate public civil class

actions against Vale seeking billions in compensation for damages caused by the dam collapse. Vale settled some of these lawsuits, but other lawsuits are still ongoing.

- In December 2018, the São Paulo State Prosecutors brought a public civil class action against Google involving the advertisement of products through *YouTube* in violation of Brazilian teenager and child protection laws as well as the Brazilian Consumer Rights Code. The São Paulo State Prosecutors requested: (i) an injunctive relief to prevent Google from broadcasting allegedly illegal advertisements; (ii) that Google be compelled to implement internal controls aimed at preventing the broadcasting of advertisements through *YouTube* in violation of teenager and child protection laws; and (iii) collective moral damages. On December 19, 2019, Google settled the dispute with the São Paulo State Prosecutors, and agreed to create—together with the National Council for Advertisement Self-Regulation—guidelines for advertising to teenagers and children in the digital environment, and create a direct communication channel with state prosecutors to complain about future similar cases.
- As one can note from the above cases, plaintiff law firms see little incentive to bring claims against market players in Brazil. This is due to the public nature of public civil class actions, and the fact that certain features of litigation in common law countries are nonexistent in Brazil. For instance, in Brazil there are no jury trials in civil matters, no common law discovery or punitive damages, and legal proceedings may generally take multiple years to be resolved given the multiple layers of appeal. For this reason, third-party funding of public civil class actions is quite limited in Brazil.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Public civil class actions are available for claims addressing: (i) consumer laws (including product liability cases); (ii) environmental, artistic, aesthetic, historic, touristic, urban, and landscape laws; (iii) elder laws; (iv) governmental property; (v) public property; (vi) rights of the handicapped; (vii) children's rights; (viii) rights of securities' market investors; (ix) violation of the economic order and antitrust; (x) corruption; (xi) illegal acts of governmental authorities; (xii) human rights of minorities and religious groups; (xiii) data protection; (xiv) acts of administrative improbity; and (xv) any collective or diffuse rights not specifically regulated by law.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Generally, in Brazil, no person can file a lawsuit on behalf of another person, unless a law provides otherwise. This is because standing to litigate is personal to the plaintiff who has suffered losses. Individuals, therefore, do not have standing to bring class actions under Brazilian collective action laws. Instead, only the following fixed set of public and private entities have standing to institute class actions: (i) governmental authorities (Federal Union, states, municipalities); (ii) government-controlled companies and foundations; (iii) public defenders; (iv) state and federal prosecutors; and (v) those private nonprofit associations (a) created at least a year before filing the class action (when there is a "clear social interest" involved in the class action, the Brazilian case law usually exempts the association to meet this requirement), and (b) with a corporate objective to protect the general public interest implicated by the class action. These plaintiffs can file class actions before state or federal courts, depending on the parties involved in the lawsuit.

Most frequently, prosecutors file class actions in Brazil for the protection of consumers' rights and the environment. Public or private organizations that represent an affected class (i.e., labor unions or industry associations) also file class actions. For those class actions filed by nonprofit associations, the Brazilian Constitution (art. 5, XXI) requires that members of the association convene at a meeting and approve the decision to file a class action on behalf of its members to defend their common interests or rights. Members may also provide individual authorization for the association to initiate a class action.

While the Brazilian Supreme Court held in 2014 that such an authorization is required, Brazilian courts, such as the Superior Court of Justice, have recently held that such authorization may not be necessary in cases involving diffuse rights, such as consumer or environmental rights belonging to a non-identifiable group of people, as well as individual homogenous rights. The case law on this point remains unsettled. Additionally, the

Superior Court of Justice has also held that judges are allowed to review, without a request by the parties, whether one of the nonprofit association's objectives is actually designed to protect the specific public interest at issue in the class action.

The Prosecutor's Office must participate in any public civil class action to oversee the legality of the proceedings (including in public civil class actions brought by prosecutors). Prosecutors also have the right to initiate administrative civil investigations (*inquérito civil*) before deciding whether or not to file a class action. These investigations usually focus on producing evidence to support the claim and may involve governmental agencies and law enforcement authorities. Importantly, once prosecutors initiate such administrative civil investigations, these investigations can only be finally dismissed or closed with the approval of the Prosecutors' Superior Council (*Conselho Superior do Ministério* Público).

D. KEY PROCEDURAL REQUIREMENTS

In stark contrast to the United States, there are no specific procedures for class certification, defining a class, or becoming a class representative in connection with class actions in Brazil. The general procedure, instead, involves only a preliminary analysis of standing to sue, in accordance with the provisions of Law No. 7,347/1985 (Public Civil Class Actions Law), the general provisions of the Civil Procedure Code, and the Consumer Defense Code (if and where applicable). Plaintiffs must make a preliminary showing of legal interest to the court (i.e., the claim must be necessary and adequate to achieve plaintiff's goals). If the court finds that the enforcement of a class action decision will be too difficult because of myriad individual particularities in the case, the court may dismiss for lack of a legal interest. Brazilian law assumes that those public and private entities with standing to sue will adequately represent the class, but recent court decisions permit the judge to review whether an association has been authorized by its members to file public civil class actions involving their individual interests or whether the issues in the public civil class action match the purposes of the association as stated in its bylaws. And while notice of claims is provided via the official press, courts do not address issues such as predominance, commonality, or ascertainability.

E. BINDING OTHERS

Only the claimants listed in Section C above can file class actions. The list does not include individuals. Therefore, there are no specific opt-in or opt-out procedural rules to join class actions in Brazil, except in cases where similar claims have already been filed by individuals seeking their own recovery.

If the rights in dispute in a public civil class action are diffuse or collective rights, the judge determines the class of persons entitled to claim damages. The court then issues a general decision in connection with the claim, but does not award monetary damages to individuals. Favorable monetary judgments go into a fund managed by state or federal authorities for the benefit of those represented. However, if the rights in dispute are individual homogeneous rights arising from the same origin (i.e., same illegal conduct), the court will issue a general decision in connection with the claim, and either the claimants listed in Section C above or each individual affected by that origin will have to appear before the court to prove causation and damages.

Even though there are no specific opt-in/opt-out class action rules in Brazil, individuals with preexisting non-class claims based on the same issues or facts have two options under the ordinary rules of civil procedure when a class action starts. First, the individual plaintiff can request the suspension of his individual case to join the class action (up to 30 days after learning about the class action). The individual then benefits if the class action is successful but resumes the individual case if the class action is dismissed with prejudice. Alternatively, the individual can choose to continue his individual case while the class action proceeds. In that case, a favorable result in the class action would not benefit the individual plaintiff, who would simply continue to pursue his or her own case.

Importantly, the Superior Court of Justice has already held that a decision dismissing a class action filed to protect collective rights precludes other public or private organizations with standing from re-filing the same class action regardless of the grounds for dismissal. The decision dismissing class actions does not, however, preclude individuals from pursuing their own rights through individual lawsuits.

Also, if individuals move to intervene in ongoing class actions as co-plaintiffs, they will benefit from a favorable decision issued in the class action, but will be prevented from filing their own individual lawsuits if the class action is dismissed.

Finally, a public notice must be published in the official press soon after the filing of the class action.

F. REMEDIES AVAILABLE

Punitive damages are not available in Brazil. Compensatory damages (material and moral, the latter of which compensate the emotional distress incurred by the plaintiff and are determined at the court's discretion) are recoverable through lawsuits. Courts decide and cap the amount of damages. Recent decisions by the Superior Court of Justice also have prevented plaintiffs from seeking collective moral damages in public civil class actions dealing with individual homogeneous rights. According to the court, moral damages should be pursued individually by the holder of the right in the liquidation phase of the proceedings.

In addition, injunctive and declaratory relief, as well as specific performance are available in class actions. Injunctions can be sought at all times and, usually, are granted or denied within a few days or weeks by means of an interlocutory decision. As

to the other types of relief (damages, declaratory relief, and specific performance), claimants must state the relief sought in their complaint, and courts normally grant relief with a final decision on the merits after undergoing the evidentiary phase of the proceedings.

Claimants may freely amend their complaint to modify the relief sought until the defendant is served. Once the defendant is served, claimants may still amend their complaint until the end of the evidentiary phase, but the defendant must consent to the amendment in light of due process. In the complaint, the claimant must assert all of the known facts and applicable law that serve as the basis for the relief sought.

G. SETTLEMENTS AND FINANCING

Prosecutors filing public civil class actions usually formalize any settlement through the execution of a Conduct Adjustment Term (*Termo de Ajustamento de Conduta—TAC,* in Portuguese). The judge then approves those settlement terms, although no requirement for fairness or reasonableness review exists.

Attorneys and clients can negotiate their own private contractual arrangements, including contingency fees. While losing parties in Brazil generally pay the prevailing parties' litigation costs, losing parties do not have to pay judicial and legal fees in class actions, except in cases of bad faith. While this has been the prevailing position at the Brazilian Superior Court of Justice for the past several years, including by decision of its Special Chamber, in March 2022, the 3rd Panel of the Superior Court of Justice held that this position does not apply to public civil class actions brought by private associations—thus, leaving room for litigants to continue debating this issue.

Third-party funding of class actions is not common in Brazil given the low damages historically awarded by Brazilian courts and the significant length of legal proceedings, which are subject to multiple levels of appeal. Damages recovered in Brazilian class actions are either paid to the collective rights fund managed by the government or directly to individuals who have suffered damages. There are no clear laws regulating (allowing or permitting) this matter.

H. OTHER KEY CLASS ACTION ISSUES

The Law No. 7,347/1985 establishes that a final decision rendered in a public civil class action will be effective within the jurisdiction of the court that has rendered such decision. This legal provision has been thoroughly debated by Brazilian courts for several years. Some courts have decided that imposing geographic limits to decisions rendered in public civil class actions undermines the sole purpose of collective lawsuits as this limitation would require the filing of multiple public civil class actions dealing with the same matter in various jurisdictions to ensure that a collective right is protected in the entire country. Other courts have decided that the geographic limitation is not only valid, but necessary to limit the impact of decisions rendered by judges in smaller jurisdictions that would otherwise have nationwide effects.

After years of debate, the Superior Court of Justice case law was settled in the sense that decisions rendered in class actions should have nationwide effects. Recently, on April 8, 2021, the Brazilian Supreme Court held, by majority, that the provision in Law No. 7,347/1985 limiting the effects of decisions rendered in class actions is unconstitutional, confirming the position that decisions rendered in class actions should have nationwide effects. The Brazilian Supreme Court also held that the Brazilian court that first hears a class action with nationwide or regional effects will have jurisdiction over all related class actions to avoid conflicting decisions. The Brazilian Supreme Court decision is binding on all Brazilian courts.

The Superior Court of Justice has also recently decided another important procedural issue related to class actions. The decision was issued in the context of a "repetitive claim" proceeding, by which the Superior Court of Justice court creates a binding precedent as to a purely legal issue that have binding effect on lower courts. In this recent precedent, the Superior Court of Justice held that individual consumers may collect damages based on awards rendered in class actions filed by consumer associations regardless of whether or not those individual consumers are members of the plaintiff association.

The new Civil Procedure Code, which became effective on March 16, 2016, modernizes Brazil's civil procedure rules and contemplates substantial changes to litigation, including class actions, in Brazil. As relevant to class actions, these changes include the creation of new mechanisms to settle disputes before going to trial, new methods to count deadlines, and reductions on the number of appeals allowed, among others. For instance, the Code provides for the "Incident for Repetitive Claims Resolution" ("IRCR"), a procedural mechanism that suspends all ongoing individual and collective claims addressing the same legal issue in the state or region of the court that issues the suspension order, or within all of Brazil, if the suspension order is issued by either the Supreme Court or Superior Court of Justice. An IRCR will issue if there is: (i) repetition of cases that contain a controversy about the same legal issue; and (ii) a risk to legal security or equality. Then, after hearing the parties and others, the court will issue a decision resolving the legal controversy raised in the IRCR. The decision applies to all suspended and upcoming individual and collective cases dealing with the same legal issue within the jurisdiction of the court issuing the decision.

One other interesting procedural issue related to public civil class actions concerns jurisdiction. Except for cases that fall under federal jurisdiction, whenever there is a national or regional damage, the state courts of the capital of the state where the damage occurred and the Federal District will have jurisdiction to hear the case regardless of whether individuals in smaller cities suffered any damages. This feature is helpful for defending against bet-the-company public civil class actions so as to ensure that the case will be heard by a judge in the capital of the state or the Federal District where judges tend to be more accustomed to deciding cases of larger magnitude.

There are several active bills pending at the Senate and the House of Representatives seeking to change various aspects of the laws governing class actions in Brazil. Between September 2020 and April 2021, at least three bills of law were introduced in the Brazilian Congress seeking to revoke Law No. 7,347/1985 and create a brand new class actions regime in Brazil. Additionally, Bill No. 2943 and Bill No. 2270, introduced in May 2019 and August 2015, respectively, seek to provide the Federal and State Branches of the Brazilian Bar Association, as well as political parties, with standing to file class actions. Bill No. 6389, introduced in October 2016, seeks to provide certain bodies of the legislative branch and individuals with standing to file class actions. And Bill No. 3203, introduced in October 2015, seeks to expand to other public organizations with standing to file class actions the power to ask the court to start civil investigations to produce evidence before filing a class action. Currently, governing law allows only prosecutors to start an administrative civil investigation before filing a class action. It is uncertain whether any of these bills will become law.

Finally, a new Brazilian Civil Code is also under discussion in the Brazilian Congress. Some of the amendments relate to the way damages and causation are proven in Brazilian courts, and to the possibility of awarding punitive damages in Brazil. If and when these amendments are approved, this could be an incentive for plaintiff law firms to start bringing investor-backed class actions in Brazil.

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Taiwan

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A. BRIEF OVERVIEW AND HISTORY

General Rules: Code of Civil Procedure

In Taiwan, the counterpart of the class action in U.S. law exists within the Code of Civil Procedure ("CCP") and is also governed by several other specialized laws. The CCP outlines the general principles and prerequisites for such actions, whereas other laws contain tailored provisions for specific matters, such as consumer disputes and labor-related disputes.

Since the 1930s, the CCP has included a system known as the "Appointing Parties." According to CCP Art. 41(1), "multiple parties, who have common interests and may not qualify to be an unincorporated association provided in the third paragraph of the preceding Article[1], may appoint one or more persons from themselves to sue or to be sued on behalf of the appointing parties and the appointed parties."

In other words, multiple parties who share mutual interests, and may not qualify as an unincorporated association with a representative or administrator, have the authority to select one or more individuals from themselves to initiate or defend legal actions on behalf of both the appointing parties and the appointed representatives.

At the beginning of the 21st century, the CCP underwent a significant overhaul. Several provisions were added to the "Appointing Parties" system. For instance, CCP Art. 44-1(1) provides that "multiple parties with common interests who are members of the same incorporated charitable association may, to the extent permitted by said association's purpose as prescribed in its articles of incorporation, appoint such association as an appointed party to sue on behalf of them."[2] CCP Art. 44-2(1) provides that "when multiple parties, whose common interests have arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind, appoint one or more persons from themselves in accordance with the provision of Article 41 to sue for the same category of legal claims, the court may, with the consent of the appointed party, or upon the original appointed party's motion that the court considers appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time specifying: the transaction or occurrence giving rise to such claim; the evidence; and the demand for judgment for the relief sought. Those persons so joining shall be deemed to have made the same appointment in accordance with the provisions of Article 41." One can deduce from the aforementioned provisions that Taiwan follows an "opt-in" procedure.

Besides, CCP Art. 44-3(1) provides that "an incorporated charitable association or a foundation may initiate, with the permission of its competent governmental business authority and

to the extent permitted by the purposes as prescribed in its articles of incorporation, an action for injunctive relief prohibiting specific acts of a person who has violated the interests of the majority concerned."

In addition to the general provisions in the CCP, in order to meet the needs of specific types of matters, other laws also have relevant provisions.

For Consumer Matters: Consumer Protection Act

For example, concerning consumer matters, Taiwan's Consumer Protection Act ("CPA") stipulates that specific consumer advocacy groups are entitled to file lawsuits for damages or non-action.

As for the former (damages), CPA Art. 50(1) provides that "where numerous consumers are injured as a result of the same incident, a consumer advocacy group may take assignment of claims from 20 or more consumers and file a lawsuit in its own name. Consumers may terminate such assignment before the close of oral arguments, in which they shall notify the court." According to CPA Art. 50(3), the claims mentioned in Art. 50(1) include both pecuniary and non-pecuniary damages, and according to CPA Art. 51, where an action is brought in accordance with the CPA, and where the injuries in dispute are caused by willful misconduct, gross negligence, or negligence of a trader, punitive damages may be claimed.

As for the latter (non-action), CPA Art. 53(1) provides that when a trader commits a serious violation of this Act, consumer ombudsmen or consumer advocacy groups may petition the court for an injunction to discontinue or prohibit such actions.

For Labor Cases: Labor Incident Act

Furthermore, in labor cases, Taiwan's Labor Incident Act ("LIA"), which was implemented in 2020, contains several special provisions. LIA Art. 40(1) states that "a labor union may, within the scope of its purpose as described in its articles of incorporation, file a lawsuit prohibiting specific acts against the employer who infringes upon the interests of a majority of its members." This can be viewed as a special provision of CCP Art. 44-3.

Also, LIA Art. 41(1) provides that "when the labor union is appointed to initiate an action for its members pursuant to Paragraph 1, Article 44-1 of the Taiwan Code of Civil Procedure, the appointed person(s) may file additional claims before the end of oral arguments in the first instance trial, and request a declaratory judgment confirming the existence of the common basis prerequisites concerning the claim or legal relationship between the appointing persons and the defendant." This provision aims to promptly confirm the "common basis prerequisites," in order to enhance the efficiency of the trial and encourage the parties to resolve disputes by themselves based on the results of the declaratory judgment.

Other Relevant Rules

Besides the aforementioned special provisions for consumer matters and labor cases, the Securities Investor and Futures Trader Protection Act ("SIFTPA") and the Personal Data Protection Act ("PDPA") also contain similar provisions. Concerning securities or futures matters, SIFTPA Art. 28(1) provides that "for protection of the public interest, within the scope of this Act and its articles of incorporation, the protection institution may . . . file a lawsuit in its own name with respect to a securities or futures matter arising from a single cause that is injurious to multiple securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders. The securities investors or futures traders may withdraw the empowerment to . . . file a lawsuit prior to the conclusion of oral arguments or examination of witnesses and shall provide notice to the . . . court." Concerning infringement of rights of data subjects, PDPA Art. 34(1) provides that "where the rights of multiple data subjects have been infringed upon due to the same incident, the incorporated foundation or incorporated charity may file a lawsuit with the court in its own name after obtaining a written delegation of litigation rights of at least 20 data subjects. The data subjects may withdraw their delegation in writing before the conclusion of the oral argument and the data subjects shall notify the court thereof."

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

As mentioned in Section A, generally speaking, in all types of civil disputes, multiple parties with shared interests may appoint one or more representatives from among themselves to either initiate or defend an action on behalf of both the appointing and appointed parties (CCP Art. 41(1)), and in some situations, certain groups ("incorporated charitable association") may be appointed as the representative (CCP Art. 44-1(1)). Regarding the types of claims, the CCP does not contain special provisions for an action initiated by an appointed party.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Under CCP Art. 41(1), natural persons may be appointed to represent those with common interests in a lawsuit. The key prerequisite for the standing to sue for such a representative is the shared common interests. Beyond that, the CCP has no provisions regarding the qualifications of the appointed individuals. Under CCP 44-1(1), an incorporated charitable association may bring an action on behalf of its members who appoint it to do so.

There are also cases where certain groups may initiate legal proceedings on behalf of numerous individuals, but certain conditions need to be met to establish their standing to sue. For instance, CPA Art. 49(1) provides that "a consumer advocacy group, which has been established for more than 2 years after its approval, has designated personnel specializing in consumer protection, and has a rating of excellence by the Executive Yuan, may bring an action in its own name for consumers in accordance with Article 50 or an action for injunctive relief prohibiting specific acts in accordance with Article 53."

D. KEY PROCEDURAL REQUIREMENTS

Under CCP Art. 41(1), the key procedural requirements of the "Appointing Parties" system are, firstly, that the numerous individuals share "common interests," meaning that they share the same methods of attack or defense, secondly, that they do not qualify as an unincorporated association with a representative or administrator and thirdly, that the appointed person is one or several of those individuals with common interests.

Outside the CCP, some special procedural requirements exist. For example, under CPA Art. 50(1), there must be 20 or more individuals assigning claims to a consumer advocacy group before the group can file a lawsuit under that Article.

While the aforementioned requirements might resemble some of the U.S. certification requirements (e.g., the requirement of commonality) to some extent, Taiwan does not have a U.S.-style class certification procedure.

Taiwan's Consumer Protection Act stipulates that specific consumer advocacy groups are entitled to file lawsuits for damages or non-action.

E. BINDING OTHERS

In the context of the aforementioned types of lawsuits, there are no specific provisions addressing the binding effect of a judgment. Hence, the general provisions provided in CCP Art. 401, which pertain to *res judicata*, are applicable. In particular, CCP Art. 401(2), which provides that "a final and binding judgment to which a party has acted as the plaintiff or the defendant for another person is also binding on such other person," might be applicable.

For instance, in cases involving the designation of a representative according to CCP Art. 41(1), not only does the judgment bind the appointed party, but the judgment's binding effect also extends to the appointing parties, pursuant to CCP Art. 401(2), for the appointed party acts as the plaintiff or the defendant for the appointing parties. However, such binding effect does not extend to individuals who share common interests but have not designated the representative.

F. REMEDIES AVAILABLE

The primary available remedy is compensatory damages, and in cases meeting the requirements set forth in CPA Art. 51, punitive damages may additionally be sought. Moreover, specific plaintiffs may file an injunction petition, seeking to prohibit defendants from engaging in certain actions, as provided in CCP Art. 44-3(1) ("an incorporated charitable association or a foundation"), CPA Art. 53(1) ("consumer ombudsmen or consumer advocacy groups"), and LIA Art. 40(1) ("a labor union").

G. SETTLEMENT AND FINANCING

Settlement

Special provisions exist in the CCP and other laws regarding the authority of representatives to settle cases, as it involves dispositions related to the proceedings themselves. For instance, CCP Art. 44(1) provides that the appointed parties may conduct all acts of litigation for the appointing parties, but the appointing parties may restrict the appointed parties' authority to settle the case, and LIA Art. 40(4) provides that settlement of the lawsuit described in LIA Art. 40(1) shall be subject to the approval of the court.

Financing

CCP and other laws contain some provisions related to expenses in the aforementioned types of lawsuits. For example, CCP Art. 77-22 provides that "(I) the appointed party who initiated an action in accordance with Article 44-2 may temporarily be exempted from paying the portion of the court costs in excess of NT$600,000 [equivalent to approximately US$18,600] if the amount of court costs collected is more than NT$600,000. (II) Court costs may be temporarily exempted from the collection on an action brought in accordance with Article 44-3. (III) After the action is concluded, the court of first instance shall make a ruling on its own initiative to collect court costs, which were temporarily exempted in accordance with the preceding two paragraphs or other regulations, from the party who should bear such costs. However, this does not apply if the incorporated association or foundation, as stipulated in Article 44-3, shall bear the litigation expenses or if other laws provide otherwise."

CPA Art. 52 provides that "If a consumer advocacy group files a lawsuit in accordance with Article 50 in its own name, the court costs for the portion of the claim exceeding NT$600,000 shall be exempted." CPA Art. 53(2) provides that court costs for an action brought under CPA Art. 53(1) shall be exempted.

Also, LIA Art. 40(2) provides that a lawyer should be retained for an action brought under LIA Art. 40(1), and LIA Art. 40(5) provides that "the remuneration for a lawyer as mentioned in [LIA Art. 40(2)] is part of the litigation costs, and its maximum amount should be defined. The payment standards should be determined by the Judicial Yuan, after considering the opinions of the Ministry of Justice and Taiwan Bar Association."

Regarding third-party funding, there are currently no specific regulations in Taiwan for the various types of litigation discussed in this report. However, Article 33, Paragraph 1 of the Bar Ethics Rules provides that "lawyers shall not accept the payment of legal fees from a third party on behalf of the client. However, with the informed consent of the client and without affecting the lawyer's independent professional judgment, this restriction does not apply."

What is particularly noteworthy is that under SIFTPA, the government-supported Securities and Futures Investors Protection Center ("SFIPC") has been established in Taiwan. SFIPC can use its protection fund, which came from institutions such as the Taiwan Stock Exchange Corporation, to initiate lawsuits on behalf of investors, as described in Section A.

H. OTHER KEY CLASS ACTION ISSUES

Leading Case Regarding CCP Art. 44-1: RCA Case

In Taiwan, there is a widely discussed judgment concerning CCP Art. 44-1 (Supreme Court Civil Judgment of Year 107 Tai Shang Zi No. 267). In that case, one of the defendants is RCA Taiwan Limited ("RCA"), which operated plants in Taiwan from 1970 to 1992, manufacturing electronic and electrical products. During the manufacturing process, it allegedly indiscriminately released various chemical substances into the ground and groundwater, resulting in soil and groundwater pollution. It is

alleged that they failed to implement protective measures, causing the employees to be exposed to high concentrations of harmful chemicals. Many RCA employees subsequently developed illnesses, and some even passed away. These employees and their families formed the "Association for the Care of Former RCA Taiwan Limited Employees in Taoyuan County," and, in accordance with CCP Art. 44-1, appointed this association to file a lawsuit against the defendant company. As of September 2024, part of the case remains unresolved and is still under litigation.

New Developments of Labor Collective Actions

The CCP added Art. 44-1 in 2003, which contains general provisions for appointing an association to initiate an action. In practice, this provision has often been used in labor disputes. As noted by Prof. Kuan-Ling Shen, who is an expert on the laws of civil procedure of Taiwan, in labor disputes, individual workers typically lack financial resources and legal expertise and are often reluctant to disrupt the harmony of labor-management relationships, which leads them to be reserved about asserting their rights through litigation. Therefore, it is important in labor disputes for the lawsuit to be initiated not by the individual worker but by an appropriate third party (an association).

To facilitate the initiation of an action by an association in labor disputes, LIA, which was promulgated in 2018 and came into effect in 2020, introduced new provisions regarding appointing a labor union to initiate an action. Recent research has been exploring past labor disputes involving multiple workers under CCP Art. 44-1, as well as the newly introduced LIA provisions and their possible implications. For details, please refer to Kuan-Ling Shen, *Developments of Labor Collective Action and New Changes*, 49(4) NTU L.J. 1979 (2020) (written in Mandarin).

ENDNOTES

1 CCP Art. 40(3) provides that "An unincorporated association with a representative or an administrator has the capacity to be a party."

2 CCP Art. 44-1(2) provides that "where an incorporated association initiates an action for monetary damages on behalf of its members in accordance with the provision of the preceding paragraph, if the entire body of the appointing parties agrees to allow the court to grant the full amount of a monetary award to them as a whole body and prescribes how such total award shall be distributed, and furthermore, if the entire body has filed a pleading to such effect, then the court may award a total sum of money to the entire body of the appointing parties without specifying the amount that the defendant must pay to each of the appointing parties respectively." This provision has not been widely applied in practice so far, but recently it has been used in an occupational accident case (Taiwan High Court Civil Judgment of Year 109 Zhong Lao Shang Zi No. 12 [Note: as of September 2024, this case is currently under review by the Supreme Court of Taiwan]).

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