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CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT

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SESSION 5. CULTURAL DIMENSIONS OF GROUP LITIGATION

General Reporter –

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How does culture influence the model of group litigation? What kind of solutions exists in other countries than civil or common law?

National Reporters:

- Australian National Report: Prof. **Vicki Waye**, University of South Australia and Prof. **Vincenzo Morabito**, Monash University, Australia
- Brazilian National Report: Prof. **Ada Pellegrini Grinover**, University of São Paulo, Brazil
- Belgium National Report: Dr. **Stefaan Voet**, Ghent University, Belgium
- Canadian National Report: Prof. **Jasminka Kalajdzic**, University of Windsor, Canada
- English National Report: Prof. **Rachael Mulheron**, Queen Mary University of London, England and Wales
- Italian National Report: Prof. **Elisabetta Silvestri**, University of Pavia, Italy
- Dutch National Report: Dr. **Helene van Lith**, Erasmus University, Netherlands
- Russian National Report: Ass. Professor **Dmitry Tumanov**, Moscow State Law Academy, Russia
- Swedish National Report: Prof. **Per Henrik Lindblom**, Uppsala University, Sweden

Discussion Panel:

- Spain: Dr. **Javier López Sánchez**, University of Zaragoza
- Russia: **Dmitry Magonya**, Art de Lex Law firm

Janet Walker¹

GENERAL REPORT²

Introduction: Who's Afraid of U.S.-style Class Actions?

U.S.-style class actions have become a flashpoint for debate over group litigation and the collective redress regimes emerging around the world. Everyone wants to develop better ways for consumers and others who suffer loss from mass harms to receive compensation for claims that are too small to litigate individually. Everyone wants to improve the means

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² A version of this paper is published in Volume 18 of the Southwestern Journal of International Law.

for encouraging responsible conduct on the part of those who might cause such harms. But everyone, at least outside the United States, seems also to agree that they do not want to adopt U.S.-style class actions in their legal systems.

Despite this widespread agreement, it is difficult to work out the precise nature of the complaint. What is it about U.S.-style class actions that offends the sensibilities of other legal communities? Could it be the basic objectives of the procedure, the way in which the class is represented and the litigation is financed, the kinds of remedies that are available, or the nature of the court's involvement? And if it is one or more of these features, is the offending feature integral to the successful operation of a collective redress system, or could it be omitted or adjusted without impairing the effectiveness of the regime? Finally, if the concern about U.S.-style class actions is merely a «not-in-my-backyard» objection, is there a means by which alternative procedures might work cooperatively with U.S. class actions to further the objectives of collective redress elsewhere?

To study these questions¹, proceduralists from other countries were asked to report on various aspects of the collective regimes that have been implemented or contemplated in their countries and to comment on the compatibility of these regimes with U.S.-style class actions. Reports were received from Canada, Australia, England and Wales, Netherlands, Italy, Belgium, Sweden, Brazil and Russian Federation. They provided remarkable insights into the range of procedural values that mark the diversity of these legal systems. This paper is based on the information and analysis provided in those reports².

Questionnaire

The questionnaire on which their reports were based, consisted of the following six parts.

1. Objectives – Access to justice, judicial economy, and behaviour modification have been identified as the main objectives of class actions in North America. What would you regard as the key objectives of group litigation in your legal system? How does group litigation enhance your civil justice system or how might it do so? How does this compare to the role played by U.S.-style class actions; and to what qualities of your civil justice system do you attribute the similarities or differences?

2. Representation – In traditional litigation in the common law, under the principle of party prosecution, the plaintiff's right to direct the proceedings serves as a key safeguard of procedural fairness. In public interest litigation, the law of standing similarly serves to ensure

¹ This is by no means the first consideration of these issues. There is a small but rich body of commentary from a U.S. perspective containing incisive economic and governance analysis of the perceived concerns of members of other legal systems. See, e.g., Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 *Vand. L. Rev.* 179 (2009); John C. Coffee, Jr. *Litigation Governance: Taking Accountability Seriously*, 110 *Colum. L. Rev.* 288 (2010). This study seeks to go beyond the application of a U.S. perspective on the differences in approaches to collective regimes by surveying comparatists from those legal systems about specific aspects of collective redress that might shape their perceptions of U.S. class actions.

² The authors of the National Reports for this study were: Canada – Professor Jasminka Kalajdzic, University of Windsor, Faculty of Law; Australia – Professor Vicki Waye, Dean of Teaching and Learning, University of South Australia and Professor Vincenzo Morabito, Department of Business Law and Taxation, Monash University; England and Wales – Professor Rachael Mulheron, Queen Mary University of London; Netherlands – Dr. Helene van Lith, Erasmus Universiteit Rotterdam; Italy – Professor Elisabetta Silvestri, Faculty of Law, University of Pavia; Belgium – Dr. Stefaan Voet, Institute for Procedural Law, Ghent University; Sweden – Professor Per Henrik Lindblom, Uppsala University, Faculty of Law; Brazil – Professor Ada Pellegrini Grinover, Faculty of Law, University of São Paulo; and Russian Federation – Associate Professor Dmitry Tumanov, Moscow State Law Academy.

that the plaintiff or applicant adequately represents the interests of the public in respect of the issues in dispute. In group litigation, which determines the interests of claimants who do not participate and who will be precluded from seeking other relief, it is all the more important to ensure that the representation is adequate. In your legal system, what kinds of persons or organizations are eligible or might be considered eligible to represent a group in litigation? How are they selected and authorized to do so? And what is their role in the litigation?

3. Funding and Financing – One of the most controversial features of U.S. class actions is the size of awards for plaintiffs' counsel fees, and yet, to many Americans considering the alternative of publicly funded regulation of consumer goods and services, the awards and fees are well-justified. Furthermore, among the various legal systems where group litigation exists, the means by which proceedings are funded and financed is thought to contribute significantly to the relative success of the class actions regime. How is group litigation funded and financed in your legal system, or how might it be funded and financed if it were introduced? How does or would this economic model fit with traditional forms of litigation in your country? How does it contribute or might it contribute to the success of the group litigation regime?

4. Available Relief – One way in which the objectives of group litigation depart significantly from traditional litigation is in the kinds of relief that are thought to constitute a just result. Where making a plaintiff whole again is thought to serve the interests of compensation and deterrence in traditional litigation, such an outcome is rarely possible or desirable in group litigation. In some cases, individual recovery of a portion of the loss suffered is regarded as appropriate, in others, an injunction or a declaration, or some form of alternative or *cy près* result is appropriate. What forms of relief are available in group litigation in your legal system and how do these achieve – or fail to achieve – justice?

5. Court Involvement – Mechanisms for court involvement to safeguard against abuse have evolved over the history of traditional litigation and are woven into the process, but the modifications necessary to permit group litigation create new risks of abuse. In North America, judicial involvement at the stages of certification and judgment or settlement approval is an important safeguard against abuse. In group litigation in your legal system, what kinds of court involvement serve this supervisory role, or might serve this role?

6. Compatibility with U.S.-style Class Actions – Based on the previous questions and any other relevant features of group litigation as it operates or might operate in your legal system, identify the most significant challenges to integrating U.S.-style class actions with mechanisms for collective redress in your legal system. How might such integration affect the culture of dispute resolution and consumer protection in your country? Describe some of the ways in which these challenges might be addressed to maximize the effectiveness of collective redress in your country.

Analysis

Overview

In order to appreciate the finer distinctions in the procedures that have been adopted or proposed in the various legal systems it is helpful to begin with a brief overview of the regimes operating in each country¹. In particular, in assessing the perspectives of other

¹ The comparative analysis in this paper assumes a basic understanding of the workings of the class action procedure under Fed. R. Civ. P. 23, pursuant to which one or more named plaintiffs may be authorized by a court in

legal systems on U.S.-style class actions, it is important to understand that of the seven legal systems considered, only two – Canada and Australia – have systems for collective redress that would be described in the United States as class actions. In no other system for collective redress may claimants be represented on an opt-out basis in matters in which the courts can order relief for individual members of the group. What follows, then, is a brief overview of the most salient features of the various regimes as a backdrop against which the more specific comparisons can be highlighted.

Canada – Since 1978, legislative regimes for class actions have been established in all but one Canadian province, and in the Federal Court¹. The legislation is modelled on U.S.-style class actions and, apart from underlying differences in the legal systems affecting the operation of the class actions regimes in Canada and the United States, the regimes have similar objectives and features.

Australia – Similarly, in the Federal Court² and in the New South Wales³ and Victoria Supreme Courts⁴ class actions may be commenced on behalf of claimants who may opt-in or opt-out of the proceedings and/or the settlement⁵. There are some minor differences, such as the lack of a certification requirement causing the suitability for class treatment to be determined on a motion by the defendant rather than the plaintiff. However, apart from relatively minor differences, like the Canadian class actions regime, the Australian regimes are similar to that in the U.S. and the primary distinctions in their operation arise from differences in the underlying civil litigation process.

England and Wales – Collective redress in England and Wales is pursued primarily by way of Group Litigation Orders. Group Litigation Orders are case management tools for aggregating claims on an opt-in basis. They may involve the determination of claims by way of test cases⁶, generic issues⁷, and trying a series of preliminary issues based on a set

a certification motion to sue on behalf of a class defined in a manner that is approved by the court. In U.S. federal courts and in the majority of states, the action may be certified to determine one or more legal or factual claims common to the entire class where: those issues predominate over individual issues; the representative party or parties will adequately protect the interests of the class; the class is so numerous as to make individual suits impractical; and the claims are typical of the plaintiffs or defendants. Court approval is also required for the content and method for notices to the class, such as those informing class members of the action and the fact that they will be bound by the result unless they opt-out. Court approval is also required for the terms of any proposed settlement reached between the named parties, and for the fees to be paid to plaintiff's counsel, which are typically in excess of a standard hourly rate and often calculated as a percentage of the award.

¹ An Act Respecting the Class Action, R.S.Q., c. R-2 (Can. Que.); Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 999-1051 (Can. Que.); Class Proceedings Act, R.S.O. 1992, c. 6 (Can. Ont.); Class Proceedings Act, R.S.B.C. 1996, c. 50 (Can. B.C.); Class Actions Act, R.S.S. 2001, c. 12.01 (Can. Sask.); Class Actions Act, R.S.N.L. 2001, c. C-18.1 (Can. Nfld.); Rules Amending the Federal Court Rules, 1998, S.O.R. 98-106 (Can.); The Class Proceedings Act, C.C.S.M., c. C130 (Can. Man.); Class Proceedings Act, R.S.A. 2003, c. C-16.5 (Can. Alta.); Class Proceedings Act, R.S.N.S. 2007, c. 28 (Can. N.S.).

² Federal Court of Australia Act 1976 (Cth) pt IVA.

³ Civil Procedure Act 2005 (NSW) pt 10 (Austl.).

⁴ Supreme Court Act 1986 (Vic) pt 4A (Austl.).

⁵ In the other State Supreme Courts representative proceedings may be commenced joining the claims of those who have *similar interests* but the judgment or settlement does not bind all such persons. See South Australia Supreme Court Rules 2006 (SA) r 80; Queensland Uniform Civil Procedure Rules 1999 (Qld) r 75 (Austl.); Western Australia Rules of the Supreme Court 1971 (WA) O 18, r 12.

⁶ *Pirelli Cable Holding NV v. Revenue & Customs Comm'rs.*, [2007] EWHC (Ch) 583, [2007] All E.R. 408 (Eng. & Wales).

⁷ *Esso Petroleum Co. Ltd. v. Addison*, [2003] EWHC (Comm) 1730, [2003] All E.R. 253 (Eng.).

of assumptions. In theory, collective redress may proceed also by way of Representative Actions. However, this is permitted only where claimants have *the same interest* and *more than one person* shares the claim with the representative¹; and such actions are often defeated by defendants on the «same interest» criterion.

In the English bank charges litigation, which involved numerous individual matters in the county courts, where the results in one case were not binding in other cases², an effort was made to instill order by deciding a test case³, which could then be appealed to the Supreme Court⁴. This improved the coherence of the process, but the decision did not resolve all the outstanding issues, and certain aspects of the individual cases remained to be determined. The experience with these cases prompted the development of a proposal for a collective action that was included in the Financial Services Bill 2010⁵. Under this proposed regime the court could order either an opt-in or an opt-out class action, and the drafting of supporting rules of court⁶. However, this legislative initiative lapsed in 2010 with the change in government⁷.

Netherlands – There are two collective redress regimes for mass damage in the Netherlands, and they are available in most areas of law. The Dutch Act on the Collective Settlement of Mass Damage Claims (WCAM)⁸ was introduced in 2005 to permit representative organizations to enter into settlement agreements with allegedly liable parties and to apply jointly for a declaration by the Amsterdam Court of Appeal that presumptively binds those covered by its terms on an opt-out basis⁹. During the pendency of the declaration, all other related proceedings may be suspended¹⁰. The WCAM was designed to complement U.S. class actions and class settlements by facilitating the inclusion of class members from outside the U.S., primarily from Europe, who would otherwise be excluded. It has proven to be an efficient, simple, and relatively inexpensive mechanism of group litigation¹¹.

In addition, the Dutch Civil Code provides for a collective right of action in mass damage cases¹² under which a Dutch foundation or association incorporated to represent the interests of a group may initiate proceedings to protect the common interests of the group.

¹ Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.6 (U.K.).

² Over 53,000 claims were filed in the English County Courts between March 2006 and August 2007. The rate of monthly litigation is outlined in Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for the Civil Justice Council, Feb 2008), section 17, and see, e.g., *Brennan v. National Westminster Bank Plc* [2007] EWHC (QB) 2759. [42] (Eng. & Wales).

³ *Office of Fair Trading v. Abbey National Plc* [2008] EWHC (Comm) 875, [2008] 2 All E.R. 625 (Eng. & Wales).

⁴ *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6, [2009] 3 W.L.R. 315 (Eng.).

⁵ Financial Services Act, 2010, §§ 18–25 (U.K.).

⁶ Financial Services Act, 2010, (U.K.) (proposed CPR 19.IV).

⁷ This left collective redress to be pursued by way of Group Litigation Orders, thus limiting the predictability of the process and, possibly, the outcome. *Multiple Claimants v. Sanifio-Synthelabo Ltd.* [2007] EWHC (QB) 1860 (Eng. & Wales) (regarding the use of the anti-epileptic drug Epilim by pregnant women).

⁸ Burgerlijk Wetboek [BW] [Civil Code], bk. 7, art. 907–910 (Neth.); Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure], art. 1013 (Neth.).

⁹ The agreement may provide for cancellation should too many injured parties opt out.

¹⁰ Dutch Arbitration Act [DCCP], art. 1015 (Neth.).

¹¹ See, e.g., *Shell Petroleum*, [Hof] [Court of Appeal Amsterdam] May 29, 2009, NJ 2009, 506 (Neth.); *Converium*, [Hof] [Court of Appeal Amsterdam] Nov. 12, 2010, LJN 2010, BO3908 (Neth.); confirmed *Scor Holding* (Switzerland) AG and the Stichting Converium Securities Compensation Litigation, 17 Jan 2012 [Court of Appeal Amsterdam].

¹² BW, bk. 3, art. 305a-c (Neth.).

Available remedies are limited to declaratory judgments and injunctions for the benefit of interested persons, and the judgment binds only the organization and the defendant. Once a judgment is rendered, interested parties must initiate separate proceedings to establish the responsible party's liability to them, along with questions of causality, and the amount of damages to be awarded to them.

Italy – In 2007, following decades of scholarly debate, legislative initiatives to introduce class actions began. The financial failures of large corporations¹ affecting thousands of investors underscored the persistent problems of court dockets clogged with individual civil suits and bankruptcy proceedings. Class actions provisions were incorporated into the Consumer Code² and after various revisions came into effect in 2010 for cases arising after mid-2009. With only six class actions having been brought and one having been declared admissible to date, the procedure is largely untested and observations on its functioning are necessarily theoretical.

Pursuant to EU Directives³, collective actions have been developed for consumer claims and expanded to environmental protection, securities regulation, anti-discrimination protection, and other areas. Such actions may be brought only by qualified bodies, such as accredited consumer associations, and these actions may seek only injunctive relief. However, a new public class action was introduced in 2009 to permit individuals and groups to apply to the administrative courts for claims in connection with public bodies that fail to fulfil their official obligations. The relief available consists of mandatory orders. Damages must be sought separately in the civil courts in individual claims or in accordance with the class action provision incorporated in the Consumer Code. Despite this range of procedures for vindicating group rights, the general lack of efficiency in the Italian judicial system is widely thought to represent a major impediment to the protection of group rights.

Belgium – In Belgium, the Judicial Code and Civil Code contain procedural techniques that are being used for multi-party actions⁴, including joinder of claims that should be tried together to prevent contradictory decisions, voluntary or coercive intervention, and party representation, in which a person (natural or legal) may receive a mandate from a group of individuals to represent them⁵. These techniques have been criticized as too cumbersome for large-scale mass claims because each group member's participation must be established individually⁶.

As in Italy, there are also a series of legislative initiatives in Belgium implementing European directives⁷. These regimes permit private professional, inter-professional or

¹ Such as Parmalat, Cirio, and Giacometti.

² Codice del Consumo [Consumer Code], art. 140 (It.).

³ See, e.g., Council Directive 98/26/CE, 1998 O.J. (L166/45) (EU); Council Directive 2009/22/CE, 2009 O.J. (L110/30) (EU).

⁴ Piet Taelman & Emilie De Baere, *New Trends in Standing and Res Iudicata in Collective Suits (Belgium)*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Intersentia, 2008.

⁵ Hubert Bocken & Bernadette Demeulenare, *The Defence of Collective Interests in Belgian Civil Procedure*, in *Effectiveness of judicial protection and the constitutional order: Belgian Report at the II International Congress of Procedural Law* 161, Kluwer, 1983 (Neth.).

⁶ Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in E. Dirix & Y.H. Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law* 305, 325, Bruylant, 2011 (Belg.).

⁷ See, e.g., Wet betreffende de intracommunautaire vorderingen tot staking op het gebied van de bescherming van de consumentenbelangen [Cross Border Injunctions Act] of May 26, 2002, *Belgisch Staatsblad* [B.S.] [Official Gazette of Belgium], July 10, 2002 (Bel.) (implementing Council Directive 98/27/EC, 1998 O.J. (L166/51))

public associations, or organizations that satisfy certain legal criteria¹ to bring injunctive or preventive actions falling within their statutory objectives (so called «group actions»). Areas covered include consumer protection, misleading advertising, unfair contract terms and long distance agreements, amicable recovery of consumer debts, environmental harm, discrimination and racism, and copyright. Such actions are rare because funding is limited, damages cannot be claimed, and the outcome does not bind the group.

Currently, there is no provision for damages class actions in which a representative may seek monetary damages on behalf of a similarly-situated group, the members of which would be bound by the result. However, three proposals have emerged²: the government³ has proposed a settlement track regime based on the Dutch Collective Settlements Act, and a litigation track based on the Quebec class action; the two Green opposition parties⁴ have proposed a procedure with a phase for the common issues followed by a phase for individual issues; and the Flemish Bar Council has proposed a class action bill. None of these have yet been submitted to Parliament.

Sweden – The Swedish Group Proceedings Act of 2002 (SGPA) permits group actions in all types of cases in the general courts, including private, organizational and, public group actions. Claims for injunctions and for individual damages for group members may be brought. Group members who have opted-in are bound by the judgment. Although only twelve actions have been commenced in the decade since its introduction, the SGPA has had considerable effect by increasing the number of claimants, improving the impact of litigation, and broadening access to justice⁵.

(EU) (on injunctions for the protection of consumers' interests)). The Anti-Discrimination Acts implemented Council Directive 2000/43/EC, 2000 O.J. (L180/22) (EU) (on equal treatment in employment and occupation); Council Directive 2000/78/EC, 2000 O.J. (L303/16) (EU) (on equal treatment in employment and occupation); and Council Directive 2004/113/EC, 2004 O.J. (L373/37) (EU) (on equal treatment between men and women in the access to and supply of goods and services, etc. See *Wet van ter bestrijding van bepaalde vormen van discriminatie*, [General Non-Discrimination Act] of May 10, 2007, *Beglich Staatsblad* [B.S.] [Official Gazette of Belgium], May 30, 2007 (Belg.); *Wet van ter bestrijding van discriminatie tussen vrouwen en mannen*, [Gender Act] of May 10, 2007, *Beglich Staatsblad* [B.S.] [Official Gazette of Belgium] May 30, 2007 (Belg.); *Wet van tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden* [Racism Act] of May 10, 2007, *Beglich Staatsblad* [B.S.] [Official Gazette of Belgium] May 30, 2007 (Belg.).

¹ For example, having legal personality for some period, generally three years.

² For a thorough analysis of these proposals see Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, at 325–342.

³ For example, the minister of Consumer Affairs and the minister of Justice. For an analysis (by the authors of the proposal) see Hakim Boularbah, *Des actions groupées vers l'action de groupe: quelle valeur ajoutée pour l'avocat?*, in *La valeur ajoutée de l'avocat. Actes du Congrès de l'O.B.F.G. du 17 février 2011*, Anthemis, 2011, at 33 (Bel.); Andrée Puttemans, *L'introduction d'une forme d'action collective en droit belge*, in A. Legendre (ed.), *L'action collective ou action de groupe. Se préparer à son introduction en droit français et en droit belge* 24, Larcier, 2010 (Belg.).

⁴ Ecolo & Groen!.

⁵ In *Grupptalan mot Skandia v. Försäkringsaktiebolaget Skandia* [Skandia], 2003-10 T6341 (Swed.) a non-profit organization («Group Action against Skandia») was formed in October 2003 to seek a declaration on behalf of 1.2 million policyholders of a subsidiary whose asset management business had been transferred to the parent company. More than 15,000 people paid membership dues of about € 15 to cover the running expenses of the organization in pursuing the relief. The media coverage was extensive. The proceedings, ultimately through arbitration, were protracted but in time, the company was ordered to pay about €145 million to the subsidiary, thus indirectly compensating policyholders. The organization said that the relief would not have been possible if there had been no class action procedure to pursue it. Per Henrik Lindblom, *National Report: Group Litigation in Sweden* 22 (Dec. 6, 2007) (Swed.) available at http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf.

In addition, potential defendants have been given the incentive to make amends voluntarily and to compensate potential group members. Thus, arguably the most important function of group actions for individually non-recoverable claims has been preventative through behaviour modification. A feasible opportunity to seek legal redress has provided considerable incentive to responsible conduct in preventing and addressing harm.

Brazil – The Brazilian Constitution of 1988 provides for class actions to protect diffuse and collective interests in all areas of law. Class actions are federally regulated but may be filed in state and federal courts in a range of matters including consumer rights, environmental problems, and public corruption. The process is generally an opt-out one in which claimants may choose to proceed independently of the class. While the claims must be similar, there is no certification procedure in which such a determination would be made, only a statutory requirement concerning the formal adequacy of the representative for the purposes of standing. Class actions may be brought by the Public Prosecutors Office (*Ministério Público*) and the Public Defenders' Office (*Defensoria Pública*); public entities, such as the Federal, State and Municipal Governments and other Agencies; private associations and unions, such as consumer organizations, which must be registered before public authorities; and by individuals in the case of citizen class actions for the protection of public assets (*ação popular*). The full range of remedies available in ordinary litigation are available in class actions.

Russian Federation – There are two forms of group action in the Russian Federation: one for the vindication of the rights of persons who cannot specifically be identified, which was first introduced in the Consumer Protection Act of 1992, and which is commonly known as a *public* class action; and another, for the vindication of the rights of persons who can be identified, which was introduced in 2009, and which is commonly known as a *private* class action. By way of background, many business disputes in Russia are resolved through arbitration in the Arbitration Courts under the Arbitration Procedure Code, and private class actions are provided for only in the Arbitration Procedure Code. In contrast, other disputes are generally resolved in the courts of law under the Civil Procedural Code of the Russian Federation, and most public class actions are decided in those courts (although they may also be considered in the Arbitration Courts).

Public class actions may be authorized specifically in legislation, such as the Consumer Procedure Act¹ or implicitly through the nature of the legal relationship. For example, the law protecting objects of cultural heritage provides that «the objects of the cultural heritage (historic and cultural monuments) of the peoples of the Russian Federation are of unique value for the whole multinational population of the Russian Federation and represent an integral part of the world cultural heritage»², therefore, if issues relating to cultural monuments are raised in court, it is the public interest that the public rights affected should be defended.

Particular Features

Objectives

There is a considerable agreement among the reports that the objectives of group litigation are to advance access to justice, judicial economy, and behavior modification. However, the

¹ Articles 45, 46 of the RF Law dd. February 7, 1992, No. 2300-I «On Consumer Protection», in Legal reference system «Consultant-Plus.»

² On Objects of the Cultural Heritage (Historic and Cultural Monuments) of the Peoples of the Russian Federation, Law No. 73-FZ dd. June 25, 2002.

differences in the way in which these objectives are weighted and described reveal each legal system's particular aspirations for meeting the challenges of providing for collective redress.

Access to justice has particular significance among common law regimes, in which claimants ordinarily must finance the prosecution of their claims, including developing and presenting the facts to the court. The obstacles faced by their civil law counterparts are different in that the courts are primarily responsible for investigating the facts and compiling the record, reducing the expense faced for individual claimants. In those countries, the improvements in access to justice tend to be more closely related to easing the burden on courts whose dockets would otherwise be clogged by large numbers of individual matters that could be aggregated.

Among common law countries, improving *judicial economy* may be more prevalent a concern in the United States, where lawyers may carry inventories of similar claims in areas of the law that in some other countries are processed in administrative tribunals. In those countries, class actions made in cases of individually, economically non-viable claims may actually serve to increase, rather than reduce the caseload for the courts¹. In these situations, access to justice is improved, but the gains in judicial economy in aggregating claims that would not otherwise be brought is less obvious.

However, a related concern for *consistency* can arise from the need to resolve large numbers of claims raising the same issues in situations or legal systems where *stare decisis* does not apply. For example, as mentioned, this concern arises in the county courts in England for claims that are not subject to binding precedent from higher judicial authority and, of course, it arises in civil law jurisdictions where the doctrine of *stare decisis* does not operate.

Nevertheless, it may safely be said that the objective of behavior modification is the most controversial of the objectives and there has been considerable debate in civil law and common law countries alike over the extent to which civil litigation undertaken by private persons should serve this function. This is not a feature of logistical differences between common law and civil law procedure, or even between the traditions of individual legal systems so much as it is an important feature of American exceptionalism.

In the following descriptions of the objectives of collective redress in the various legal systems surveyed, it is interesting to see the commitment to ensuring that class actions enhance the effectiveness of collective redress within the civil justice system without altering or interfering with what are understood to be the core procedural values of each system.

Canada – In 1978, with the rise in public law litigation² and the hope that private Attorneys General could use class actions to fill the gaps in regulatory enforcement, Quebec passed class action legislation³. Soon after, in 1982, the Ontario Law Reform Commission published a three-volume report recommending the enactment of legislation

¹ Nevertheless, such claims would need to be distinguished from those described in the U.S. as *negative value claims* in that the threshold for viability in other legal systems may be much higher than in the U.S. where contingency fees have long been a regular feature of named-party litigation and claimants do not ordinarily face the prospect of paying a defendant's attorneys fees if they are unsuccessful.

² Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report*, in M. Cappelletti & B. Garth (eds.), *Access to Justice* 36, Sijthoff & Noordhoff, 1979; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1041 (1976).

³ See W.A. Bogart, *Questioning Litigation's Role: Courts and Class Actions in Canada*, 62 *Ind. L.J.* 665 (1986–1987); Catherine Piche, *The Cultural Analysis of Class Action Law*, 2 *LSU L. Ctr. J. Civ. L. Stud.* 101, 118 (2009); Shaun Finn, *In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission*, 2 *Can. Class Action Rev.* 333, 352–353 (2005) (Can.).

in Ontario¹. The Report recognized the increasingly complex and interdependent nature of society resulting from «mass manufacturing, mass promotion, and mass consumption» and the fact that the activities of major corporations, international conglomerates, and big government can be affecting and possibly causing injury to large numbers of people². Bearing in mind that «the individual is very often unable or unwilling to stand alone in meaningful opposition»³, class actions could serve an important function in promoting access to justice. «By affording «an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing «judicial» system», [class actions] may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis»⁴.

Access to justice, judicial economy and behavior modification were the three principal justifications for recommending that Ontario enact class proceedings legislation. The Report noted that «many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers»⁵. It was hoped that class actions could help to overcome these barriers and, in this way, perform an important function in society.

When the legislation was passed in 1992, both the access to justice and the regulatory functions were acknowledged. According to the Attorney General of Ontario, there was more to the initiative than access to justice: «Representative plaintiffs [...] serve in effect as some sort of private attorneys general to attack what they consider to be shoddy workmanship, environmental banditry[,] or corporate skulduggery [...] [in this] cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-restrained government ministries»⁶. Despite this, the regulatory function of class actions has received less recognition than the access to justice benefits⁷; and class actions have far more commonly been described as serving the tripartite role of access to justice, judicial economy, and behaviour modification⁸.

Australia – As in Canada, the main objective of group litigation in Australia is understood as improving access to justice by permitting matters with high ratios of litigation cost to claim size to be aggregated so as to overcome the disproportionately high cost of litigating individual claims⁹. Still, as in Canada, the procedure also supports regulatory

¹ Ont. Law Reform Comm'n, Report on Class Actions (1982) (Can.).

² Ibid., at 3.

³ Ibidem.

⁴ Ibid., at 130.

⁵ Ibid., at 139.

⁶ I. Scott & N. McCormick, *To Make a Difference: A Memoir* Stoddart, 2001, 182 (as cited in Hon. I. Binnie, *Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat*, 22 *Advoc. Soc'y J.* 4 (Spring 2004) (Can.)).

⁷ The Supreme Court of Canada referred to class actions as having a «social dimension» in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at para. 106 (Can.). In *Alfresh Beverages Can. Corp. v. Hoechst AG* (2002), CarswellOnt 77, [2002] 16 C.P.C. 5th 301 (Can. Ont.), the Ontario Superior Court stated at paragraph 16 that «the private class action litigation bar functions as a regulator in the public interest for public policy objectives.» However, explicit acknowledgments of the class action's broader public policy function are rare.

⁸ *Western Canadian Shopping Centres v. Dutton (Dutton)*, [2001] 2 S.C.R. 534, para. 28 (Can.). The extent to which these objectives are realized through class actions has been considered by Jasminka Kalajdzic in *Assessing Justice: Appraising Class Actions Ten Years After Dutton*, Hollick & Rumley, 53 *Sup. Ct. L. Rev.* 2d 3 (2011) available at <http://www.uwindsor.ca/law/kalajj/system/files/Introduction-%20Kalajdzic.pdf> (Can.).

⁹ *Access to Just. Taskforce, A Strategic Framework for Access to Justice in the Federal Civil System* 114 (2009) (Austl.), available at <http://www.ag.gov.au/Documents/A%20Strategic%20Framework%20for%20Access%20to%20>

objectives¹ by promoting consumer protection, efficient markets, and a better environment through the initiation of largely privately funded and privately driven litigation². This is particularly true in areas where gaps in regulatory action will leave harm undercompensated and where the internalization of such harm by wrongdoers will enhance deterrence.

England and Wales – Group litigation in England and Wales has been described as having six objectives: proportionality; predictability; access to justice; judicial and wider economy; (to a lesser extent) deterrence; and fairness.

Proportionality, an overriding objective for all litigation under the Civil Procedure Rules (CPR)³, requires the allotment of an appropriate share of the court's resources to each case taking into account the need to allot resources to other cases⁴. For example, in an appropriate case, the requirement of proportionality may warrant the recommendation that claimants participate in an opt-in Group Litigation Order rather than pursue a representative action⁵.

Predictability is an obvious benefit of aggregating claims that otherwise could follow a myriad of courses producing a range of outcomes, and which could be subjected to different case management strategies by the courts. The 2010 legislative initiative to establish a class action regime would have furthered this objective under the Group Litigation Orders regime, but the initiative lapsed with the change in government.

Access to Justice, was named by Lord Woolf in his 1996 Report as one of three key principles underpinning any new regime of collective redress, «where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable»⁶. The Court of Appeal has also noted that the

20Justice%20in%20the%20Federal%20Civil%20Justice%20System%20%20Report%20of%20the%20Access%20to%20Justice%20Taskforce.pdf; *Cth, Parliamentary Debates, House of Representatives*, 14 Nov. 1991, 3174 (Michael Duffy, Att'y Gen.) (Austl.); *Austl. Law Reform Comm'n, Grouped Proceedings in the Federal Court: Report no. 46*, at 13 (1988).

¹ Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 *Melb. U. L. Rev.* 399, 404 (2006) (Austl.).

² See *ibidem.*; John Sorabji et al. (eds.), *Civil Justice Council, Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* 13 (2008) (Eng. & Wales), available at http://www.lawcentres.org.uk/uploads/Improving_Access_to_Justice_through_Collective_Actions.pdf.

³ See Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 1.1(1), (2)(c) (U.K.).

⁴ CPR r. 1.1(2)(e).

⁵ *Emerald Supplies Ltd v. British Airways Plc*, [2009] EWHC 741 (Ch) 741 [38], [2010] Ch. 48 (claim for price fixing against airlines), *aff'd*, [2010] EWCA (Civ) 1284, [2011] Ch. 354 (Eng. & Wales) (claim for price-fixing against airlines); see *Taylor v. Nugent Care Soc'y*, [2004] EWCA (Civ) 51 [22], [2004] 1 W.L.R. 1129 (Eng.) (proportionality referred to in the Group Litigation Order). But see *Millharbour Mgmt. Ltd. v. Weston Homes Ltd.*, [2011] EWHC (TCC) 661 [22(6)], [2011] 3 All E.R. 1027 (Eng.) (proportionality militated in favour of a representative action).

⁶ Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, ch. 17, para. 2 (1996) (Gr. Brit.). (According to the Civil Justice Council of England and Wales: «A civil justice system: 1. should be just in the results it and they deliver; 2. should be fair and be seen to be fair; 3. should ensure litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights; 4. should ensure that every litigant has an adequate opportunity to state his or her own case and answer their [sic] opponent's; 5. should treat like cases alike (and conversely treat different cases differently); 6. should deal with cases efficiently and economically, in a way which is comprehensible to those using the civil justice system and which provides litigants with as much certainty as the litigation permits; and do so within a system best organised to realise these principles... It is these principles, which reflect Lord Woolf's commitment to procedural justice now being as important as substantive justice, which guide the Civil Justice Council in making its recommendations [for collective redress reform]; John Sorabji et al. eds., *Civil Justice Council, Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, at 9–10.

importance of efforts to permit viable actions to be brought in situations where claimants would find it prohibitively expensive to bring individual proceedings¹.

Judicial, and wider, economy, also named as a key principle by Lord Woolf, would be served by a procedure that could «provide expeditious, effective[,] and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure»². The potential benefit of this feature of the proceedings to defendants has also been noted³.

Deterrence, though only a by-product of achieving compensation for class members, is an important ancillary consequence of effective private enforcement. Accordingly, the Office of Fair Trading and the European Commission⁴, and the U.K. government⁵ have acknowledged that private actions by victims in competition law are a necessary complement to public enforcement efforts, as they broaden the scope of cases that can be investigated; they promote greater awareness of competition law; and they reinforce deterrence.

Fairness was also emphasized by Lord Woolf's report, which acknowledged that collective redress should «achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner»⁶. The Civil Justice Council Report in 2008 emphasized that fairness remains a valid benchmark when considering any collective actions reform and design for the jurisdiction⁷.

Netherlands – The WCAM procedure promotes access to justice and judicial economy by enabling Dutch claimants to benefit from the results of foreign class actions (typically in the United States) and to enable them and the defendants to avoid re-litigation of the claim. In addition, the WCAM seeks to promote finality or legal certainty by providing for judicial declarations of the parties' rights and obligations in respect of the matters in which settlements are approved⁸. To the extent the WCAM provides compensation that is not otherwise obtain-

¹ *Afrika v. Cape plc* [2001] EWCA Civ 2017, para. 1.

² Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*; see *Emerald Supplies*, [2010] EWCA (Civ) 1284 [4] (Eng. & Wales).

³ John Sorabji et al. eds., Civil Justice Council, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*.

⁴ *Ibid.*, at 60, 69.

⁵ Her Majesty's Treasury, Budget 2007, H.C. 342, 3.45 (U.K.), cited in John Sorabji et al. eds., Civil Justice Council, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, at 50 n. 82.

⁶ Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*; see Civil Procedure Rules [CPR], 1998, S.I. 1998/3132 r. 1.1(2)(a), (d) (U.K.).

⁷ Civil Justice Council, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, 43.

⁸ See Helene van Lith, *The Dutch Collective Settlements Act and Private International Law*, Maklu Publishers, 2011 (2010) (Neth.); M.B.M. Loos, Frank Alleweldt et al. (eds.), *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – Country Report The Netherlands*, 2008 (Neth.), available at http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf; *Memorie van Toelichting [Explanatory Memorandum to the WCAM]*, *Kamerstukken II 2003-04*, 29 414, no. 3 (Neth.); The Dutch Class Action (Financial Settlement) Act (WCAM) (Neth.), available at www.rijksoverheid.nl; I.N. Tzankova, *Financiering en kosten van massaclaims: legal realism. Ofwel: wat kunnen we leren van de Engelsen (en van andere common law landen)?*, in *Massaclaims: Class actions opz'n Nederlands 171–204*, Stichting Mordenate College ed., Ars Aequi Libri, 2007 (Neth.); I.N. Tzankova, *National Report: The Netherlands: Part II* (2008) (Neth.), available at http://globalclassactions.stanford.edu/sites/default/files/documents/Netherlands_National_Report_2.pdf;

able, it has been regarded as found money and few if any interested parties have opted-out. Execution of settlements and the payment of compensation have encountered few problems and the process has succeeded in providing closure for the parties responsible.

Behaviour modification has been understood to be a by-product and not a main objective of the WCAM, and the WCAM has succeeded in promoting collective negotiation instead of confrontation in a collective litigation procedure. The WCAM was inspired by the fact that collective settlements have enabled collective redress in mass damage cases in the United States, but the WCAM seeks to promote this process without court intervention and outside the process of a pending class action brought to the court. It seeks to change the way that negotiations are carried out by enabling them to be based on the idea of dialogue instead of confrontation in court proceedings.

Italy – The main objective of the class action procedure under the Italian Consumer Code is to enhance access to justice. The right to sue to protect one's rights under civil and administrative law is predicated on the principle of equality, which is a fundamental tenet of the Italian Constitution¹. With the growth in mass harms, the lack of means of collective redress was seen to represent a major deficiency in the implementation of these guarantees. With the inclusion of collective redress in the Consumer Code, this gap has been filled for consumers of goods and services. It is too early to tell whether group litigation will also serve the purpose of behaviour modification and deterrence.

Belgium – The existing Belgian procedures for group litigation fall short of the objectives of access to justice, judicial economy, and behaviour modification². The procedural techniques of joinder, intervention, and party representation seek to enhance judicial economy³, but they require each claimant to opt-in. Accordingly, the procedures are ineffective for individually non-recoverable claims and their effectiveness in other claims is impaired by the fact that they do not prevent a multiplicity of group proceedings⁴. The existing procedures for group actions also fall short of these objectives because they do not permit claims for damages and so serve only the objective of deterrence. Neither the traditional procedural techniques, nor the existing group actions regimes create credible access to justice for victims of a mass harm. The current class action proposals seek to remedy this.

Sweden – Despite the relatively few group proceedings commenced to date, with the publicity surrounding ongoing and upcoming trials⁵, group litigation has proved effective in promoting access to justice and behavior modification. Judicial lawmaking and prece-

Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, 21 *Eur. Bus. L. Rev.* 857, 865–866 (2010) (Neth.); Helene van Lith, *Case note Converium*, *Ondernemingsrecht* 3, 117–121 (2011) (Neth.); W.M. Schonewille, *De financiering van collectieve acties*, *Ondernemingsrecht* 137 (2010) (Neth.).

¹ See art. 3 Costituzione [Cost.] (It.) (providing that «[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions»); *ibid.*, art. 24, § 1 (providing that «anyone may bring cases before a court of law in order to protect their rights under civil and administrative law»).

² These objectives, which were based on Ont. Law Reform Comm'n, *Report on Class Actions*, at 117 (Can.), were summarized in *Dutton*, [2001] 2 S.C.R. 534 at para. 27–29.

³ Charles van Reepinghen, Ministerie van justitie, *Verslag over de gerechtelijke hervorming 327* (1964) (Belg.).

⁴ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *Harv. L. Rev.* 356, 397–398 (1967); Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court: Report no. 46*, at 107 (1988).

⁵ On the role of courts and functions of civil procedure in Sweden, see Per Henrik Lindblom, *National Report: Group Litigation in Sweden* (in English).

dent-building' occur mainly in public and organization group actions brought by strong and established agencies and non-profit organizations, but private group actions may also produce these results. Moreover, group actions promote legal policy debate and ethical/moral discourse that can result in important changes to the law. While defendants initially try to avoid group actions, such actions provide closure by binding every member of the group. Group actions also have a potential to contribute to judicial economy, particularly in individually recoverable cases².

Brazil – The objectives of Brazilian class actions are the same as those of North American class actions. To these must be added the desire to prevent inconsistent results because Brazil does not follow the model of the binding precedent of the common law. Group litigation in Brazil has transformed civil justice from an individual model to a social model. There may be differences in terminology, but the systems are substantially similar: «diffuse» or «collective» interests in Brazil are similar to those protected by US Federal Rules 23(b)1 and 23(b)2 and «homogeneous» individual interests correspond to those protected by Rule 23(b)3.

Russian Federation – The development of economic and legal relations has created a pressing need for defense of a group of persons with claims that have common issues of fact and law. Given the number of participants involved, conventional joinder is inefficient and the academic literature has stressed the need for the development of a kind of proceeding capable of meeting the specific needs of group litigation.

Representation

Important distinctions exist between the approaches taken in the various legal systems to representing claimants. In general, in the common law, there is a well-established tradition of individual claimants framing and prosecuting their own claims in consultation with their legal advisors. Under the principle of party prosecution claimants themselves are thought to be in the best position to assess their own needs and to exercise judgment in resolving in the way that best achieves this result. This provides a basis for public confidence in the prospect of permitting an individual claimant advised by counsel to represent the interests of other similarly situated claimants, subject to the right of class members to opt out.

In contrast, in the civil law, where the courts have primary responsibility for directing the case, the lack of a tradition of party-prosecution can limit public confidence in the ability of individual claimants who have suffered the harm for which redress is sought to direct the litigation. In the civil law, community organizations, or ideological plaintiffs, may be thought better able to meet the challenges of advocating on behalf of the class. In those countries, the debates centre on whether established community organizations alone should be permitted to represent claimants or whether associations created for the purpose

¹ This refers to judicial review and judicial control of consistency of national law with EU law.

² See *Ozum v. Sweden*, Tingsrätt [TR] [Uppsala District Court] 2008 T3897 (Swed.), *aff'd*, Hovrätt [HovR] [Svea Court of Appeals] (Swed.). A quota rule was applied to admissions to the veterinary medicine program at the Swedish University of Agricultural Sciences in Uppsala that gave the underrepresented gender among applicants (currently male students) a better chance of being admitted to the program. In a private group action in July 2008, the plaintiff claimed damages in total of 4.6 million Swedish kronor (about € 500,000) for herself and 46 other female students who were not admitted. The plaintiff was represented by the Centre for Justice Foundation (*Centrum för rättvisa*), which had undertaken to pay the plaintiff's litigation costs. Through the Office of the Chancellor of Justice, the State declared that it had no objections to trying the case as a group action. The Uppsala District Court decided in September 2008 to hear the case as a group action and ordered the Swedish state in a final judgment to pay 35,000 Swedish kronor (about € 3,500) to the plaintiff and each member of the group, for a total of 1.6 million Swedish kronor (€ 160,000). The decision was affirmed by the Court of Appeal (Svea Hovrätt).

of pursuing the litigation should also be permitted to represent claimants, and on how the capacity of such organizations applying to serve as representatives should be determined.

For U.S. lawyers, the prospect of casting a community organization in the role of representative plaintiff could give rise to agency concerns and suspicion of the potential for capture. Professors Issacharoff and Miller noted that:

«The interests of nonprofit consumer organizations may reflect ideological considerations that may not necessarily coincide with the economic interests of consumers. [...] This potential for distorted representation as a result of a distinct policy agenda is not as worrisome in U.S. class action litigation, where the class is usually represented by attorneys whose interests are in obtaining a fee, not in changing the world¹.

Even within the common law, interesting differences in approach have emerged among legal systems. In part, this is a product of the simple fact that, despite the principle of party prosecution, the claimant is not representing his or her own interests alone, but also the interests of a group of persons who, apart from the similarities between their claims, may have little in common. In Australia, this prompted legislators to abandon the pretense of party prosecution directed by a claimant and to impose instead a fiduciary duty on class counsel to serve the interests of the class. The representative plaintiff in the Australian systems serves more as an example of the harm suffered as a means of providing a factual substratum for the assessment of the claim than as the person responsible for determining the direction of the litigation.

The Australian and civil law approaches contrast with the approach taken in the United States in which a responsible representative plaintiff, capable of exercising judgment independently from counsel, is seen as an important safeguard against the risk of harm to the interests of the class that might result from the inherent conflicts of interest faced by class counsel. Despite the acknowledged potential for conflicts of interest between the representative plaintiff and other members of the class², solutions have been sought in ensuring that the representative plaintiff is at least a plaintiff with a material interest in the litigation³.

It is interesting to see in the following commentaries how the common concerns relating to questions such as the representatives' dedication to the welfare of the class representative's capacity to instruct counsel effectively give rise to such different solutions from one legal system to another.

Canada – In order to be certified as a class action, the plaintiffs in a proceeding must have a representative who is able to «fairly and adequately represent the interests of the class»⁴. Adequacy of the representative will usually be determined as a function of the plaintiff's motivation to prosecute the claim, the ability to bear the costs of the litigation, and the competence of the plaintiffs' counsel⁵.

Motivation per se may be difficult to assess, but a representative plaintiff must at least have «an interest the same as others in the class» and not be impecunious⁶. In theory, any

¹ Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, at 194.

² Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, 49 *Osgoode Hall L.J.* 1, 11–12 (2011) (Can.).

³ See *ibid.*, at 25–26 (citing Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006)). In addition, while the legislation refers to a representative plaintiff, this function is often supported by a committee of plaintiffs.

⁴ Class Proceedings Act, R.S.O. 1992, c. 6 § 5(1)(e)(i) (Can. Ont.).

⁵ *Dutton*, [2001] 2 S.C.R. 534, para. 41.

⁶ *Smith v. Canadian Tire Acceptance Ltd.* (1995), 22 O.R. 3d 433, para. 63 (Can. Ont. Gen. Div.), *aff'd*, 26 O.R. 3d 94 (Can. Ont. C.A.).

legal person with a direct cause of action may serve as a representative plaintiff. Most representative plaintiffs are individuals, but where corporations are permitted to serve in this capacity, the law imposes restrictions¹. In Quebec, consumer organizations have served as representatives, but this is rare elsewhere in Canada.

Most representative plaintiffs are recruited by class action lawyers². This practice is controversial: practitioners regard it necessary to promote access to justice, but academics and judges doubt whether it promotes effective oversight of counsel³. A representative plaintiff recruited by a lawyer based on the lawyer's research of a potential claim may lack of the necessary interest, independence, and incentive to fulfill his or her duties to the class to exercise independent judgment in instructing counsel⁴. Nevertheless, in some cases the plaintiffs' recruitment and limited contact with counsel has not resulted in disqualification⁵. Once the representative plaintiff has been approved by the certification judge he or she has the power to instruct, hire, and fire counsel, and the duty to act in the best interests of the class⁶. The extent of the involvement of representative plaintiffs varies considerably from case to case⁷.

Australia – In Australia, class actions are generally pursued by specialist law firms, but few are large enough to underwrite and manage large scale group proceedings⁸. A minimum of seven claimants must instruct a firm⁹ in order to commence a class action¹⁰. The firm acts on their instructions, but it owes fiduciary duties to all group members¹¹ and it must protect

¹ See Code of Civil Procedure, R.S.Q., c. C-25, arts. 999, 1048 (Can. Que.) (providing that a legal person established for a private interest, partnership, or association may apply for the status of representative if one of its designated members is a member of the group that intends to bring a class action, and the interest of that member is linked to the objects for which the legal person or association has been constituted).

² Data collected in a small-scale survey reflects the class action activity of approximately 77 class action lawyers, working in thirteen firms, who reported between them a total of 332 class actions as at January 1, 2009. None of the four firms with the largest portfolio of class actions (over 40 cases each) attributed more than twenty five percent of their cases as having been initiated by a client who sought legal advice from the firm. Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario*, LLM thesis, U. Toronto, 2009, at https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic_Jasminka_200911_LLM_Thesis.pdf.

³ See Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*; Catherine Piche, *The Class Action Settlement Actors: Who Protects Whom?*, 23 *Sup. Ct. L. Rev.* 2d 57 (2011) (Can.).

⁴ *Chartrand v. Gen. Motors Corp.*, 2008 BCSC 1781, paras. 96-112 (Can. B.C.); *Singer v. Schering-Plough Can. Inc.*, 2010 ONSC 42, paras. 221 (Can. Ont.); *Poulin v. Ford Motor Co. of Can.* (2006), 35 C.P.C. 6th 264, paras. 85-95, 105 (Can. Ont. Sup. Ct. J.), *aff'd*, [2008] O.J. No. 4153 (Can. Ont. Div. Ct.) (plaintiff, who was described as a «pawn» by counsel who recruited him, was ultimately found not to be an adequate representative).

⁵ *Fantl v. Transamerica Life Can.* (1998), 66 C.P.C. 6th 203, paras. 26-40 (Can. Ont. Div. Ct.), *aff'd*, 2009 ONCA 377 (Can. Ont.).

⁶ *Fantl*, 2009 ONCA 377, paras. 48-74.

⁷ Kalajdzic, *Legal Ethics and Class Action Praxis*.

⁸ Vicki Waye & Vince Morabito, *The Dawning of the Age of the Litigation Entrepreneur*, 28 *Civ. Just. Q.* 389, 425 (2009) (U.K.). Between 1992 and 2009, roughly one-third of all class actions commenced in the Federal Court were filed by two law firms, who were the only firms to be involved in more than ten such proceedings. See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, First Report: Class Action Facts and Figures* 28 (2009).

⁹ *Matthews v. SPI Electricity Pty. Ltd.* (No. 1) [2011] VSC 167, paras. 44-46 (Austl.).

¹⁰ Federal Court of Australia Act 1976 (Cth) s 33C(1)(a); Supreme Court Act 1986 (Vic) s 33C(1)(a) (Austl.); Civil Procedure Act 2005 (NSW), s 157(1)(a) (Austl.).

¹¹ *Petrusevski v. Bulldogs Rugby League Club Ltd.* [2003] FCA 1056, para 7 (Austl.); *King v. AG Austl. Holdings Ltd.* (2002) 121 FCR 480, 488-89 (Austl.); *Courtney v. Medtel Pty. Ltd.* (2002) 122 FCR 168, 182, 184-85 (Austl.); *McMullin v. ICI Austl. Operations Pty. Ltd.* [1997] No NG 305 (Unreported, Wilcox J, 27 Nov. 1997) (Austl.) cited in *King*, 121 FCR at 482.

the interests of the class in the event of a conflict between the class and the representative claimants. Related class actions are common place¹, accounting for nearly half of the representative proceedings filed in the Federal Court of Australia², with nearly one-third commenced by different law firms³. In one case, following the court-ordered formation of an independently selected litigation committee to determine how to proceed in the best interests of the group, all the proceedings were heard together⁴.

Individuals, corporations, trade unions, incorporated associations and local government councils may all serve as representatives⁵. Their interests need not be identical with the class members' interests provided their claims have substantial common issues of law and fact⁶. However, each representative and each class member must have a claim against each of the defendants⁷. Class representatives must have standing to bring their own claims⁸, but they are not agents or fiduciaries of class members⁹. It is the class lawyers who interact with class members and who have this responsibility. This has prompted commentators to question the need for representatives¹⁰. Representatives can be removed if they do not adequately represent group's interests¹¹, and class members can opt out¹² if they are dissatisfied with the conduct of the proceedings.

Most class actions are commenced by private parties, but the Australian Competition and Consumer Commission (ACCC)¹³ and the Australian Securities and Investment Commission (ASIC)¹⁴ were authorized in 2001 to commence proceedings in the public interest on behalf of persons who have been harmed and who have provided their written

¹ See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* 21 (2010).

² *Ibid.*, at 22.

³ See *ibidem*.

⁴ *Kirby v. Centro Properties Ltd.* [2008] FCA 1505, paras 9–12, 39 (Austl.).

⁵ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives*, at 45.

⁶ E.g., *Williams v. FAI Home Sec. Pty. Ltd.* (No 2) [2000] FCA 726, para 12 (Austl.); *Rod Inv. Pty. Ltd. v. Clark* (No 2) [2006] VSC 342, para 53 (Vic.) (Austl.); *Woodcroft-Brown v. Timbercorp Sec. Ltd.* [2010] VSC 68, paras 14–17 (Austl.).

⁷ *Philip Morris (Austl.) Ltd. v. Nixon* (2000) 170 ALR 487, para 3 (Austl.). However in *Bray v. F Hoffman-La Roche Ltd.* (2003) 200 ALR 607, paras 122–130, 246–248 (Austl.), a majority of the Full Court of the Federal Court said (in obiter) (at 630–631, [122]–[130] per Carr J and at 657–659, [246]–[248] per Finkelstein J) that they considered *Philip Morris* was wrongly decided on this point. Nevertheless, *Philip Morris* has been largely followed. E.g., *Cook v. Pasmenco* (No 2) (2000) 107 FCR 44, 46 (Austl.); *Johnstone v. HIH Ins. Ltd.* [2004] FCA 190, para 38 (Austl.); *Rod Inv.* [2006] VSC 342; *Kirby*, [2008] FCA 1505, paras 175–176 (Austl.).

⁸ Federal Court of Australia Act 1976 (Cth) s 33D; Supreme Court Act 1986 (Vic) s 33D (Austl.); Civil Procedure Act 2005 (NSW) s 158 (Austl.). Moreover, these provisions allow a class representative who has commenced proceedings to maintain those proceedings even though he or she ceases to have a claim against the defendant.

⁹ Federal Court of Australia Act 1976 (Cth) s 33E; Supreme Court Act 1986 (Vic) s 33E (Austl.); Civil Procedure Act 2005 (NSW) s 159 (Austl.).

¹⁰ Damian B. Grave & Kenneth A. Adams, *Class Actions in Australia*, 131–132 (2005).

¹¹ Federal Court of Australia Act 1976 (Cth) s 33T; Supreme Court Act 1986 (Vic) s 33T (Austl.); Civil Procedure Act 2005 (NSW) s 171 (Austl.).

¹² Federal Court of Australia Act 1976 (Cth) s 33J; Supreme Court Act 1986 (Vic) s 33J (Austl.); Civil Procedure Act 2005 (NSW) s 162 (Austl.).

¹³ The ACCC carries out these broad functions using an array of statutory powers conferred by the Competition and Consumer Act 2010 (Cth) (Austl.).

¹⁴ Australian Securities and Investment Commission Act 2001 (Cth) s 1 (2).

consent to this representation¹. This power was meant to redress the difficulties of pursuing expensive and complicated litigation², but it was not exercised³. From 1992-2009 only 15 out of 241 applications commenced in the Federal Court of Australia were filed by the ACCC and the ASIC⁴, who preferred to leave it to private parties to assess the costs and benefits of litigation⁵.

In 2010, the ACCC and the ASIC were given authority to commence actions without written consent following a judicial declaration that a respondent had breached statutory prohibitions against unconscionable behaviour or misleading and deceptive conduct, or had taken advantage of consumers through unfair contract terms⁶. In such actions, the courts do not award damages⁷, but they are authorized to make various orders, including declaring a term of a contract or a whole contract void; varying standard form contracts; directing refunds or the return of property; or mandating the supply of services. The orders are binding on non-party consumers who accept the redress from the respondent acting at the direction of the court.

Enforceable undertakings falling within the array of powers belonging to these regulators can lead to the initiation of other forms collective of redress⁸. These powers include issuing public warning notices⁹ and infringement notices¹⁰. They are not litigious, but they can augment group litigation. Privately initiated group proceedings for compensation relying upon a finding in an action taken by a regulator may precede, follow, or operate in tandem with regulatory action.

For example, in the *Multiplex* dispute, a 2005 ASIC investigation of misleading and deceptive conduct by an international construction company culminated in an enforceable

¹ See Competition and Consumer Act 2010 (Cth) s 87 (1B) (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 50.

² *Austl. Sec. Comm'n v. Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 115 (Austl.); *Somerville v. Austl. Sec. Comm'n* (1995) 60 FCR 319, 324 (Austl.).

³ Janet Austin, *Does the Westpoint Litigation Signal a Revival of the ASIC Section 50 Class Action*, 22 *Austl. J. Corp. L.* 8 (2008).

⁴ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: First Report: Class Action Facts and Figures* 28 (2009).

⁵ ASIC Regulatory Guide 4, 1991 (Cth) reg 4.4 (Austl.); ACCC Compliance and Enforcement Policy 2012 (Cth) 2 (Austl.) (The ACCC is more likely to act in cases of egregious breaches of national and international significance involving important interpretations of law than in cases involving the private commercial rights of the parties).

⁶ Competition and Consumer Act 2010 (Cth) s 239 (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 12GNB.

⁷ Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) sch 2 pt 7. The omission of damages awards may be a response to the ruling in *Georgiadis v. Austl. & Overseas Telecom. Corp.* (1994) 179 CLR 297 (Austl.) that an action for damages is a proprietary right that may be extinguished only on just terms under AUSTRALIAN CONSTITUTION s 51 (xxxi) or that the proceeding was developed to fill a gap in regulatory incentive where the damages were not large, which is consistent with ASIC's ability to recover compensation as an adjunct to its power to seek civil penalties pursuant to Corporations Act 2001 (Cth) ss 1317H, 1317HA (Austl.) and the regulator's power to seek compensation on behalf of consumers as a component of an enforceable undertaking.

⁸ Competition and Consumer Act 2010 (Cth) s 87B (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 93AA.

⁹ Competition and Consumer Act 2010 (Cth) s 51ADA (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 12GLC.

¹⁰ Corporations Act 2001 (Cth) s 1317DAC (Austl.); Competition and Consumer Act 2010 (Cth) s 134A (Austl.).

undertaking to establish a \$32 million compensation fund for investors, to undertake an independent review of disclosure policies and practices, and to implement any recommendations that resulted¹. A class action followed and it was eventually settled² for many times what the investors would have received if they had accepted the terms of the original ASIC settlement³. Similarly, in the *Ancor/Visy* settlement, an ACCC application for pecuniary penalties under the *Trade Practices Act 1974* (Cth) for a price fixing and market sharing agreement, resulted in a fine⁴ and was followed by a class action on behalf of businesses that purchased their product within the period under investigation⁵. Finally, in the *Opes Prime* litigation, a securities lending and stockbroking firm extended loans to investors that were secured by their shares, often having much greater value than the loans⁶. The shares were transferred to *Opes Prime's* financiers, two leading banks. When the securities firm went bankrupt, the banks seized the shares, and ASIC launched an investigation into allegations that the firm and its bankers had been promoting an unregistered management investment scheme. A class action was started on behalf of the investors and, following an ASIC initiated mediation, a global settlement was reached in which a scheme of arrangement required the banks to pay the liquidators a sum that permitted some recovery by investors⁷.

To date, there has been little public debate over the balance between publicly and privately initiated class actions despite the substantial transaction costs of private class actions in legal fees and litigation financier premiums⁸ and a report on Australia's Access to Justice Framework in 2009⁹.

England and Wales – In the English civil justice system, there has been considerable debate over whether ideological plaintiffs should be permitted to represent claimant groups in litigation. The Group Litigation Order regime requires a litigant with a direct cause of action to pursue the claim rather than an entity that represents the interests of the class¹⁰. Under the representative action regime, in recent years, trade associations and others have been refused permission to represent their members¹¹. However, in the recently-enacted

¹ 06-443 ASIC accepts an enforceable undertaking from the Multiplex Group, Austl. Sec. Inv. Comm'n (Dec. 20, 2006), www.asic.gov.au/asic/asic.nsf/byheadline/06-443+ASIC+accepts+an+enforceable+undertaking+from+the+ Multiplex+Group?openDocument.

² *P Dawson Nominees Pty. Ltd. v. Brookfield Multiplex Ltd.* (No. 4) [2010] FCA 1029 (Austl.).

³ Ben Butler, *ASIC attacked on Multiplex deal*, *The Age* (Australia), July 22, 2010, available at <http://www.theage.com.au/business/asic-attacked-on-multiplex-deal-20100721-1018a.html>.

⁴ *Austl. Competition & Consumer Comm'n v. Visy Indus. Holdings Pty. Ltd.* (No. 3) (2007) 244 ALR 673.

⁵ *Jarra Creek Cent. Packing Shed Pty. Ltd. v. Ancor* [2011] FCA 671, para 6 (Austl.).

⁶ See, e.g., *Beconwood Sec. Pty. Ltd. v. Austl. & N.Z. Banking Grp. Ltd.* (2008) 246 ALR 361 (Austl.).

⁷ *Fowler v. Lindholm* (2009) 178 FCR 563 (Austl.).

⁸ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010).

⁹ *Access to Just. Taskforce, A Strategic Framework for Access to Justice in the Federal Civil System*, at 119–127. But see Elizabeth Boros, *Public and Private Enforcement of Disclosure Breaches in Australia*, 9 *J. Corp. L. Stud.* 409 (2009) (commenting on the incremental development of the remedial regime and its overlapping remedies, and arguing in favour of enforcement against individual defendants rather than «pocket shifting» compensation against entities).

¹⁰ Civil Procedure Rules [CPR] S.I. 1998/3132, Practice Direction 19B, para. 3.1 (U.K.) (an application for a GLO «may be made either by a claimant or by a defendant»).

¹¹ *Consorzio del Prosciutto de Parma v. Marks & Spencer Plc* [1990] F.S.R. 530 (Ch), *aff'd*, [1991] R.P.C. 351 (A.C.) (U.K.); *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd.* [1998] R.P.C. 117 (Ch), *aff'd*, [1999] R.P.C. 826 (A.C.) (U.K.).

sectoral representative action for follow-on actions in the competition law sector¹, the English Consumers' Association, Which? was approved as a representative of consumer claimants. The proposed reforms to the Financial Services Bill 2010 contemplated permitting representation by ideological plaintiffs².

Further debate has related to whether an ideological plaintiff would need to be one of a list of pre-designated organizations or whether any organization that met the criteria for adequacy should be permitted to represent claimants. In the competition law sector regime, only pre-designated organizations were permitted to serve, but in the proposed Financial Services Bill regime, any suitable entity that met the statutory requirements for an «appropriate person» would have been permitted to do so³. Finally, there has been debate on whether ideological claimants should be the sole option for representatives or whether this should be in addition to members of the class. Again, in the competition law sector regime, only a pre-designated organization was permitted to serve, but in the proposed Financial Services Bill regime both could bring claims, provided that they were «appropriate» persons.

The methods of selecting representatives and their roles also vary from one regime to another. In the representative action regime, the representative must have the same interest as those represented. This has proved to be a difficult threshold to meet⁴. Under the Group Litigation Order, if the court adopts a test case approach⁵, the claim of one of the claimants could be considered and the result could have a precedential effect on the claims of other claimants entered on the group register. Under the proposed reforms in the Financial Services Bill 2010, the representative claimant would have to meet the criteria of adequacy and satisfy the court of the ability to pay the defendant's recoverable costs if ordered to do so⁶.

Netherlands – In deciding whether to approve a settlement under the WCAM procedure, the Dutch courts will consider carefully the adequacy of the representation by the representative organization. The formal standing requirements for such organizations are not onerous, but there is a rigorous judicial assessment of whether an organization is sufficiently representative of the interests of persons on whose behalf the agreement has been concluded. Whether a representative organization is generic in nature, such as the Consumers' Association, the Investors' Association, or an ad hoc foundation established to promote the interests of persons for the benefit of whom a specific settlement agreement has been concluded⁷, it must persuade the court that it serves the interests of those who it is asking the court to bind with the settlement it has reached.

In determining the adequacy of the representation, the court may consider various criteria, such as the activities undertaken by the representative association on behalf of the interests of its members, the number of interested parties that are members of the association, and the general acceptance of the association's representation by the interested parties. The court is not empowered to declare the settlement binding only on a portion of

¹ Competition Act, 1998, § 47 (U.K.).

² See Financial Services Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing CPR 19.21(3)).

³ *Ibidem*.

⁴ *Emerald Supplies Ltd. v. British Airways Plc.* [2009] EWHC 741 (Ch), *aff'd*, [2010] EWCA (Civ) 1284 (A.C.) (U.K.).

⁵ Civil Procedure Rules [CPR] S.I. 1998/3132, r. 19.13(b) (U.K.).

⁶ See Financial Services Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing CPR 19.21(2)(b)(iv)).

⁷ Examples include the Shell Reserves Compensation Foundation in the Shell Settlement and the Stichting Converium Securities Compensation Foundation in the Converium Settlement.

the proposed group, but it may suggest that the parties modify the petition and limit the binding effect of the settlement agreement to those who are sufficiently represented. The reduced coverage may affect the viability of the proposed settlement as it affects the extent of the closure on questions of liability available for the responsible party.

Some have questioned the ability of a representative organization established under Dutch law to represent claimants from outside the Netherlands. Various practical solutions have emerged, such as written expressions of support for a settlement by representative organizations from other countries whose residents are included in the class that is sought to be bound, participation by those organizations in negotiating and concluding the settlement agreement, or agreement by them to become a party to it. In cases involving multi-jurisdictional classes, the question is not whether any one representative organization represents the class as a whole, but whether the representative associations and foundations are jointly sufficiently capable of representing the interests of the persons for the benefit of whom the settlement has been concluded.

Italy – Any class member or consumer association can serve as the representative plaintiff. Once an ordinary civil proceeding is declared admissible as a class action, the court issues an order providing for notice to potential class members and for a deadline to opt in. Class members who opt in are bound by the outcome but are not considered parties to the suit, which proceeds between the lead plaintiff and the defendant. The opt-in period can be short and, in any event, cannot exceed 120 days, after which, no other class actions can be brought against the same defendant on the same set of issues.

The only reference in the legislation to adequacy of representation relates to the ability of the plaintiff to afford adequate protection to the interests of the class. While the opt-in requirement enables class members to avoid participation in a class action in which they are not confident that their interests will be adequately represented, the lack of authority to take initiative in the suit prevents class members from taking steps to ensure that their interests are adequately represented should they choose to opt-in.

Belgium – Claimant groups must be represented by established private professional, inter-professional or public associations, or organizations whose statutory aims correspond with the cause of action. The requirement of representation by these ideological plaintiffs has been defended¹ on three grounds: the representative's interests are aligned with the class as a whole and not with any individual member²; individuals are shielded from the risks and burdens of representation³; and financing the litigation is more manageable.

Sweden – There are three kinds of group actions in Sweden: those led by private persons, those led by organizations, and those led by public authorities. A private group action may be commenced by a natural or legal person who is a member of the group and who has standing to be a party to the proceedings with respect to at least one of the causes of action. Non-profit consumer organizations may represent consumers or workers in the area of consumer and

¹ Rachael Mulheron, *The Class Action in Common Law Legal System: A Comparative Perspective*, Hart Publishing, 2004, 303 [hereinafter Mulheron, *Common Law Class Action*].

² This is the «class-entity» or «class-as-client» theory. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 913 (1997–1998); S. Afr. Law Comm'n, *The Recognition of a Class Action in South African Law*, para. 5.5 (Working Paper No. 57); Vince Morabito, *Ideological Plaintiffs and Class Actions – An Australian Perspective*, 34 *U.B.C. L. Rev.* 459, 497 (2000–2001); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 13, 26–32 (1996).

³ Ont. Law Reform Comm'n, *Report on Class Actions*, at 128, 132; Pierre-Claude Lafond, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 *Consumer L. J.* 329, 332 (2000).

environmental law in claims concerning goods, services, or other utilities offered in the course of business to consumers, primarily for personal use. Non-profit organizations dedicated to nature conservation and environmental protection (and professional federations in the fishing, farming, reindeer husbandry, and forestry industries) can bring actions for injunctions and/or damages for environmental impairment. Any organization, no matter how small or new, can obtain court approval¹ to serve as a representative of its own members and the public². Finally, the Consumer Ombudsman, the Swedish Environmental Protection Agency, or any other public agency authorized by the government may initiate public group actions³.

A representative plaintiff must be represented by an advocate unless the court authorizes the representative to appear without an advocate or to appear with an advocate who is not a member of the bar⁴. The representative plaintiff's role is to protect the interests of the members of the group by giving them an opportunity to express their views on important matters where feasible and by keeping them informed upon request⁵. The right to represent the group does not cease if there is a change in the circumstances on which the right to institute the action has been founded⁶. However, if the plaintiff is no longer considered appropriate to represent the members of the group in the case, the court appoints someone else who is entitled to do so. If no new plaintiff can be appointed the group action is dismissed. If the plaintiff is the appellant's counterparty in a superior court, the court may appoint someone else who is considered appropriate to conduct the group's action as plaintiff⁷.

Brazil – In Brazil, the class representative is granted standing on the basis of certain formal requirements alone, leaving adequacy to be assessed indirectly by means of tests such as «thematic relevance». In the «popular» actions any citizen may sue because this litigation is more like public interest litigation than class actions.

Russian Federation – Generally speaking, the claimants in public class actions are not represented by a member of the class, but by an entity – usually a governmental authority – who is authorized by law to do so⁸. Such entities may include consumer organizations and public prosecutors and they usually pursue claims such as regulatory matters and environmental matters⁹. Any claim brought by a person who does not have standing to do so under the legislation is rejected¹⁰.

¹ The representative must satisfy the court that it is an appropriate representative in view of its interest in the matter, its financial capacity to bring a group action, and the circumstances generally. (SPGA §5.) LAG OM GRUPPRÄTTEGÅNG (Svensk författningssamling [SFS] 2002:599) (Swed.).

² In the case of organization and public group actions, the representative plaintiff is not a member of the group. If an organization or public authority has a claim as a member of a group, the action is treated as a private group action.

³ In *The Consumer Ombudsman v. Kraftkommission i Sverige AB Umeå* [TR] [District Court] 2004 T5416 (Swed.), the Consumer Ombudsman sought damages on behalf of about 7,000 people for the defendant's failure to supply electricity as agreed under a fixed price contract. The defendant challenged the representation unsuccessfully and about 2,300 people opted in. A plea for a declaration that the defendant must compensate all group members was heard and finally approved by the Court of Appeal in September 2011.

⁴ SGPA §11.

⁵ SGPA §17.

⁶ SGPA §7.

⁷ SGPA §21.

⁸ CPC RF, art 45.

⁹ Part 2, article 11 of the Federal Law «On Protection of the Environment» dd. January 10, 2002, No. 7-FZ, in Legal reference system «Consultant-Plus».

¹⁰ CPC RF, art 1, item 1, pt 1.

The limitations on standing for public class actions have been criticized on the basis that authorized representatives may not have the time or inclination to pursue claims promptly or at all despite their merit. Furthermore, the law of standing generally has been criticized as taking too restrictive an approach to the question of whose rights may be affected by, for example, misappropriation of the intellectual property¹, or affronts to the honour and dignity² of deceased persons. Similarly, there has been criticism of the law of standing in areas of the law such as that relating to elections, where standing is restricted to entities whose interests may conflict with that of the public at large³ and where standing is otherwise restricted to persons whose specific rights have been breached, despite the larger public interest. Similar concerns have been expressed over the laws protecting animals, where the legal protections are incomplete and in need of modernization⁴.

In this regard, the procedure for private class actions in the Russian Federation may also be subject to criticism for failing to provide the procedural safeguards for class members of either opt-in or opt-out proceedings. There appears to be no way to opt-out or to commence separate proceedings and, once included in the class, the class member receives whatever is awarded in the proceeding. Under the private class action procedure, the initiator is the person who has the rights and responsibilities of a party⁵, including the right to define the class⁶ and the responsibility for fees. The law does recognize another category of claimants consisting of those concurring in the request, whose rights seem to be confined to demanding substitution of the representative under specified conditions if a majority agrees⁷. This group also has the right to be informed of the steps taken in the proceeding⁸. A third group, comprised of those who will be bound by the result, have only the right to join the second group.

Funding and Financing

Perhaps the most controversial feature of U.S.-style class actions is the economic context in which it operates. Epithets such as outrageous and obscene are routinely leveled at the quantum of fees awarded to class counsel upon the successful conclusion of a class action

¹ E.P. Gavrilov, V.I. Eremenko, *Comments to Part Four of the Civil Code of the Russian Federation (article-by-article)*, Moscow, 2009; E.A. Pavlova, O.Yu. Shilokhvoost (eds.), *Current Issues of Russian Private Law: Collected Works Dedicated to the 80th Anniversary of Professor V.A. Dozortsev*, 2008 (author: E.I. Kaminskaya); S.P. Gri-shayev, *Copyright Defense and Protection*, prepared for «Consultant-Plus» system, 2008, in Consultant Plus.

² Decree of the Plenum of the RF Supreme Court dd. February 24, 2005, No. 3 «On judicial practice on proceedings related to defense of citizens' honor and dignity, as well as reputation and goodwill of persons and legal entities», in Legal reference system «Consultant-Plus».

³ Thereat it is important to take into account for which purposes such entities have actually been established. For example, part 2, article 1 of the RF Federal Law dd. October 6, 2003, No. 131-FZ «On General Principles of Local Administration in the Russian Federation» states that «local administration in ... is a form of power exercise by the public, that ensures... independent resolution of local issues by the public at its own risk directly and (or) through local authorities, based on the interests of the population...»

⁴ Sanctions for abusive animal treatment are stipulated in the Criminal Code of the Russian Federation (article 245). At the same time, such abusive treatment shall be considered as a crime only if it caused death or permanent injury of the animal, provided that such act was undertaken based on hooligan motives or for financial gain, or using sadistic approaches, or in the presence of minors. It is easy to notice that the aforementioned includes only a small part of possible situations.

⁵ APC RF, art 225.12.

⁶ APC RF, art 225.12, pt 1.

⁷ APC RF, art 225.15, pt 8.

⁸ APC RF, art 225.16, pt 3.

in the United States. All manner of potential abuses are feared inevitable through adoption of the U.S. approach to funding and financing, and yet in the United States this approach is thought to be essential to the successful operation of the regime.

Nevertheless, even in legal systems that once regarded conditional fees as fundamentally unacceptable, their merit in the context of group litigation has prompted reforms to relax the restrictions on them. And in some legal systems in which there has not been reform to provide adequate financial incentives, and in which safeguards for claimants have not been introduced, there is concern that the effectiveness of group litigation may be diminished as a result.

The comparisons below on the topics of funding and financing are among the most striking in the questions they raise about whether introducing the changes necessary to meet the basic requirements of a regime for group litigation inevitably results in «Americanizing» a civil justice system.

Canada – Most class actions are financed by class counsel, but some rely on third party financing. In all cases, counsel enters into a contingency fee arrangement with the representative plaintiff and agrees to be reimbursed for disbursements and paid for legal services at a rate of 20-35% of the award or 2-4 times counsel's base fee when and if the action settles or succeeds at trial¹. Upon approval by the court as fair and reasonable, the fee arrangement binds all class members. Some judges give weight to the terms of the contract with the representative plaintiff², but others do not³ on the basis that, unlike the situation in named party litigation, the agreement has not involved a client who is directly affected by the level of fees claimed⁴.

In Ontario, contingency fees were once prohibited, but the need for them in class actions prompted a review of this restriction on fee arrangements – a review that ultimately extended to all matters except those in family law. It is recognized that class actions rely upon entrepreneurial lawyering with the caveat that «the entrepreneurial lawyer is a means to an end, not an end in and of itself»⁵. Nevertheless, counsel fees in Canada do not seem to be as generous as those awarded in the United States.

The governments of Quebec and Ontario have established funds to which class counsel may apply for financial support. Applications are accepted on the basis of a number of factors including the likelihood of success and the public interest in the case. In return for a percentage of the award⁶ both funds cover disbursements and provide indemnification

¹ Benjamin Alarie, *Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions*, 4 *Can. Class Action Rev.* 15 (2007) (Can.).

² See, e.g., *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. 3d 543, para. 63 (Can. Ont. Sup. Ct. J.) («there was nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted»). See also *McLay & Co. v. Cascades Fine Papers Grp. Inc.* (2008), CarswellOnt 7936, para. 6 (Can. Ont. Sup. Ct. J.) (WL) (where Leitch J was «prepared to approve this fee request because it is consistent with the retainer agreement entered into with the representative plaintiff»); see Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, at 11.

³ *Martin v. Barrett* [2008] O.J. No. 2105, para. 48 (Can. Ont. Sup. Ct. J.) (QL).

⁴ *Ibid.*, at para. 52.

⁵ *Fantl v. Transamerica Life Canada*, at para. 66.

⁶ In Ontario, the percentage recovery is 10 percent on top of the amount of funding previously paid by the Ontario Fund to the representative plaintiff. *Class Proceedings*, O. Reg. 771/92, s. 10(3)(b) (Can. Ont.). In Québec, the amount collected by its Fund varies depending on the method of recovery by the class, and applies in

against adverse costs awards¹ and the Québec fund may also provide for legal fees. In a legal system in which an unsuccessful plaintiff may be required to pay the costs of the defendant, the indemnity is an important safeguard for representative plaintiffs, and for their counsel who may otherwise be called upon to provide it.

Apart from this, the Ontario Class Proceedings Fund has not been regarded as entirely successful. On the one hand, there is concern that its limited resources could easily be depleted by a large unsuccessful matter; and on the other hand, established plaintiff's counsel prefer to finance the litigation themselves if they are confident of success, rather than invest the time in making an application to the Fund knowing that it will claim 10% of a successful recovery.

Finally, third party financing arrangements are now being approved. Under these arrangements, financiers indemnify plaintiffs in return for a levy on settlement or judgment proceeds of less than 10%². If such arrangements become commonplace, there may be need for greater regulatory or judicial oversight³.

Australia – Since the Australian High Court approval of litigation financier underwriting and control of class proceedings⁴, conditional fee agreements have frequently been combined with litigation financing. Conditional fee or «no win no fee» agreements address some of the concerns of cost shifting⁵ by permitting lawyers to charge uplift fees of twenty-five to fifty percent on their prescribed fees, which are payable only in the event of success, but otherwise they leave the claim holder liable for disbursements and adverse costs. Litigation funding, however, costs an average of thirty percent of the proceeds⁶ but it provides indemnity for adverse costs awards and it covers all or a part of the legal costs and disbursements⁷.

The courts have recognized the public importance of taking the financial risk of pursuing class actions by requiring class members to enter into a litigation funding agreement, thereby closing the class to free riders⁸. This has made the indemnities in such agreements significant in attracting members. Furthermore, third-party funding has been important in Australia,

every class action, not just those in which funding has been granted. See Regulation Respecting the Percentage Withheld by the Fonds d'aide aux recours collectifs, R.R.Q. c. R-21, r. 3.1 (Can. Que.).

¹ Law Society Act, R.S.O. 1990, c. L.8, amended by Law Society Amendment Act (Class Proceedings Funding), S.O. 1992, c. 7, s. 3 (Can.). In Québec, if a cost award is made against the representative plaintiff and he or she is unable to pay, the defendant may then apply to the Québec Fund for payment. See An Act Respecting the Class Action, R.S.Q. 2000, c. R-21, s. 20 (Can. Que.). The Fund then becomes subrogated to the defendant's rights as against the unsuccessful representative: See *ibid.*, at s. 31. Adverse costs awards are not inevitable in Ontario, but they are not available at all in some other provinces, and this distinction has resulted in some debate about whether they can inappropriately discourage claims from being brought.

² See *Metzler Investment GMBH v. Gildan Activewear Inc.* [2009] O.J. No. 33150 (Can. Ont. Sup. Ct. J.) (QL); *MacQueen v. Sydney Steel Corp.*, 2011 NSSC 484 (Can. N.S.); *Dugal v. Manulife Corp.* (2011), 105 O.R. 3d 364 (Can. Ont. Sup. Ct. J.).

³ Sandra Rubin, *Enter the Silent Partner*, *Lexpert Mag.* July/Aug. 2011, at 56–61; Luis Millan, *Why class actions create ethical minefields*, *Law. Wkly* (Aug. 19, 2011), at 4, 7.

⁴ *Campbells Cash & Carry Ltd. v. Fostif Pty. Ltd.* (2006) 229 CLR 386 (Austl.).

⁵ Vince Morabito, *Contingency Fee Agreements with Represented Persons in Class Actions - An Undesirable Australian Phenomenon*, 34 *Common L. World Rev.* 201 (2005).

⁶ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives*, 38–39 (2010).

⁷ *Ibidem.*

⁸ *Multiplex Funds Mgmt. Ltd. v P Dawson Nominees Pty. Ltd.* (2007) 164 FCR 275 at paras 141–142 (Austl.).

where all the States prohibit contingency fee arrangements and the challenges of financing the action through to its conclusion have proved onerous¹.

The acceptance of third-party funding of class actions was foreshadowed by litigation financing in insolvency and in other commercial applications². It has been part of broader economic changes to the legal profession³, which have included the de-regulation of legal services, the introduction of multi-disciplinary practice, permitting non-lawyers to own interests in law firms⁴, and the listing of law firms on the Australian Securities Exchange⁵. Access to capital markets to underwrite the expansion of legal practice and access to capital markets to underwrite litigation have prompted increased corporate regulation, new causes of action, broader shareholder ownership, and an enhanced sense of entitlement to monetary compensation for investment losses⁶.

However, these developments, particularly in securities class actions⁷, have caused concern that lawyers are opportunistically stirring up claims for financial gain and little social benefit⁸. Conflicts of interest between financiers, law firms, and claim holders have exacerbated the concern⁹. Nevertheless, the government and ASIC have not been persuaded to require litigation financiers to register their underwriting of class actions as managed investment schemes¹⁰ or to hold an Australian Financial Services License¹¹, but new regulations are being drafted to address conflicts of interest¹².

England and Wales – Like Canada and Australia, civil litigation in England and Wales operates on the principle of cost-shifting. Accordingly, a representative claimant must be able to finance the litigation and pay adverse costs in the event that the claim does

¹ Greg Houston, Svetlana Starykh, Astrid Dahl & Shane Anderson, *NERA Econ. Consulting, Trends in Australian Securities Class Action: 1 January 1993 – 31 December 2009*, at 2 (May 9, 2010).

² See Vick Wayne, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US* (2008).

³ On the nature of this transformation see more generally Richard Susskind, *The End of Lawyers Rethinking the Nature of Legal Services* (2010).

⁴ Steven Mark & Tahlia Gordon, *Innovations in Regulation – Responding to a Changing Legal Services Market*, 22 *Geo. J. Legal Ethics* 501, 527–528 (2009).

⁵ *Ibid.*, at 515.

⁶ Michael Legg, *Shareholder Class Actions in Australia – The Perfect Storm*, 31 *U.N.S.W.L.J.* 669, 671–674 (2008) (Austl.); Peta Spender, *After Fostif: Lingering uncertainties and controversies about litigation funding*, 18 *J. Jud. Admin.* 101, 102 (2008) (Austl.).

⁷ E.g., Kathy Merrick, *The Multiplex class action settlement – best and fairest outcome or is there room for improvement?*, 62 *Keeping Good Cos.*, Oct. 2010, at 542; Hon. PA Keane, *Access to Justice and other Shibboleths, Judicial Conference of Australian Colloquium in Melbourne* (Oct. 10, 2009), available at <http://www.jca.asn.au/attachments/2009AccessToJustice.pdf>; Peta Spender, *After Fostif: Lingering uncertainties and controversies about litigation funding*.

⁸ See, e.g., *Campbells Cash & Carry Ltd. v. Fostif Pty. Ltd.* (2006) 229 CLR 386, 487 (Austl.) (Callinan & Heydon, JJ., dissenting).

⁹ Law Council of Austl., *Position Paper, Regulation of Litigation Funding in Australia* (June 2011).

¹⁰ *Brookfield Multiplex Ltd. v. Int'l Litig. Funding Partners Pte Ltd.* (No. 3) (2009) 256 ALR 427 (Austl.) (a full federal court decision determining that litigation funding of class actions was a managed investment scheme subject to Corporations Act 2001 (Cth) s 5C (Austl.)).

¹¹ But see *Int'l Litig. Partners Pte Ltd. v Chameleon Mining NL* (2011) 276 ALR 138 (Austl.) (determining that litigation funding was a financial product and that litigation financiers therefore required Australian Financial Services Licenses under Corporations Act 2001 (Cth) c 7 (Austl.)).

¹² Australian Securities and Investments Commission 2010 (Cth.) CO 10/333 (currently effective until 30 June 2011); see also Hon. Chris Bowen, *Address to Shareholder Class Action Conference* (May 4, 2010), available at <http://www.chrisbowen.net/media-centre/allNews.do?newID=3132>.

not succeed. Conditional fee arrangements are permitted and counsel may recover up to twice its regular rate of fees in the event of success, but percentage recoveries are not yet permitted.

Third party funders may finance the litigation and provide indemnity against adverse costs awards. A Working Group is presently drafting a voluntary Code of Conduct for such arrangements. After-the-event insurers may provide coverage for adverse costs, and before-the-event insurers, presumably through coverage held by the claimants, may join together to finance the litigation. The class members may contribute to a common fund for the costs of litigation and the potential costs of an adverse costs award¹. The Legal Services Commission may provide financing through legal aid for the costs of litigation and to indemnify a claimant against adverse costs awards. Such funding has not generally been provided for consumer claims. Other funding mechanisms that have been considered include a Supplementary Legal Aid Scheme, or an Access to Justice Fund set up under statute².

The rules governing costs and funding in litigation in England and Wales, including group litigation, are under review pursuant to the Jackson Costs Enquiry³, and presently, a proposal for «damages-based agreements» (which largely replicate a true contingency fee), contained in Part II of the Legal Aid, Sentencing, and Punishment of Offenders Bill, is undergoing Parliamentary debate. The Civil Justice Council had earlier recommended that contingency fees should be permitted where no other form of funding is available to enhance access to justice⁴. Currently, claimants seek to address the risks of adverse costs awards through costs-capping orders⁵ and the Civil Justice Council has recommended a presumption in favour of such orders in group litigation⁶.

Netherlands – Group litigation is financed and funded in the same way as ordinary litigation. There are no conditional or contingency fee arrangements, but generic representative organizations, which still depend upon the contributions of members, are considered *professional funders*. Ad hoc representative groups employ some forms of contingency arrangements with interested parties and there is public discussion of introducing some form of contingency fees, but there is concern that this could lead to high costs and litigation that is excessively lawyer-focused.

There is no public funding of representative organizations⁷, but there is legal aid and legal insurance, which has been sought in mass claims, and there is public discussion about whether a policy of public financial support would improve access to justice. Nevertheless, the need for funding and financing of the WCAM procedure needs to be understood in context. The need for financial resources is eased by the fact that the principle costs of

¹ This was used in the Equitable Life Group Litigation and Railtrack Private Shareholders Action Group Litigation. See *Equitable Life Members Support Group*, <http://www.equitablelifemembers.org.uk/> (last visited Mar. 16, 2012); *Weir v. Sec'y of State for Transp.* (No. 1) [2005] EWHC (Ch) 812 (U.K.) (brought by RPSAG).

² Legal Services Act, 2007, c. 29, § 194 (Eng.).

³ See Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, 330–336 (2009).

⁴ CJC, *Improved Access to Justice: Funding Options and Proportionate Costs: The Future Funding of Litigation: Alternative Funding Structures*, 68 (2007).

⁵ See *A B v. Leeds Teaching Hospitals NHS Trust* [2003] EWHC (QB) 1034 (Eng.).

⁶ CJC, *Improved Access to Justice: Funding Options and Proportionate Costs*, 26, recommendation 7 (2005).

⁷ Such as the Dutch Consumers Organisation (Consumentenbond) established by the Injunctions Directive 98/27/EC. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51–53.

negotiating, realizing, and executing a settlement agreement are borne by the representative organizations and the responsible parties. The settlement, once reached, usually provides for recovery of the costs of the representative organizations, including the costs of adequate worldwide representation for ad hoc representatives. The relatively inexpensive nature of the WCAM procedure is an important feature of its success.

Italy – There are no special funding or financing rules for class actions. As in ordinary proceedings, each party must bear its own expenses during the proceeding and, pursuant to the loser-pays rule, the prevailing party is generally entitled to recover its costs when the matter is over. In the handful of class actions commenced to date, consumer organizations were probably motivated to represent individual claimants more by a desire to raise their profile than by a hope for financial benefit from bringing a successful action.

Contingency fee agreements are forbidden, but attorneys may enter into an agreement to receive a success fee calculated according to a mandatory rate, approved by the government if they win the case. This is unlikely to make such actions profitable, particularly as damages awards are strictly compensatory. Moreover, in making an award in favour of the plaintiff, a court may choose merely to set the criteria for determining damages for class members, who would then need to commence separate actions to recover damages on the basis of the criteria. Finally, there is no statutory regime for third-party funding, either to permit it or to regulate it, placing this in an area of legal uncertainty.

Belgium – Under the existing procedures, the litigation is funded and financed by the claimants, or, in the case of group actions, by the organizations that are permitted to seek the injunctive or preventative relief. Apart from agreement on the possibility of funding through a government fund, the three proposals for class actions lack a clear vision on this aspect of group litigation.

Despite the range of apparent options – funding by the class, funding by the class representative, funding by the class attorney, and funding by a third party – only funding by the government seems likely to provide a way forward. Funding by the plaintiff is feasible only for ideological plaintiffs and even then, the risk of adverse costs awards seems likely to create considerable disincentive¹. Funding by the class attorney is not an option because contingency fees are prohibited as a violation of public order and as incompatible with professional ethical obligations². It is conceivable that fees partially dependent on the outcome of the case might be permitted, but this could be seen as creating a personal financial stake in the litigation, which would impair counsel's ability to fulfil the role of securing the due administration of justice as part of counsel's professional responsibility.

Only outside funding seems likely to meet with success. Whether this funding takes the form of legal expenses insurance (before-the-event insurance)³, legal aid funding, a govern-

¹ Issacharoff & Miller, *Will Aggregate Litigation Come to Europe?*, at 199; Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report No. 46, para. 252 (1988).

² See Code Judiciaire [C.Jud.] art. 446 (Belg.); see generally Vincent Sagaert & Ilse Samoy, *Belgian Report*, in Christopher Hodges, Stefan Vogenauer & Magdalena Tulibaca (eds.), *The Costs and Funding of Civil Litigation. A Comparative Perspective*, Hart Publishing, 2010, 217, 217.

³ In this context, see the *Eschig* decision of the Court of Justice of the European Union in which the Court ruled that article 4(1)(a) of Council Directive 87/344 on the coordination of laws, regulations, and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned. See Case C-199/08, *Erhard Eschig v. UNIQA Sachversicherung AG*, 2009 E.C.R. I-08295.

ment fund¹, or third party funding², it is much more likely to succeed with an ideological plaintiff as class representative, because such a representative will be more likely to enjoy the respect and confidence of funders in its discharge of the responsibilities of representation.

Sweden – In Sweden, the costs of litigation are borne by the losing party except in small claims cases where parties represent themselves or pay their own lawyers. In group litigation, representative plaintiffs and any group members who intervene in the proceedings are liable for adverse costs awards. However, conditional fee arrangements called *risk agreements*, are commonplace, with attorneys receiving double or triple the normal rate if the action is successful and half the rate or nothing if the action fails.

These agreements are not binding on defendants, who cannot be ordered to pay more than the customary hourly rate. Any plaintiff's counsel fees that a defendant cannot pay are borne by the members of the plaintiff class from the proceeds of the award. Risk agreements are binding only if approved by the court as reasonable in view of the nature of the case³. Thus, among the criteria for determining the adequacy of representative plaintiffs is the financial capacity to prosecute the action, including investigations and counsel⁴, but not necessarily an adverse costs award if unsuccessful.

The assessment of financial capacity was intended to be limited to determining that the plaintiff's financial affairs were in order, in that he or she had a reasonable annual income and access to public legal aid⁵ or private legal insurance (although both are usually limited to an amount equal to customary attorney's fees for less than 100 hours of work or €10,000). Nevertheless, the risk of adverse costs awards is a strong deterrent to pursuing an action and there are no government funds to which a representative plaintiff may apply for indemnity.

Accordingly, it was anticipated that of the expected ten or so group actions per year most would be commenced by organizations and not by individuals. In fact, in the first six years of operation the group action regime saw only twelve group actions commenced in total, and despite very liberal standing rules for representative organizations, none have been commenced in this way. Only one public group action has been brought, that by the Consumer Ombudsman, and the other eleven have been private group actions, albeit with many enjoying the support of non-profit organizations. Such organizations are not eligible for public legal aid or private legal insurance, but they may raise funds from their members and shield them from personal responsibility for adverse costs. Alternatively, a number of the members of the class may agree to be named so as to share the financial risk involved and, possibly, to benefit from multiple legal insurance policies, where this is not excluded by the policies.

In «true» organization actions, the organization cannot also be a group member (i.e., have an interest of its own); if the organization is a group member, the lawsuit is treated as a private group action. However, legal persons, such as non-profit organizations, may

¹ The best example can be found in Québec with the *Fonds d'aide aux recours collectifs*, Gov't Quebec, www.farc.justice.gouv.qc.ca/ (last visited Mar. 16, 2012). Also Ontario has a *Class Proceedings Fund, L. Found. Ontario*, www.lawfoundation.on.ca/cpcabout.php (last visited Mar. 16, 2012).

² See Rachael Mulheron & Peter Cashman, *Third Party Funding: A Changing Landscape*, 27 *C.J.Q.* 312 (2008).

³ SGPA §38 (SFS 2002:599) (Swed.).

⁴ Note however that, unlike in the United States, the court both issues and pays for notice to group members in group actions under the Swedish Act. See 50 § SGPA (Swed.).

⁵ Public legal aid is available only to plaintiffs who do not have and should not be expected to have private legal insurance (due to poverty or comparable circumstances).

initiate private group actions. A group of people who want to initiate a group action may form an organization or foundation solely for the purpose. By transferring one of the members' claims for damages, or only part of it, to the legal person (the organization) becomes a member of the group. By this means, the organization gains standing to initiate a private group action (but not an organization action) on behalf of everyone who opts in, whether or not they are members of the organization. While the organization's finances must be «in order»¹ for the organization to be accepted as a plaintiff, this can be arranged by collecting dues or other funding from the association's members (such as a limited guaranty). By this means, the members can limit their financial risk. In addition, members are shielded from the risk of being required to pay the opponent's costs because the named plaintiff – the organization – bears the entire risk. This «transfer method» is also open to existing organizations, foundations, and other legal persons not formed solely for the purpose of litigating a claim.

Brazil – Since standing to sue in public civil actions is granted only to public entities and associations, who generally have lawyers on staff, counsel fees do not create a barrier to access to justice. Furthermore, there is no cost shifting (except in cases of bad faith). Accordingly, funding and financing do not create special issues for class actions.

Russian Federation – The issue of legal expenses is resolved as follows: if a specially empowered person or a public prosecutor files a lawsuit in court, they are exempted from payment of the related legal expenses². If the case is lost by the defendant, such expenses are charged to it/him/her.

Available Relief

Ultimately, for the members of the class, the nature of the relief available for individual claimants is the most significant feature of the regime. Are they able to receive individual compensation? Must they commence separate proceedings to do so? If so, in what forum must this be done? Does the relief granted preclude them from making other claims? For members of the public whose claims are subject to collective redress, these considerations can be determinative of the effectiveness of the regime.

Canada – Most class proceedings in Canada, like most ordinary proceedings, seek compensatory damages for pecuniary losses. Declarations and injunctions are available, but they are often more efficiently and cost-effectively resolved through test cases or ordinary litigation³. Accordingly, for example, class actions against the government seeking declaratory relief and damages for breaches of aboriginal rights have been difficult to certify⁴.

For cases that go to trial, the legislation provides for the determination of damages. In particular, the legislation provides for the assessment of aggregate awards and the use of sampling evidence in appropriate circumstances and for making awards to members of the class on an average or proportional basis⁵. The legislation further provides for the participation of individual members of the class for determination of issues particular to them⁶

¹ SGPA §8 para 5.

² CPC RF, arts 45, 46.

³ *Roach v. Canada* (Att'y Gen.), [2009] O.J. No. 737 (Can. Ont. Sup. Ct. J.) (QL) (denying certification motion in action seeking declaration of constitutional invalidity).

⁴ See, e.g., *Davis v. Canada* (Att'y Gen.), 2007 NLTD 25.

⁵ See, e.g., Class Proceedings Act [CPA], S.O. 1992, c. 6, ss. 23–24 (Can. Ont.).

⁶ *Ibid.*, at s. 25.

and for the distribution of judgments, including by a *cy près* method¹. To date, less than twenty class actions have gone to trial, but the courts have found these provisions useful in determining whether to certify claims as class actions².

In recent years, a number of class action settlements have provided for *cy près* distribution of all or part of the award³ because the cost of locating and compensating class members would exceed the amounts to be distributed. Critics have noted the lack of connection between the class and the *cy près* recipient in some cases⁴, and the fact that the cost of locating and compensating class members, though significant, has not always exceeded the funds available under the award⁵. Some have argued that, where a *cy près* distribution is justified, the proceeds should be directed to charities or non-profit organizations whose works will indirectly benefit the class in order to promote the objectives of class proceedings⁶.

Australia – In deciding class actions, judges may: determine issues of law and fact; make declarations of liability; grant equitable relief; make awards of damages for class members, sub-class members, or individual class members, consisting of specified amounts or amounts worked out as the court specifies; award damages in an aggregate amount without specifying amounts for individual class members; and make such other orders as they think just⁷.

Damages in the aggregate may be awarded without specifying amounts for individual class members only where it is possible to make a reasonably accurate assessment of the total⁸. For example, in a class action in respect of a pyramid scheme, the ACCC sought an injunction and a declaration that the members were entitled to recover the money they had paid into the scheme⁹ in the amount of \$50 per class member for a total award of \$600,000.

¹ Class Proceedings Act [CPA], S.O. 1992, c. 6., at s. 26.

² See, e.g., *Cassano v. TD Bank*, 2007 ONCA 781, [2007] 87 O.R. 3d 401 (Can. Ont. C.A.) (relying on section 24 of the CPA to find that establishing the extent of the bank's liability did not require making individual inquiries of cardholders; rather, the aggregate of the bank's liability could be determined by looking at its records of the amount of fee income collected over the class period); *Markson v. MBNA Canada Bank*, 2007 ONCA 334 para. 45, [2007] 85 O.R. 3d 321, para. 45 (Can. Ont. C.A.) («statistical sampling can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims.»).

³ In Professor Kalajdzic's 2010 study of *cy près* awards, she estimated that 35 class actions involving fixed *cy près* awards had settled in the previous ten years. Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions*, 50 *Can. Bus. L.J.* 356, 371 n. 58 (2011).

⁴ Jeff Berryman, *Class Actions and the Exercise of Cy près Doctrine: Time for Improved Scrutiny*, in J. Berryman & R. Bigwood (eds.), *The Law of Remedies: New Directions in the Common Law*, Irwin Law, 2009, ch. 22; Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy près Distributions and Class Actions*, 53 *Supreme Court L. Rev.* 2d 133 (2011) [hereinafter *Nudge, Nudge*]; Jasminka Kalajdzic, *Access to a Just Result: Revisiting Settlement Standards and Cy près Distributions*, 6 *Can. Class Action Rev.* 217, 246–247 (2010) [hereinafter Kalajdzic, *Access to a Just Result*].

⁵ The OLRC adopted the same approach, stating that «all feasible efforts» must be made to compensate class members directly before making any *cy près* distribution. Ont. Law Report Comm'n, *Report on Class Actions*, at 581.

⁶ Class Proceedings Act, R.S.O. 1992, at c. 26(4) (Can. Ont.) (courts can direct the payment of aggregate amounts in any manner that «may reasonably be expected to benefit the class members»); Kalajdzic, *Access to a Just Result*; Berryman, *Nudge, Nudge*.

⁷ Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(1); Supreme Court Act 1986 (Vic) pt 4A s 33Z(1) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(1) (Austl.).

⁸ Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(3); Supreme Court Act 1986 (Vic) pt 4A s 33Z(3) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(3) (Austl.).

⁹ *Austl. Comp. & Consumer Comm'n v. Golden Sphere Int'l* [1998] 83 FCR 424, 424 (Austl.).

This was permitted because the respondents possessed the information to refute the claim if they wanted a substantially different result¹.

In making orders for damages awards, the court makes provision for the distribution to the class², including the manner for members to establish their entitlement to a share of the damages and the manner in which disputes over entitlement may be determined³; and for the constitution and administration of a fund, either through the payment of a fixed sum or instalments, and the terms of the fund, such as the entitlement to interest⁴.

Unlike Canada's legislative class action regimes, Australian courts are not permitted to make *cy près* orders⁵, because it has been thought that any money ordered to be paid by the respondent should be matched with an entitlement to compensation. Anything more would be in the nature of a penalty and this would go beyond the mandate for procedural reform underlying the class actions regime⁶. Where the cost of identifying class members and distributing the damages would be excessive, the court may order the termination of the proceeding⁷.

The Victorian Law Reform Commission had recommended permitting *cy près* remedies in cases involving a proven contravention of the law creating a pecuniary advantage for the wrongdoer, where the loss suffered was quantifiable and it was not cost effective to identify and compensate some or all of the class members⁸. This recommendation was not implemented but it was endorsed by the New South Wales Government in its plans to introduce a legislative class action regime⁹. However, criticism by law firms, business groups and the Law Society caused this to be dropped from the Bill. As a result, for example in the vitamin price-fixing cases, class membership was limited to those who had purchased far larger quantities than the average consumers¹⁰.

¹ *Austl. Comp. & Consumer Comm'n v. Golden Sphere Int'l*, at 446–447.

² Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(2); Supreme Court Act 1986 (Vic) pt 4A s 33Z(2) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(2) (Austl.).

³ Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(4); Supreme Court Act 1986 (Vic) pt 4A s 33Z(4) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(4) (Austl.).

⁴ Federal Court of Australia Act 1976 (Cth) pt IVA s 33ZA(1); Supreme Court Act 1986 (Vic) pt 4A s 33ZA(1) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 178(1) (Austl.).

⁵ See Rachael Mulheron, *The Modern Cy près Doctrine: Applications and Implications*, University College London Press, 2006.

⁶ Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report no. 46, at 239.

⁷ Federal Court of Australia Act 1976 (Cth) pt IVA s 33M; Supreme Court Act 1986 (Vic) pt 4A s 33M (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 165 (Austl.).

⁸ Victorian Law Reform Comm'n, *Civil Justice Review*, Report No. 14, at 559–560, recommendation 101 (2008), available at <http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf>.

⁹ Hon. John Hatzistergos, *NSW Set to Reform Class Action Laws*, *NSW Gov't, Media Release*, Aug. 6, 2010, [http://www.lawlink.nsw.gov.au/Lawlink/Corporate/II_corporate.nsf/vwFiles/060810_NSW_reform_c_action_laws.pdf/\\$file/060810_NSW_reform_c_action_laws.pdf](http://www.lawlink.nsw.gov.au/Lawlink/Corporate/II_corporate.nsf/vwFiles/060810_NSW_reform_c_action_laws.pdf/$file/060810_NSW_reform_c_action_laws.pdf) («[T]he NSW legislation will give the Supreme Court the power to order that unclaimed damages from a successful class action be distributed to a charity or public interest beneficiary»); *Explanatory Memorandum, Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010* (NSW) 3 (Austl.), available at <http://www.legislation.nsw.gov.au/exposure/archive/b2010-108-d05.pdf> («Section 178 [...] enables the court to make orders [...] establishing schemes for any money remaining in the fund [consisting of money to be distributed to group members] (or any part of it), that cannot practically be distributed to group members to be applied *cy près*»).

¹⁰ *Bray v. F Hoffman-La Roche Ltd.* [2003] FCA 1505 9 (Austl.) (\$2,000); *Jarra Creek Cent. Packing Shed Pty. Ltd. v. Amcor Ltd.* [2006] FCA 1802 (Austl.) (\$100,000); *Auskay Int'l Mfg. & Trade Pty. Ltd. v. Qantas Air-*

England and Wales – The opt-in nature of group litigation in England, together with the absence of provision for aggregate assessment of damages have limited the relief available under Group Litigation Orders and the follow-on competition law regime under the Competition Act of 1998. Restitutionary damages and an accounting for profits are not available in competition infringement cases, and punitive damages cannot be claimed where the defendant has already been fined by a competition regulator¹. Accordingly, in the only action to date under the Competition Act² recovery was limited to compensation for purchasers of the price-fixed football shirts who came forward during the take-up period.

The relief available under the English representative action has always proved difficult, since the decision a century ago³ in which a representative action was not permitted on behalf of consignors of cargo lost at sea because proof of damage was personal to each consignor, and there was no possibility of any common fund being sought by the representative on behalf of the represented parties. A century later, the represented claimants in recent price fixing litigation⁴ sought a declaration that damages were recoverable in principle in respect of three types of loss that they claimed to have suffered subject to individual assessment. This claim this was not accepted as having the requisite *same interest* for a representative proceeding.

While *cy près* damages distributions are not formally recognized in England, one price-fixing action in the automobile industry that settled before group litigation orders were available, involved a payment to the Consumers' Association for car safety research; and one representative action for pirated cassettes⁵ resulted in payment to the British Phonographic Industry Ltd, to support the identification and suppression of counterfeit and piracy activities. The proposed Financial Services Bill 2010 reforms contemplated provision for *cy près* damages distributions⁶.

Netherlands – Under the WCAM procedure, financial relief may be claimed by interested parties pursuant to an order prescribing the damages based on various categories of loss. In turn, interested parties who have not opted out are precluded from commencing separate claims for loss.

By contrast, under the collective right of action under the Dutch Civil Code almost every form of relief may be claimed other than monetary relief. Typically, claimants seek declaratory relief establishing liability and injunctive relief requiring the responsible party to perform or refrain from performing an act with respect to the parties. Interested parties must then commence individual actions to prove causation and loss in order to receive damages.

In this way, the two procedures support one another with the collective right of action being used to solve unanswered questions of law without financial risk to either the claimants or the responsible party, thereby facilitating negotiation of a settlement agreement. The absence of direct monetary consequences to the collective right of action may reduce

ways Ltd. [2010] FCA 1302 (Austl.) (a cartel in international air freight services \$ 20,000); *Wright Rubber Prod. v. Bayer AG* [2011] FCA 1172 (Austl.) (a cartel in the rubber chemicals industry \$ 50,000 for rubber chemicals and \$ 10,000 for rubber compounds).

¹ *Devenish Nutrition Ltd. v. Sanofi-Aventis SA* (Fr.) [2007] EWHC (Ch) 2394 (Eng.), *aff'd*, [2008] EWCA (Civ) 1086 (Eng.).

² *Consumers Ass'n v. JJB Sports Plc.*, [2009] CAT 2, 2009 WL 364157 (Eng. & Wales).

³ *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021 (A.C.) (Eng.).

⁴ *Emerald Supplies Ltd. v. British Airways plc* [2010] EWCA Civ 1284.

⁵ *EMI Records Ltd. v. Riley*, [1981] 1 W.L.R. 923 (Ch) (Eng.).

⁶ Financial Services Bill, 2010, § 23(4)–(5) (U.K.).

the risk of «black mail settlements» and the absence of formal determinations of liability in the WCAM may permit responsible persons to obtain closure on claims without damage to their reputations. Nevertheless, the main Dutch consumer organization, the Consumentenbond, argues that there is no real incentive to settle without a collective proceeding that has financial consequences and when there is no interest in settling there is no way for interested parties to obtain financial compensation in individually, economically non-viable claims.

Italy – There now exists a *public* class action in addition to the collective actions created in the fields of consumer law, environmental protection, securities regulation, and anti-discrimination protection that were developed pursuant to EU Directives¹. Public class actions may be brought by qualified bodies or entities in the administrative courts and they may seek injunctive relief from the inertia of public administration. Damages are not available, but the courts may mandate the administration (as defendant) to fulfil its obligations. Interested persons may then seek damages in the civil courts in individual actions or *private* class actions under the Consumer Code.

Belgium – Currently, group litigation in Belgium can be used only to obtain injunctive or preventive relief, such as injunctions preventing environmental harm² or illegal canvassing practices³, not compensation for those affected⁴. Each of the three current proposals for reform permits claims for monetary relief. The government's proposal also permits class settlements or court decisions to provide for amounts below a certain threshold not to be distributed if the costs are prohibitive and, instead, to be deposited into a government fund to finance future class actions. The Flemish Bar Council proposal would permit the judge to appoint a special master⁵ to deal with the individual claims of class members out of court.

Sweden – The Swedish Act on Group Proceedings covers group actions in general courts and its use is not restricted to any particular area of law. In all three forms of group actions under the Act, the plaintiff can petition for injunctions and seek individual damages for injury suffered by individual members of the group. Actions for an order obliging the defendant to perform (e.g. pay damages or stop a certain activity) and/or petitions for declaratory judgments (see above) may be entertained as a group action. However, customary substantive rules on causation in tort law, calculation of damages, and evidence are applied. Post-trial calculation mechanisms, standardized computation of damages and *cy près solutions* are not available under the Swedish Act. Punitive damages do not exist in Sweden. This restrictive attitude reduces access to justice in group actions as well as in other forms of litigation.

¹ See Council Directive 98/27/EC O.J. (L 166) 51 (EU); Council Directive 2009/22/EC O.J. (L 110) 30 (EU).

² Wet van betreffende een vorderingsrecht inzake bescherming van het leefmilieu [Federal Environmental Protection Act] of Jan. 12, 1993, [Belgisch Staatsblad] [B.S.] Feb. 19, 1993 (Belg.).

³ Wet op de financiële transacties en de financiële markten, [Act on Financial Transactions and Financial Markets] of Dec. 4, 1990, [Belgisch Staatsblad] [B.S.] Dec. 22, 1990 (Belg.).

⁴ Proposals to follow the 1994 Dutch initiative of combining these proceedings in a single transubstantive procedure (article 3:305a of the Dutch Civil Code) have not yet succeeded. Mathias E. Storme & Evelyne Terryn, *Belgian Report on Class Action*, 2 (2007), available at http://globalclassactions.stanford.edu/sites/default/files/documents/Belgium_National_Report.pdf. The most recent Belgian proposal, dating from February 2008, suggests supplementing article 18 of the Judicial Code with «the plaintiff is supposed to have an interest in commencing a group action, when he is an association (organization) that has legal capacity for a minimum period of one year, when he acts in accordance with his permissible statutory aim and when he shows a real activity in accordance with his statutory aim.»

⁵ Called «a judicial claim settler.» See David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 *B.U. L. Rev.* 695 (1989); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 *U. Chi. L. Rev.* 394 (1986).

Brazil – All forms of relief are available in public class actions, including declaratory, constitutive and condemnatory awards in the form of orders for compensation and for injunctions. In popular class actions, the claimants generally seek an end to harmful actions and the awards take a condemnatory form.

Russian Federation – It would appear that there are no specific restrictions on the kinds of relief available, however, the uncertain arrangements for notifying the class may have implications for the relief that is received.

Court Involvement

The management of class actions creates new challenges for common law and civil law courts alike. On the one hand, common law courts must develop ways to address the adversarial void in which the interests of class counsel and defense counsel in gaining approval for settlements are aligned so that the court is deprived of the fundamental forensic benefits of the adversary system. On the other hand, in civil law jurisdictions, given the quantum of money at stake in an aggregated claim, the parties may insist on greater involvement in the process than might ordinarily be expected. The particular responsibilities assigned to the court reflect important assessments of judicial competence and the requirements for oversight of group litigation.

Canada – Under class proceedings legislation: matters must be certified in order to proceed as class actions; notices to the class must be approved by the court; each action is case managed by the judge assigned to it; and matters may be settled and counsel fees determined only with the approval of the court. This extensive court involvement is intended to ensure that the interests of absent class members are protected.

The supervisory role of judges is especially important in hearings held to determine the fairness of a settlement because the usual adversarial safeguards do not operate when plaintiff's counsel and defendants have a common interest in obtaining approval for the settlement that they have negotiated¹. Until recently, Canadian courts did not welcome the involvement of non-parties in ensuring that the settlement is «fair, reasonable[,] and in the best interests of the class.» While their U.S. counterparts have long been encouraged to permit non-profit entities, government bodies, and state attorneys-general to participate actively in fairness hearings to provide assistance to the court², Canadian courts have only recently acknowledged in principle the value of a court-appointed monitors, amici curiae or guardians ad litem in assisting the judge in scrutinizing the proposed settlement or counsel fee³.

Australia – It is well understood in Australia that grouped proceedings require greater judicial oversight than regular proceedings to protect the interests of unidentified parties, to administer arrangements for notice and the distribution of relief, and to determine sub-group issues and individual questions⁴. Accordingly, judges have been granted broad

¹ *Smith v. Nat'l Money Mart*, 2010 ONSC 1334 (Can. Ont. Sup. Ct. J.) («It is also well known that the court finds itself in a difficult position in carrying out its responsibilities of determining whether a settlement and class counsel's fee should be approved or rejected»).

² Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 15 (2009).

³ *Smith v. Nat'l Money Mart*, 2011 ONCA 233 (Can. Ont. CA). Since this decision was released, an amicus or guardian has not been appointed in any reported class action. It is difficult to predict how frequently such court-appointed assistance will be used.

⁴ Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report no. 46, at 157.

powers to manage class proceedings¹ including: for the approval of notices to the class²; for creating sub-classes where necessary and appointing representatives for them³; for approving proposed settlements⁴; and for discontinuing the proceedings⁵. Settlement approval has been acknowledged to be particularly difficult because the application is based on a result negotiated between plaintiff's counsel and the defendant and it is not usually opposed⁶. Judges have rarely declined to approve the settlement agreements⁷ despite criticism by some commentators⁸, but there do not appear to have been any instances of «coupon settlements» or other potentially abusive results⁹. Nevertheless, with so many class actions ending in settlement, this will continue to be a matter of concern.

Unlike North American class action regimes, the Australian regimes do not provide for certification, but for a respondent's right to challenge the validity of a class proceeding at any time¹⁰ where the requirements for class proceedings have not been satisfied¹¹ or where the court is of the view that it is inappropriate that the proceeding progress as a class proceeding¹². While this approach was meant to streamline the progress of class actions, the routine practice of challenging the validity of the class proceeding has produced much the same result as exists in North America¹³ and it has prompted commentators to recommend the introduction of a certification process¹⁴.

¹ Federal Court of Australia Act 1976 (Cth) pt IVA s 33ZF; Supreme Court Act 1986 (Vic) pt 4A s 33ZF (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 183 (Austl.).

² Federal Court of Australia Act 1976 (Cth) pt IVA s 33Y; Supreme Court Act 1986 (Vic) pt 4A s 33Y (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 176 (Austl.).

³ Federal Court of Australia Act 1976 (Cth) pt IVA s 33Q; Supreme Court Act 1986 (Vic) pt 4A s 33Q (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 168 (Austl.).

⁴ Federal Court of Australia Act 1976 (Cth) pt IVA s 33W; Supreme Court Act 1986 (Vic) pt 4A s 33W (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 174 (Austl.).

⁵ Federal Court of Australia Act 1976 (Cth) pt IVA s 33V; Supreme Court Act 1986 (Vic) pt 4A s 33V (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 173 (Austl.).

⁶ *Lopez v. Star World Enters. Pty. Ltd.* [1999] FCA 104 para 15–16 (Austl.).

⁷ See generally Vince Morabito, *An Australian Perspective on Class Action Settlements*, 69 *Mod. L. Rev.* 347, 367–371 (2006).

⁸ See, e.g., Marsha Jacobs, *Telstra Class Action Settled for Just \$5m*, *Austl. Fin. Rev.*, Nov. 17, 2007, at 3; Vince Morabito, *Judicial Responses to Class Action Settlements that Provide no Benefits to some Class Members*, 32 *Monash U. L. Rev.* 75 (2006).

⁹ In the United States, several class action settlements provided class members with coupons for discounts on future purchases from the defendants, in lieu of cash awards, whilst generous payments were made to the class representative's lawyers. See, e.g., *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

¹⁰ Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*. Report no. 46, at 146.

¹¹ The first requirement is that seven or more persons have claims against the same person. The second requirement is that the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact. Federal Court of Australia Act 1976 (Cth) pt IVA s 33C1; Supreme Court Act 1986 (Vic) pt 4A s 33C1 (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 157(1) (Austl.).

¹² Federal Court of Australia Act 1976 (Cth) pt IVA s 33N(1)(d); Supreme Court Act 1986 (Vic) pt 4A s 33N(1)(d) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 166(1)(e) (Austl.).

¹³ *Bright v. Femcare Ltd.* [2002] 195 ALR 574, 607 (Austl.). A year later, Justice Finkelstein again indicated that «many class actions become bogged down by interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders.» *Bray v. F Hoffmann-La Roche Ltd.* [2003] 200 ALR 607, 660 (Austl.); see also [2004] FCA 1637 (Austl.).

¹⁴ See, e.g., Mulheron, *Common Law Class Action*, at 27–29; see also *P Dawson Nominees Pty. Ltd. v. Multiplex Limited* [2007] FCA 1061 para 18 (Austl.) (where Justice Finkelstein noted that the «experience of class ac-

England and Wales – Case management is an essential part of group litigation in England and Wales¹ as a means of managing the complexity of the proceedings and as a way of ensuring that the approach taken is consistent with the overriding objective. The need for robust case management was highlighted by criticism of the procedures for managing group litigation in the period before group litigation orders became available, and it was recognized for complex litigation in the 2007 *Report and Recommendations of the Commercial Court Long Trials Working Party*. The Civil Justice Council's 2008 Report observed the similarities in nature between collective actions and complex commercial claims and, accordingly, the need for a similar approach to collective actions.

Specifically, in group litigation, five certification criteria must be met: *numerosity* (there must be a «number of claims»)²; *commonality* (these must give rise to «common or related issues of fact or law»)³; *suitability* (managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court «to deal with cases justly»)⁴; *preliminary merits* (the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whichever is appropriate), is required)⁵; and *superiority* – a GLO will not be commenced if consolidation of the claims, or a representative proceeding, would be more appropriate⁶. Representative actions require that claimants have the same interest and that more than one person share the claim with the representative⁷ and actions framed as such are routinely challenged by defendants on this basis.

The proposed Financial Services Bill contained several requirements for certification, including: commonality (the claim must raise the «same, similar or related issues of fact or law» among class members)⁸; a suitable representative (either an «ideological claimant» or a directly-affected class member may bring the claim, if an «appropriate person»)⁹; superiority (the collective proceedings for determining the claim must be the «most appropriate means for the fair and efficient resolution of the common issues» and must be «appropriate [to] further the overriding objective»)¹⁰; minimum class size (an identifiable class of persons)¹¹; preliminary merits threshold (a claim that is weak, but not so weak

tions suggests that the absence of a certification process is itself the cause of numerous interlocutory applications with resultant expense and delay»). The situation might further be exacerbated by the introduction of pre-action protocols requiring parties to undertake genuine steps to resolve the dispute including the exploration of Alternative Dispute Resolution options before proceeding with litigation. Civil Dispute Resolution Act 2011 (Cth) (Austl.); Federal Court of Australia Act 1976 (Cth) Practice Note CM 17 (Austl.).

¹ Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.10 (U.K.) provides that a GLO «means an order [...] to provide for the case management of claims which give rise to common or related issues of fact or law (the «GLO issues»)» with further extensive case management powers stipulated in CPR r. 19.13 (U.K.). See *Civil Justice Council Report, Improving Access to Justice through Collective Actions*, 161–162, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at800175_improving_access_authcheckdam.pdf (recommending that «collective claims should be subject to an enhanced form of case management by specialist judges»).

² Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.11 (U.K.).

³ *Ibid.*, at r. 19.10, 19.11(1).

⁴ *Ibid.*, at 1.1(1).

⁵ *Ibid.*, at Practice Direction 19B, para. 3.3.

⁶ *Ibid.*, at Practice Direction 19B, para. 2.3.

⁷ *Ibid.*, at r. 19.6.

⁸ See Financial Services Bill, 2010, H.C. Bill 2010–12 (U.K.) (proposing CPR 19.21(3)).

⁹ *Ibidem.*

¹⁰ *Ibid.* (proposing 19.20(2)(b)).

¹¹ *Ibid.* (proposing 19.20(2)(a)).

that it could be struck out, could fail certification because, «in all the circumstances,» it should not be certified¹; a statement of truth (the representative claimant is required to state in its application, verified by a statement of truth, that it believes that the claim has real prospects of success²; and cost–benefit test – the court must take into account «the costs and the benefits of the proposed collective proceeding» when deciding whether the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues³. The proposed Financial Services Bill 2010 also included provision for fairness hearings and judicial approval of any proposed compromise or discontinuance of a collective action⁴.

Netherlands – To declare a WCAM settlement binding, the court must determine whether the representative foundation or association sufficiently represents the interests of the persons pursuant to its articles of association; whether the amount of compensation awarded in the settlement agreement is reasonable⁵ (based on the extent and possible cause of the damages suffered, whether payment is sufficiently guaranteed, and the ease and speed with which compensation can be obtained); and whether interested parties have received adequate notification⁶ (both for the purposes of objecting to a binding declaration and for deciding whether they wish to opt-out. The latter may be determined in a pre-trial hearing, during which the court may order the notification to be done in some other way, as long as it respects international instruments on notification⁷.

The court must determine whether the agreement adequately describes the interested parties according to the nature and the seriousness of their loss; provides an accurate estimate of the number of interested parties; and indicates the amounts of compensation, the conditions to qualify for compensation, the procedure for establishing and obtaining payment and the name and place of residence of the interested parties for notification purposes. The court's authority to alter the content of the settlement is limited to addressing the fairness of the amount of compensation or the process of determining the compensation. The court is not allowed to exclude a portion of the interested parties.

Proposed reforms contemplate permitting the court to assist in pre-trial appearances to identify the main points of dispute and to encourage parties to seek assistance from mediators. Supplementary measures would stimulate the parties' willingness to negotiate, and facilitate the negotiation and the finalisation of settlement agreements. A further reform would introduce a procedure for requesting preliminary rulings from the Dutch Supreme Court to clarify the negotiating parties' legal positions.

Italy – Actions may be brought on a representative basis only if the court declares them admissible pursuant to the requirements of the Consumer Code. Admissibility may be denied if the action appears to be clearly groundless. The Italian legislation does not make provision for the court to review settlements in class actions for their fairness to the class members. It remains to be seen how the courts will address this concern.

¹ Ibid. (proposing 19.20(2)(c)).

² Ibid. (proposing 19.18(3)(c)).

³ Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing 19.20(3)(a)).

⁴ Ibid. (proposing 19.37).

⁵ BW [Civil Code], bk. 7, art. 907(3)(b), 907(3)(f) (Neth.).

⁶ Rv [Code of Civil Procedure], art. 1013 (Neth.).

⁷ Rv [Code of Civil Procedure], art. 1013(5) (Neth.).

Belgium – The government proposal for class actions would confine them to the Brussels Court of First Instance and the Brussels Court of Appeals¹ to ensure that the necessary specialized expertise is developed in the courts that handle them². This would promote efficient handling of cases, and the development of a uniform and predictable jurisprudence, particularly in view of the limited number of mass cases in European countries³.

In terms of court involvement, it is important to note the adversarial character of Belgian civil procedure generally⁴ with its respect for party autonomy in framing the proceedings in terms of the claims and parties, and the active role played by judges in case management⁵ and, where the parties present insufficient evidence, in ordering a complementary inquiry⁶. Existing case management tools, such as the authority to impose a binding procedural calendar, to undertake ex officio a complementary inquiry, and to have an interactive debate with the parties, and to impose fines in cases of misuse or abuse of procedure, could be adapted for a group litigation procedure.

In addition, the court will need special powers, such as those for discontinuing proceedings, substituting representative plaintiffs who are not providing adequate representation, and establishing sub-groups⁷. Such tools are needed to ensure that the best interests of the parties, including absent group members and the public, are served and public confidence in group litigation is maintained⁸. The current proposals have yet to include procedures for matters such as additional notice, imposing additional conditions on the class representative or class attorney, and allowing individual class members to be involved in the procedure. These will be important features of a well-functioning group litigation regime.

Sweden – In Sweden, group actions may proceed as such only with the approval of a court, which is granted provided that: the action is based on one or more common or

¹ This reflects the approach in the Dutch Collective Settlements Acts, which makes the Amsterdam Court of Appeals exclusively competent to approve collective settlements. The government proposal also provides for a «class action training» for the Brussels judges, and the possibility that the court would travel as needed throughout the country. See Randall D. Lloyd, Leonard B. Weinberg & Elizabeth Francis, *An Exploration of State and Local Judge Mobility*, 22 *Just. Sys. J.* 19 (2001); George R. Pring & Catherine K. Pring, *Specialized Environment Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 *Or. Rev. Int'l L.* 301, 328 (2009).

² See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465, 1517–1518 (2004).

³ To date, there were 75 GLO procedures in England and Wales. Since the introduction in 2005 of the Dutch Collective Settlements Acts, there were 6 procedures. In Sweden there were 11 class action procedures in between 2003 and 2007.

⁴ See Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in Eric Dirix & Yves-Henri Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law*, Bruylant, 2011, 309–311; see also Gerald J. Meijer, *Belgian Civil Procedure*, in Henk J. Snijders (ed.), *Access to Civil Procedure Abroad*, Kluwer Law International, 1996, 193–237; Jean Laenens & Georges Van Mellaert, *The Judicial System and Procedure*, in H. Bocken (ed.), *Introduction to Belgian Law*, Kluwer Law International, 2001, 83–110; Paul Lefebvre, *Belgium*, in Shelby R. Grubbs (ed.), *International Civil Procedure*, Kluwer Law International, 2003, 75–96.

⁵ Benoît Allemeersch, *Civil Case Management: The Belgian Debate and Reforms*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Intersentia, 2008, 237.

⁶ Consisting, for example, in the submission of certain documents, witness testimony, an official visit to the scene of the facts, the personal appearance of the parties in the court, etc.

⁷ Vince Morabito, *Ideological Plaintiffs and Class Actions. An Australian Perspective*, 34 *U.B.C. L. Rev.* 459, 494–95 (2000–2001).

⁸ See Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. Davis L. Rev.* 805 (1997); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 *Harv. L. Rev.* 747 (2002); Catherine Piché, *Judging Fairness in Class Action Settlements*, 28 *Windsor Y.B. Access to Just.* 111–112 (2010).

similar circumstances or matters of law among the claims of the group members; a group action is the best available procedure to litigate the majority of the claims (superiority); the group is adequately defined; that the financial affairs of the group representative are in good order and the representative is suitable; and, with few exceptions, that the plaintiffs are represented by a member of the bar¹. The requirement of representation by a member of the bar is unique to class actions in Swedish civil procedure.

Notices to the group members² and appeals³ are also subject to judicial approval to protect group members, the defendant, and the court from abuse, as are settlements in order for them to be binding on the group. Approval for settlements depends upon them not being discriminatory against some group members or otherwise obviously unreasonable⁴. In addition, costs shifting and the absence of contingency fees safeguard against abuse, and «*risk agreements*» (conditional fees) are binding only if approved as reasonable in view of the nature of the litigation.

Brazil – The parties' conduct in the group litigation, including the negotiation of settlements, is controlled by the Public Prosecutor's Department, an autonomous governmental department that is independent of the government and of the judiciary. If the Public Prosecutor is not the plaintiff, then it will oversee the proceedings. The judge has authority to impose heavy penalties for bad faith in conducting the litigation.

Russian Federation – In class actions, the court determines whether the matter is suitable for the class action procedure and it defines the membership in the class. However, unlike in ordinary litigation, where the court is responsible for notifying participants of the action, this responsibility is given to the initiator. The range of possible methods of notification suggests that there are limited means for ensuring that notice is adequate or that the initiator takes this responsibility seriously.

Compatibility with US-style Class Actions

Canada – Canadian class actions have been modelled on U.S. class actions, but it has been thought that some of the excesses of U.S.-style litigation have been avoided due to differences in the legal culture. Although many consumer and securities claims are follow-on actions to U.S. proceedings, counsel fees and settlement awards have been more restrained, in part due to the absence of jury trials, treble damages awards, and a more conservative judiciary. Owing to the extensive economic engagement between the two countries, as mentioned, there have been many parallel and overlapping claims, and a number of them have involved informal coordination either among counsel, or between courts. In 2011, the American Bar Association approved protocols for notice and for court-to-court communications to facilitate the process of coordinating parallel actions⁵.

Australia – The government of Australia has acknowledged that class actions have become an important part of the Australian justice system⁶ by enhancing the community's

¹ SGPA § 8 (SFS 2002:599) (Swed.).

² SGPA §§ 13, 24, 49, 59.

³ SGPA §§ 42, 48.

⁴ SGPA § 26.

⁵ Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, online: http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation_eng.pdf.

⁶ Hon. Chris Bowen, Minister for Fin. Servs., *Superannuation & Corporate Law, Address to Shareholder Class Action Conference* (May 4, 2010) available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2010/005.htm&pageID=005&min=ceba&Year=&DocType=1>.

access to justice¹. Union-driven class actions have enabled thousands of workers to receive compensation², and Australia's two major regulators, ASIC and ACCC, have employed the Federal class action regime to fulfil their mandates³. In view of the fact that they are modelled on U.S.-style class actions, it would seem that, in principle, they are compatible with them.

England and Wales – To the extent that U.S.-style class actions are characterized by an opt-out regime, with the possibility of aggregate assessment of damages, a *cy près* damages distribution, with certification, and with a fairness hearing in the event of settlement, no such regime exists in England and Wales, although such a regime was contemplated in the previously proposed reforms to the Financial Services Act⁴. The considerable criticism that has been made of U.S.-style class actions has been decried by the Civil Justice Council as misplaced in that U.S. litigation operates on a different footing with limited cost-shifting, broad discovery rights, jury trials, percentage-based contingency fees, and punitive damages⁵. Whether a regime of collective redress similar to that found in the United States, Canada, and Australia can be introduced into the English civil justice system remains to be seen.

Netherlands – The WCAM does not create a U.S.-style class action, but a mechanism for approving settlements in collective actions that would bind potential claimants on an opt-out basis. It relies on the fact that most class actions in the U.S., Canada, and Australia are settled. To date, five such settlements have been approved and a sixth has sought approval. Several have involved foreign elements and, significantly, some have enabled European affected persons or interested parties who were excluded from U.S. class actions and settlements to obtain compensation⁶. While the WCAM is designed to be compatible with U.S.-style class actions and has brought the benefit of some class actions to Europe, the decision not to establish U.S.-style class actions is thought to reflect the culture of Dutch pragmatism favouring practical solution through harmonious negotiations rather than expensive confrontation in mass litigation in court proceedings.

Italy – Italian class actions differ from their American counterparts in a number of ways, including the requirement that class members opt in, the lack of specialized arrangements for funding and financing, and fairness hearings for settlements. However, any concern raised by the underdeveloped nature of class actions must be placed in the larger context of an inefficient civil justice system. Nevertheless, as indicated by an EU Commission working document, *Toward a Coherent European Approach to Collective Redress*⁷, the challenges posed by the sheer variety of legal systems might best be addressed by a common approach to collective redress, one that might assist national legal systems in finding the way forward.

¹ Hon. Chris Bowen, Minister for Fin. Servs., *Superannuation & Corporate Law, Address to Shareholder Class Action Conference*.

² See Jane Caruana & Vince Morabito, *Australian Unions – The Unknown Class Action Protagonists*, 30 *Civ. Just. Q.* (forthcoming 2011).

³ E.g., *Australian Comp. & Consumer Comm'n v. Chats House Inv. Pty. Ltd.* (1998) 83 FCR 424 (Austl.).

⁴ Financial Services Bill, 2010, H.C. Bill 2010-12 cl. 18-25 (U.K.).

⁵ John Sorabji et al. (eds.), *Improving Access to Justice Through Collective Actions*, 2008, 38–41.

⁶ See *In re Royal Dutch / Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 721 (D.N.J. 2007); Hof 29 mei 2009, NJ 2009, 506 m.nt. J.M.J. Chorus, M.P. van Achterberg en W.H.F.M. (Shell Petroleum N.V./Dexia Bank Nederland N.V.) (Neth.); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556 (S.D.N.Y. 2008).

⁷ European Comm'n, *Towards a Coherent European Approach to Collective Redress* (2011), available at http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf.

Belgium – Class actions are seen in Belgium as a supplement to existing methods of dealing with mass harms and are accepted only when they are superior to other available methods for adjudicating a controversy¹. Their role must be understood in the context of the panoply of other public, private, and administrative resources² in the form of complaint boards, criminal prosecutions with the possibility of ancillary relief for victims, and governmental regulatory bodies, such as in the field of competition law. Belgian class actions, where they are necessary, would operate differently than U.S.-style class actions because they would be embedded in a different procedural culture, with different rules on standing, funding and financing litigation, and court involvement. They would be required to be initiated by an ideological plaintiff; they could not be funded on a contingency fee basis; and they would be required to be dealt with by one competent court. However, Belgian class actions would seek to achieve the same objectives as U.S.-style class actions and would offer claims for injunctive and monetary relief.

Sweden – In assessing the compatibility of the regimes, it must be borne in mind that the courts have played less of a role in the reform of legal rights than other means of dispute resolution and behavior modification. This may be partly due to a concern that litigation is not necessarily the most equitable means of determining the right of consumers and others and partly to a historical lack of confidence in the willingness of courts and judges to participate actively in building the welfare state based on the Social Democratic model. This coupled with a limited scope for judicial lawmaking and judicial review, has reduced the influence of Swedish courts in civil matters and limited the tendency to litigate. However, there are signs that this might be changing with an increased role for the courts and new functions for civil procedure ahead³.

Differences between U.S.-style class actions and the Swedish group action, such as costs-shifting; the absence of contingency fees *strictu sensu* and state and private funding mechanisms; the opt-in requirement; the lack of pretrial discovery, post-trial calculation mechanisms, *cy près* awards, punitive damages, and standardized computation of damages have reduced the effectiveness of the group litigation procedure. Further constraints exist in the poor regard for the procedure among insurers, some groups in the bar, and some conservative judges and politicians. This poor regard has caused many to favour alternative dispute resolution as an easily accessible, flexible, fast, and low-cost way for parties to resolve disputes, as well as a means of reducing judicial workload. This is not without controversy. ADR is a valuable complement to civil

¹ See Fed. R. Civ. P. 23(b).

² See Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Hart Publishing, 2008, 235 (suggesting a ranking of the different options: first voluntary settlement; then regulatory oversight; and finally judicial supervision (including private enforcement tools as class actions)); see also Willem H. Van Boom & Marco Loos, *Collective Enforcement of Consumer Law. Securing Compliance in Europe through Private Group Action and Public Authority Intervention*, Europa Law Publ'g, 2007. Also in the United States, some authors point out that there are public legal protection tools as valuable alternatives for class actions, especially in small claims cases. See Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 *Geo. J. Legal Ethics* 1419 (2005); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 *U. Chi. Legal F.* 71; see also Richard A. Nagareda, *Mass Torts in A World of Settlement*, Univ. of Chi. Press, 2007.

³ See Per Henrik Lindblom, *The Growing Role of the Courts and the new Functions of Judicial Process – Fact or Flummery?*, 51 *Scandinavian Stud. L.* 281 (2007).

litigation (including group actions)¹, but some have expressed concern that in serving as a surrogate, ADR may diminish the role of the courts and threaten the functions of civil procedure².

Brazil – While the Brazilian system shares the objectives of US-style class actions, it follows its own model in which there is no certification and no discovery, and associations play an important role in representing the class. Moreover, in circumstances where there is no opportunity to opt-out, the result will not preclude further litigation by interested parties. Like other civil law jurisdictions, Brazil is unlikely to reform its procedure to become more like that in the US.

Russian Federation – Private class actions are still too recent an innovation to assess how they will function. Nevertheless, it seems likely that the issues of compatibility with U.S. style class actions experienced in other civil law jurisdictions will also be experienced in the Russian Federation.

Further Reflections: What Are We (They) Afraid of?

This study sought to go beyond a U.S. perspective on the differences in approaches to collective regimes by surveying comparatists from various legal systems about specific aspects of collective redress that might shape their perceptions of U.S. class actions. However, designing a survey of perceptions on the cultural dimensions of a controversial procedure such as class actions can be fraught with unexpected pitfalls. Among the more significant are those that can arise in tackling the challenge of sample selection. To receive pertinent and insightful responses in a comparative study of the specifics of complex procedural mechanisms, such as those comprising systems for collective redress, it is necessary to consult reporters with significant insight into the range of procedural options and configurations that exist across legal systems. Accordingly, the reports in this study were sought from knowledgeable comparatists.

On receiving the reports, it became apparent that the strong reaction that seemed routinely to be provoked by the discussion of U.S.-style class actions in many international settings was strangely muted. One explanation for this could be that the hostility and anxiety of those who would resist reforms that might bring a legal system closer to the U.S. model was borne largely of ignorance.

Writing more than a decade ago, Michele Taruffo, said that «the European rejection of class actions – essentially based upon ignorance – has usually been justified by the necessity of preventing such a monster from penetrating the quiet European legal

¹ Settlement and arbitration. In *Carl de Geer v. Luftfartsverket* [*Carl de Geer v. Swedish Airports & Air Navigation Serv.*] [Nacka District Court, Environmental Court Division] 2007 M1931(Swed.) residents of a community near Arlanda Airport, formed a non-profit organization called «Residents of Väsby Against Aviation Noise» to bring a *private* group action against the Swedish Airports and Air Navigation Service (LFV), seeking damages for injury caused by aviation noise on behalf of about 20,000 people, mainly residents of one neighbourhood adjacent to the airport. The District Court issued the summons and about 7,000 people have opted in so far. LFV moved to dismiss, arguing that the conditions of SGPA § 8 had not been met. The court denied the motion in January 2009. The parties subsequently commenced settlement negotiations, which are still ongoing (September 2011). Lindblom, *National Report: Group Litigation in Sweden*, at 7.

² See Per Henrik Lindblom, *ADR – the Oplate of the Legal System?*, 16 *European Rev. Private L.* 63 (2008). But see Bengt Lindell, *Alternative Dispute Resolution and the Administration of Justice – Basic Principles*, 51 *Scandinavian Stud. L.* 311, 322 (2007).

gardens»¹. To varying degrees, the experience and insight that the reporters in this study have gained from their own work on class actions in comparative context seemed to have set them apart from other less informed members of their legal systems. Indeed, in the European Parliament Resolution of 2 February 2012 on «Towards a Coherent European Approach to Collective Redress»² «stresse[d] that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions»³.

Even if these reporters' views were not developed in concert with one another, their views have been shaped by an appreciation of the range of options for the various features of collective redress regimes and the implications of the choices that might be made among these options. In contrast with other members of their legal communities, who have been reluctant to support reforms that might engender the entrepreneurial lawyering and other unwanted features associated with American civil litigation, these reporters seemed impatient with the slow progress of such reforms.

Despite this, these reporters were not naïve about the challenges of reform. The reporters in this study were sufficiently knowledgeable to appreciate that adapting class actions to fit the local legal culture (and yet to operate effectively) would require considerable ingenuity in process design – more than that required simply for implementation⁴.

Perhaps, in the end, there remains a fundamental difference in views over the merits of commodifying of legal rights in the course of their vindication. In their incisive 2009 analysis of the concerns about U.S.-style class actions, Professors Issacharoff and Miller identified their core concern as follows: «that an apparent cultural revulsion at accepting the reality of legal enforcement as entrepreneurial activity may leave the reforms without the necessary agents of implementation»⁵. However, whether legal enforcement is ultimately an essentially entrepreneurial activity is far from clear to most observers outside the United States.

It is not clear that legal enforcement is ultimately an essentially entrepreneurial activity particularly in the civil law, where the development and resolution of civil disputes are placed primarily in the hands of the courts, who are viewed as public officials. In the civil law, cases are resolved when justice is dispensed by the state through the courts applying the laws that have been passed by the legislature. They are not resolved as a product of a monetary compromise negotiated between those responsible for the harm and class counsel seeking a substantial fee.

Neither is it clear that legal enforcement is ultimately an essentially entrepreneurial activity in other parts of the common law world. In other common law countries the principle of party prosecution is tempered, at least in the perception of the public, by the belief that even class actions operate primarily to promote access to *justice* as understood in the

¹ Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 *Duke J. Const. L & Pub. Pol'y* 405, 414 (2001).

² *European Parliament resolution of 2 February 2012 on «Towards a Coherent European Approach to Collective Redress»*, *European Parliament*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> (last visited Apr. 15, 2012).

³ *Ibidem*.

⁴ Cf. Christopher Smithka, *From Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence*, 27 *WIS. INT'L L.J.* 173 (advocating implementation of class actions confident that the absence of punitive damages and excessive attorneys fees would suffice to avert the abuses feared).

⁵ Issacharoff & Miller, *Will Aggregate Litigation Come to Europe?*, at 181.

traditional sense, and that the monetary outcome of a civil dispute is not the only or best purpose or measure of its success.

Perhaps even more importantly are the two further questions raised by the question of whether litigation is really only about money. The first is whether, as Issacharoff and Miller suggest, introducing the kinds of economic incentives that drive U.S.-style class actions is an inevitable requirement for the effective functioning of a collective redress regime. The second is whether fashioning the legal enforcement of collective rights as an entrepreneurial activity necessarily reduces the sense of doing justice in resolving disputes through group litigation to what some have considered to be a bare knuckle negotiation between a business that has caused widespread harm and a team of avaricious lawyers.

Given the enormously complex matrix of procedural mechanisms and features of the economic and professional context in which class actions operate, it may well be that the only way to find the answers to these questions is to implement reform and observe the results. The difficulty is, as the American experience has demonstrated, this is a kind of learning that, like the knowledge in the Platonic dialogue, cannot be unlearned¹. Indeed, a significant feature of the American comparative jurisprudence is the reflection on the many concerns arising from the excesses of U.S. class actions and the measures that have been taken to curb them.

Perhaps, then, the only prudent approach to reforms of collective redress regimes outside the United States is to take these two questions in that order, *i.e.*, by first testing for efficacy, and only then for suitability; and by testing for efficacy in the negative. In other words, if entrepreneurship is an inevitable reality for effective legal enforcement, there is no need to lunge forward to embrace it – its necessity will eventually become apparent. Instead, adopting reforms that are consistent with a country's legal culture, whether or not the reforms are effective, makes it possible to evaluate their efficacy and adjust the economic incentives as needed. This is arguably what has happened in Canada and Australia where attitudes to counsel fees and third party financing have gradually evolved as the justification for reform has been demonstrated on a case-by-case basis.

Approaching reform in this way eliminates the need to discover that certain reforms are unsuitable for a particular legal culture. Experimenting with potentially unsuitable transplants could leave a legal system with an unpopular procedure that harms the reputation of the administration of justice, but that has engaged an entrenched interest on the part of a sector of the legal profession that makes it difficult to withdraw.

On further reflection, there may be emerging another option: that of a companion procedure that does not seek to replicate U.S.-style class actions, but to provide the benefits of them to the would-be parties to matters that would otherwise be resolved in this way. With the recent settlement approval by the Amsterdam Court of Appeal in the *Converium* case, Europe has just witnessed its first opt-out multi-jurisdictional group litigation judgment. In principle, this judgment will enjoy recognition throughout Europe under the Brussels I Regulation.

Any analysis from a U.S. perspective of the WCAM procedure based on the checks and balances that have been developed for U.S. class actions would probably conclude that it is likely to fail. Reducing the entire collective redress process to a single procedure – that

¹ In *Protagoras*, Socrates warns Hippocrates about the teachings of Protagoras, which he says unlike fruit in the market, cannot be purchased and then examined before being consumed – once learned, the teachings become part of one. Plato, *Protagoras*, in W.C.K. Guthrie (trans.), *Protagoras and Meno*, Penguin Books, 1956.

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of settlement approval – the procedure that is treated with the most circumspection in the United States, seems hardly a promising way to construct a regime that will operate with integrity. Add to that the requirement that the negotiation not be conducted with a lawyer whose economic interests likely coincide with those of the claimants, but with a nonprofit organization whose interests may reflect idiosyncratic ideological considerations, and the WCAM procedure seems, at least from a U.S. perspective, dubious at best.

And yet, as a purely derivative procedure – one that relies for its operation on the existence of parallel class litigation in the United States or elsewhere – the WCAM process may be a suitable way to localize the process of collective redress in a multijurisdictional claim. Whether it succeeds in providing closure for defendants remains to be seen. Whether it succeeds in providing claimants with a sense of vindication remains to be seen. Nevertheless, contrary to all the projections that might be constructed out of the U.S. class actions experience for a successful collective redress regime, the WCAM procedure seems to be one that promises to inspire the most confidence and, possibly, the least fear among those who seem most afraid of U.S.-style class actions.