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Class & Group Actions 2018

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A practical cross-border insight into class and group actions work

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Class & Group Actions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of class and group actions.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting class & group actions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in class and group actions in 18 jurisdictions.

All chapters are written by leading class and group actions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Ian Dodds-Smith and Alison Brown of Arnold & Porter Kaye Scholer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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EU Developments in Relation to Collective Redress

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Introduction

In recent years, there have been significant developments in Europe in the field of collective consumer redress, with the publication in June 2013 of a Commission Recommendation and a Commission Communication setting out common principles for collective redress mechanisms to be applied in EU Member States. This represents the culmination of a series of policy reviews carried out by the European Commission in the consumer and competition fields since 2005. This chapter discusses the Recommendation and its implications and wider EU developments in relation to collective redress.

The Current Position

There is currently no uniform system of collective redress applicable to all EU Member States. However, in recent years individual Member States have increasingly introduced their own systems. According to the results of a survey published in March 2017 by the US Chamber Institute for Legal Reform ("U.S. CILR"), virtually all EU Member States now have a system of collective redress. However, the precise mechanisms vary. Some countries, such as Germany, have mechanisms applicable to specific areas of law, such as securities litigation, whereas other countries such as Austria and Spain have generally applicable collective action procedures. While many countries have 'opt-in' procedures, several countries, including Belgium, Bulgaria and Spain, have introduced mechanisms with 'opt-out' procedures. Other countries, such as the Netherlands, have hybrid systems with both 'opt-in' and 'opt-out' procedures available for general litigation and settlement of claims respectively. Different countries also have different approaches to standing; in some Member States only certain approved public authorities can bring proceedings (e.g. the Ombudsman in Finland), whereas others grant standing to private organisations such as consumer associations (e.g. Bulgaria) or to individuals acting on behalf of a group (e.g. Portugal), or have a combination of such rules.

Previous European Initiatives

The European Union has already enacted a number of measures in the consumer protection field aimed at defending consumers' collective rights in specified circumstances. In the past, these have been focused on injunctive relief rather than monetary claims. For example, the Injunctions Directive 98/27/EC permits certain qualified bodies in one Member State to apply to the courts or authorities in another Member State for a cross-border injunction aimed at protecting the collective interests of consumers under certain consumer protection Directives, including the Directives on misleading advertising, distance sales contracts, consumer credit, television broadcasting, package travel, advertising of medicines, unfair terms in consumer contracts and property timeshare contracts.

In recent years the Commission has turned its attention to the question of whether European consumers have available to them an adequate mechanism for seeking damages in circumstances where the growth of the internet and the expansion of consumer markets creates greater potential for mass claims. Separate initiatives have been progressed in tandem by the Commission's Competition Directorate, which looked at whether there is a need for a collective mechanism to assist victims of anti-trust infringements to seek damages, and by the Health and Consumer Affairs Directorate, which considered more broadly whether a general collective redress mechanism should be introduced. Those initiatives have resulted in a series of publications, including a White Paper on damages actions for breach of EU anti-trust rules published in April 2008, and a Green Paper on Consumer Collective Redress published in November 2008. However, concerns that these various initiatives were inconsistent and were advanced on a piecemeal basis led to a further consultation in February 2011, "Towards a Coherent Approach to Collective Redress". The Recommendation has been introduced in light of the responses received during that consultation.

Collective Consumer Redress – Background

The adequacy of the mechanisms permitting collective consumer redress has been under review for many years. A series of studies have been commissioned looking at the collective redress schemes in place in Member States, and seeking to evaluate the difficulties faced by consumers in pursuing mass claims. In its most recent consultation, the Commission noted that, while many Member States had introduced a collective redress procedure in respect of compensatory relief, this was not universal, and every national system was unique.

In its so-called Evaluation Study published in August 2008, the Commission concluded that this patchwork of different laws and procedures created a "justice gap" where consumers and businesses have different rights depending on where they are located, which was particularly acute in the case of cross-border claims. A separate 'Problem Study' looked at the problems faced by consumers who wanted to pursue a claim and found that they faced barriers in terms of access to justice, effectiveness and affordability, particularly in pursuing small claims. Litigation costs were high and judicial procedures were complex and lengthy. Half of consumers said that they would not bring court proceedings where the amount claimed was less than €200. In light of these reports, the Commission

concluded that a significant proportion of EU consumers who have suffered damage do not obtain redress. It estimated in its 2009 discussion document that about 40 million EU consumers who have problems with a trader and make a complaint do not pursue the matter and apparently do not, therefore, obtain redress.

Commission Recommendation 2013/396/EU on Common Principles for Collective Redress Mechanisms

The Commission Recommendation sets out a number of common principles to be applied by Member States in their national collective redress systems. The principles are intended to apply horizontally in all areas where collective claims are made, but in its accompanying Communication the Commission singles out, in particular, the areas of consumer protection, competition, environment protection, protection of personal data, financial services and investor protection.

Member States were asked to implement the principles set out in the Recommendation by 26 July 2015. However, the Recommendation is not binding and it therefore remains to be seen whether any changes to existing national laws will be made. Within two years following implementation, by 26 July 2017, the Commission is required to assess the practical impact of the Recommendation and determine whether further measures should be proposed to consolidate and strengthen EU laws on collective redress. In May 2017, they issued a consultation seeking information from stakeholders on this matter. In particular, the Commission sought to identify and obtain information about collective actions within the scope of the Recommendation commenced after its adoption, to identify situations where such actions might have been appropriate but action was not taken, and to obtain views generally on the effectiveness and efficiency of collective actions. The consultation closed on 15 August 2017 and the results have not yet been published.

One area that will remain under review is whether there is a need for specific rules on jurisdiction and choice of law in collective redress actions: the Commission rejected this proposal in its Communication, but said that it will review the experience of these issues in cross-border cases. As matters currently stand, there is considerable uncertainty as to whether any strengthened measures will be introduced in the future. According to the Commission's Communication, Member States that responded to the consultation expressed divergent views on whether binding rules on collective redress should be introduced, ranging from support to "strong scepticism". Some Member States supported the idea of binding rules only in certain legal areas such as competition law (Sweden and the UK) or for cross-border claims only (Denmark).

The overall aim of the Recommendation is to facilitate access to justice by ensuring that collective redress mechanisms are available to assist in the resolution of large numbers of similar claims, while at the same time ensuring that appropriate procedural safeguards are put in place to avoid abusive litigation. The Commission Communication rejects 'US style' class actions, which it describes as vulnerable to abusive litigation, and highlights the fact that such class action procedures, and in particular the availability of punitive damages, funding of cases by means of contingency fees, extensive discovery of documents and 'opt-out' class action procedures, have encouraged defendants to settle claims that may not be well founded. The Recommendation seeks to balance these different considerations, proposing that all Member States should have collective redress mechanisms in place, while at the same time introducing safeguards in terms of the format of that procedure. The few Member States which do not presently have any collective redress mechanisms are therefore encouraged to introduce these. To balance this, the Commission proposes a range of safeguards including recommending that Member States' collective redress procedures are 'opt-in', no punitive damages should be available and there should be restrictions on the availability of funding by means of contingency fees and through third party funders.

The Common Principles

The Recommendation contains a set of principles which would apply to all collective redress mechanisms, whether their purpose is to provide injunctive relief to stop illegal practices, or to provide compensation to injured parties in mass harm situations. These are:

1. *Standing to bring a Representative Action* – Member States should designate representative entities to bring representative actions on the basis of defined conditions of eligibility. In particular, the Commission suggests that the representative entity should be non-profit making, have a direct relationship with, or interest in, the subject matter of the collective proceedings and act in the best interests of the group represented. Alternatively, Member States should be permitted to empower public authorities to bring representative actions on behalf of claimants seeking compensation.
2. *Admissibility* – the Recommendation appears to support a process of approval or certification of all collective actions by the courts. It states that there should be a process of verification at the earliest possible stage to ensure that manifestly unfounded cases and cases which do not comply with the rules for collective actions are not pursued.
3. *Provision of Information* – the representative body must be able to publicise the proposed proceedings.
4. *Costs* – the Commission proposes that the "loser pays" principle should apply and that the party that loses a collective redress action should reimburse the legal costs of the winning party. The Communication indicates that all stakeholders in the public consultation supported this proposal and the Commission's Recommendation is expressed emphatically: "the Commission has no doubt that the 'loser pays' principle should form part of the European approach to collective redress".
5. *Funding* – claimants should be required to provide details of their source of funding for the litigation at the outset of the case. Although the Recommendation supports the funding of collective proceedings by third party funders, this would only be permitted in restricted circumstances. In particular, rules should prohibit the third party funder from charging excessive interest, prevent conflicts of interest and stop the funder from seeking to influence the conduct of the litigation by the claimant, including in relation to settlement of the proceedings. The Recommendation also proposes that the courts should have the power to stay proceedings if either the third party funder or the claimant has insufficient resources to fund the litigation and any adverse costs ruling.
6. *Cross-Border Cases* – Member States should ensure the claims can be brought in their jurisdiction by foreign groups of claimants or representative entities from other countries. In particular, any representative entity that has been officially designated by another Member State as having standing to bring proceedings in that country should be permitted to bring a claim in another Member State which has jurisdiction to hear the collective proceedings. This recommendation could potentially have a significant impact if, for example, the Dutch special purpose vehicle (SPV) model is used to bring claims in common law jurisdictions such as the UK, which don't generally recognise representative entities as having a right to bring such claims.

The Regulation also lays down a number of specific principles relating to injunctive collective redress. These are very generally worded and suggest that Member States must provide expedient procedures so that any injunctive orders can be made promptly to prevent any continuing harm, and should provide for sanctions, such as daily fixed-fee penalty payments, to ensure that any injunctive orders are complied with.

With regard to compensatory collective redress, the Commission makes detailed recommendations governing the basis of the proceedings. These include:

1. *"Opt-in" Collective Redress Mechanism* – the Commission considers that claims should generally be pursued on an "opt-in" basis because this respects the right of individuals to decide whether they want to litigate. In addition, it notes that 'opt-out' systems may not be consistent with the central aim of providing compensation, since the class of persons affected are not individually identified and they may therefore never receive the compensation awarded. However, the Recommendation suggests that exceptions to this principle may be permitted if they are justified by reason of "sound administration of justice". Member States such as the Netherlands, Portugal, Bulgaria and Denmark which already have "opt-out" collective redress mechanisms may therefore be able to justify their continued operation on grounds of national administration of justice. A similar justification could be made by the UK Government, which has recently introduced a new collective redress procedure for competition damages actions that can be pursued on either an "opt-out" or an "opt-in" basis.
2. *ADR and Settlement* – parties to any collective proceeding should be encouraged to settle the dispute both pre-trial and during the proceedings. In order to encourage this, the Commission proposes that any limitation period applicable to the claim should be suspended while ADR procedures are followed. This recommendation is in line with the ADR Directive, 2013/11/EU, which provides that Member States must facilitate access to ADR procedures for disputes relating to consumer contracts for the supply of goods or services. Where a collective settlement is agreed, the Commission also proposes that this should be approved or verified by the courts to ensure the appropriate protection of interests and rights for all parties involved.
3. *Contingency Fees* – in general, Member States should not permit contingency fees as these risk creating an incentive to conduct litigation which might result in spurious claims being brought. However, Member States can in exceptional circumstances allow for contingency fees provided these are appropriately regulated, taking into account the right to full compensation of the individual claimants.
4. *Punitive Damages* – these should not be permitted. In its Communication, the Commission makes clear that the aim of collective redress procedures should be to facilitate compensation: it considers that imposing sanctions on infringers as a punishment and deterrence is a matter for public enforcement.
5. *Collective Follow-on Actions* – the Commission generally favours so-called "follow-on" actions. Where the claim for compensatory damages relates to an area of law such as competition law, where public authorities are empowered to adopt decisions finding that there has been a violation of EU legislation, it considers that proceedings should generally only be brought after the regulatory action has been concluded, so as to avoid the risk of conflicting decisions. The courts should also have the power to stay any claim for compensatory relief until the regulatory proceedings have been concluded.

Since the Recommendation was published, only France, Belgium and the UK (in respect of competition damages actions only) have introduced new collective redress procedures. Each of these laws adopt some of the matters addressed in the Recommendation. The French common representative action law provides for claims to be brought by authorised consumer associations. The Belgium and UK laws adopt a flexible system, with the court determining once the action has been found to be admissible whether to apply an opt-in, or an opt-out procedure. In view of the limited implementation steps which have been taken to date by other Member States, it remains to be seen whether the Recommendation will have a significant impact in practice. Despite the absence of harmonised procedural rules, across the EU there appears to be an increased willingness to bring collective actions. For example, according to statistics published by U.S. CILR, 176 class action proceedings were commenced in Poland between 2010 and 2015.

Claim Against Facebook, Case C-498/16

Although European Member States have been slow to support the concept of a uniform collective redress procedure, the European Court of Justice (CJEU) has recently been asked to rule on an issue that could expand the availability of collective redress procedures in Europe. A privacy campaigner, Max Schrems, has brought proceedings against Facebook in Austria, on behalf of 25,000 users of the website, alleging various violations of EU privacy law. The case concerns the meaning of Regulation 16 of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EC) 44/2001 (the so called "Judgments Regulation") which provides that in relation to contractual claims, a consumer may bring his claim against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

Although the Austrian courts rejected Mr Schrems' attempt to bring the claim as a class action on behalf of various EU and non-EU claimants in Austria, the matter has now been referred to the CJEU under Case C-498/16. The Court has been asked to determine whether: a) Mr Schrems is a consumer for the purposes of the Judgments Regulation; and b) if so, whether Article 16 of the Regulation permitted Mr Schrems to bring claims on behalf of other claimants based in Austria, or in other European Member States, or worldwide. It remains to be seen what position the CJEU will adopt. The oral hearing took place in August, but it is likely to be some time until the Court delivers its Judgment.

General Data Protection Regulation ("GDPR")

In a further development in relation to data privacy, the adoption of the General Data Protection Regulation, 2016/679, has seen the introduction of safeguards for EU citizens seeking compensation for damage caused by infringement of their data protection rights, including a new collective redress mechanism. This gives data subjects the right to appoint a representative body to act on their behalf to make a complaint and bring a claim for compensation. To be appointed, the representative body must be a not-for-profit organisation, with objectives that are in the public interest and active in the field of data protection.

In the past, European Member States have been reluctant to agree to the introduction of horizontal collective redress mechanisms applying a uniform set of rules. It remains to be seen whether the approval of the GDPR marks a change in approach and whether Member States may in future be willing to accept the introduction of similar mechanisms in other specific areas of law.

Conclusion

After years of investigation and debate, the Commission has finally published formal proposals on collective redress. The Recommendation seeks to influence Member States' national procedural rules, encouraging a more coherent approach to collective redress through the publication of common principles that it recommends should apply to such collective redress procedures. Overall, the impact of the Recommendation remains uncertain. It remains to be seen whether Member States will, in fact, make legislative changes to their procedural rules to implement or amend existing collective redress procedures given that the Recommendation is not binding and Member States have divergent views on the need for EU-wide measures in this area. What seems certain, however, is that Member States will continue to develop their national laws on collective redress and that we are likely to see more of such actions being brought in the future.

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ARNOLD & PORTER KAYE SCHOLER

Arnold & Porter Kaye Scholer is an international law firm with over 1,000 attorneys in 13 offices in the US, London, Frankfurt, Shanghai and Brussels. The firm is recognised as one of the leading class action defence firms, providing clients with an integrated litigation service on a transatlantic basis. It handles the defence of class actions and coordinated litigation in a wide range of areas including product liability, antitrust, consumer protection/false advertising, counterfeit goods, securities, distributor disputes and environmental matters.

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Please contact Ian Dodds-Smith, Alison Brown or Dr. Adela Williams in the London office for UK or EU enquiries, and Anand Agneshwar (New York) for US enquiries.

International Class Action Settlements in the Netherlands since *Converium*

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Introduction

1 Since the US Supreme Court's decision in *Morrison v. National Australian Bank* [see Endnote 1], the international relevance of Dutch law to class action settlements has increased. Indeed, now that "foreign cubed class actions" have become a problem in the United States [see Endnote 2], the Netherlands may offer a serious alternative for the certification of class action settlements involving non-US investors in non-US securities, listed on a non-US stock exchange.

2 Dutch law does not provide for an "American-style" class action, but it does provide for an opt-out mechanism that facilitates the implementation of collective settlements in a fashion somewhat similar to US class action settlements. This mechanism is rooted in the Act on the Collective Settlement of Mass Claims, known in the Netherlands as the "**WCAM**".

3 Dutch law relating to international class action settlements has had several important developments in recent years. In its decision of 29 May 2009, the Amsterdam Court of Appeal (the "**Court**") declared the international settlement in the "*Shell Reserves*" case binding under the WCAM. Although the ruling was the first of its kind to truly reflect an international application of the WCAM, one of the two Shell entities settling the matter was Dutch (the other was a UK entity).

4 In its interim decision of 12 November 2010 and its final decision of 17 January 2012, the Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the two potentially liable parties were Dutch (they were both Swiss), and where only a limited number of the potential claimants were domiciled in the Netherlands. This approach was confirmed in the 16 June 2017 interim decision in *Ageas*, where the potentially liable party was Belgian and some, but not all potential claimants were domiciled in the Netherlands. [See Endnote 3.]

5 In this chapter, we first outline the WCAM's system. We then discuss different issues within the framework as set up by the WCAM and the Court's case law on the same subject. The various issues include: jurisdiction; notification; representativeness; reasonableness; and international recognition.

The System of the WCAM

6 The WCAM entered into force on 27 July 2005. Its main aim is to enable parties to a settlement agreement to jointly request the Court to declare the settlement agreement binding. The agreement must have been concluded between one or more potentially liable parties, and one or more foundations or associations representing one or more groups of persons for whose benefit the settlement agreement was concluded (the "**interested persons**"). If the Court does declare the settlement agreement binding, the agreement will then bind all persons covered by its terms, unless such a person decides to opt out in writing within a certain period after the binding declaration. The opt-out period is determined by the Court, but is at least three months.

7 Before deciding on the binding declaration, the Court will test, among other things, the representativeness of the foundations and associations representing the interested persons, as well as the reasonableness of the settlement.

8 Notification of the interested persons is crucial, both at the litigation stage, where the aim is to obtain a binding declaration, and after the binding declaration has been issued. The binding effect of a settlement agreement is only regarded as acceptable if the interested persons have been properly notified at both stages, and thus have had an opportunity to object and to opt out. [See Endnote 4.]

9 Thus far, the Court has issued eight final decisions within the framework of the WCAM, namely in:

- *DES* and *DES II* (regarding personal injury allegedly caused by a harmful drug);
- *Dexia* (regarding financial loss allegedly caused by certain retail investment products);
- *Vie d'Or* (regarding financial loss allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company);
- *Vedior* (regarding financial loss allegedly suffered by shareholders as a consequence of late disclosure of takeover discussions); and
- *Shell*, *Converium* and *DSB Bank* (see below).

In each of these cases, the Court declared the settlement agreements binding. It further found the settlements reasonable and confirmed the representativeness of the foundations and associations representing the persons in the suit.

10 Both *Shell* and *Converium* are cases with substantial international scope. Both cases concern financial loss suffered by shareholders and allegedly caused by misleading statements by the company in a certain period. In *Shell*, one of the Shell entities involved was Dutch and the other was English. The majority of the shareholders who had bought or sold Shell shares during the relevant period – these were the persons for whose benefit the settlement agreement was concluded – were not residing in the Netherlands. In *Converium*, both entities involved – Converium and Zürich Financial Services – were Swiss. Also, only a minority of the shareholders who bought or sold shares during the relevant period were residents of the Netherlands.

11 On 1 July 2013, an amendment to the WCAM came into force, providing that the WCAM can also be applied to settlements reached if the liable person is declared bankrupt in the Netherlands. [See Endnote 5.] On 4 November 2014, the first settlement agreement in a bankruptcy situation was declared binding by the Court in *DSB Bank*. In *DSB Bank* about 100,000 customers had potential damages claims on the bankrupt estate, because *DSB Bank* had violated its duty of care towards them. The settlement that was brought to court provides for an arrangement that intends to compensate all *DSB Bank*'s customers for the possible violation of its duty of care. To this effect, various categories of damages were included in the settlement agreement. The criteria for each category determine which category applies to an interested person. In two interim decisions, the Court has held that the settlement complies with formal requirements and is deemed adequate in most respects. The Court raised questions as to the reasonableness of the compensation amount and indicated what amendments would be necessary for the settlement to pass this test. Accordingly, parties submitted an amended settlement which was declared binding by the Court. The Court's integral approach to review in *DSB Bank* could, in the light of the settlement's function, be viewed as an alternative to elements of the regular Dutch bankruptcy proceedings. Whether the Court will also adopt this approach in other cases remains to be seen.

12 On 23 May 2016, Ageas and a number of claims organisations submitted a request to the Court to declare the global settlement agreement with respect to all civil proceedings related to the former Fortis group for the events that occurred in 2007 and 2008 binding. The total settlement amounts to EUR 1,204 million, where the compensation per share will be determined based on four factors. One of these factors is whether the shareholder participated in proceedings before a Dutch or Belgian court. The Court has criticised certain elements in that settlement in a 16 June 2017 interim decision and allowed the parties to submit a revised settlement. [See Endnote 6.]

13 A legislative proposal to revise the Dutch legislation on collective actions is pending in parliament, but it is uncertain whether it will become law. It would enable collective actions for damages on an opt-out basis. Furthermore, the Proposal introduces stricter criteria for representative organisations with regard to governance, funding and representativeness. These criteria would apply in collective actions for damages claims as well as in other collective actions. A scope rule would be introduced to limit collective damages proceedings to matters substantively connected with the Netherlands. Procedural rules would be enacted to the effect that other representative organisations can file alternative competing collective actions that are based on the same event. If more than one representative organisation files a claim for the same event, the court will appoint a lead plaintiff, an "exclusive representative", to represent the interests of the whole class. We do not discuss the details of the proposal in this chapter, but we do note that the proposal would provide for various moments at which a WCAM settlement would be facilitated during the process.

Jurisdiction in International Settlements

14 From an international perspective, one of the most important issues in both *Shell* and *Converium* is whether the Court had jurisdiction. Since 10 January 2015, this matter is, in principle, governed by Council Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 12 December 2012 (the "**Brussels I*bis* Regulation**") [see Endnote 7] and the Lugano Convention [see Endnote 8], depending on whether it can be said that the person "to be sued" is domiciled in an EU Member State, or in Norway, Switzerland or Iceland (the "Lugano" countries).

15 The Brussels I*bis* Regulation and the Lugano Convention are substantively applicable if the litigation concerns a "civil or commercial matter". In both *Shell* and *Converium*, the Court ruled that the WCAM procedure is a "civil and commercial matter" as referred to in the predecessor of article 1 of the Brussels I*bis* Regulation and the Lugano Convention. Apart from that, it ruled that for the purpose of the application of these international instruments, the shareholders should be regarded as the persons "to be sued" as referred to in the predecessor of article 4 section 1 of the Brussels I*bis* Regulation and article 2 section 1 of the Lugano Convention. On that basis, the Court first assumed jurisdiction with regard to the shareholders domiciled in the Netherlands. The Court then assumed jurisdiction with regard to the shareholders domiciled outside the Netherlands, but within the EU, Switzerland, Iceland or Norway, as their potential claims were "so closely connected" to the claims of the shareholders domiciled in the Netherlands that it was "expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (see article 8 section 1 of the Brussels I*bis* Regulation and article 6 section 1 of the Lugano Convention).

16 Finally, the Court assumed jurisdiction with regard to the shareholders who were not domiciled in the Netherlands, or in any other EU Member State, Switzerland, Iceland or Norway. This decision was based on the fact that five out of six petitioners in *Shell* and two out of four petitioners in *Converium* were domiciled in the Netherlands. This ground for jurisdiction was based on article 3 of the Dutch Code of Civil Procedure ("**DCCP**"). That article provides that, in these type of proceedings [see Endnote 9], Dutch courts have jurisdiction if at least one of the parties requesting the binding declaration or one of the defendants is domiciled in the Netherlands. One could ask whether the Court might be regarded as an inappropriate forum if there is hardly any substantive connection between the case and the Netherlands. During the legislative process, resulting in article 3 DCCP, the Minister of Justice stated that if the formal criteria of this provision were met, the provision would not allow the Dutch courts to decline jurisdiction on the basis of the "*forum non conveniens*" doctrine. [See Endnote 10.]

17 The decision that the parties for whose benefit the settlement agreement has been concluded are actually the persons "to be sued", under (the predecessor of) article 4 of the Brussels I*bis* Regulation and article 2 of the Lugano Convention, appears to be the right one. Indeed, these persons are the ones that may be bound by the binding declaration. They need to be notified of the request for the binding declaration, so that they may file objections to the request. This implies that they are the potential defendants in the litigation. However, this approach has been criticised in a report commissioned by the Dutch Ministry of Justice. [See Endnote 11.]

18 The Court's decision by the Court on international jurisdiction in *Converium* implies that even if the case is not substantively connected to the Netherlands, but a minority of the parties "to be sued" – i.e. the shareholders or, in a product liability case, the alleged victims of a defective product – are domiciled in the Netherlands and one of the parties to the settlement agreement is a Dutch entity – for example, a Dutch foundation representing the interests of the alleged victims – the Court will assume jurisdiction.

19 It should be noted that the Court in *Converium* also held as a separate and autonomous ground for jurisdiction that the settlement agreement to be declared binding has to be executed in the Netherlands. Consequently, the Court also assumed jurisdiction on the basis of the predecessor of article 7 sub 1 of the Brussels I*bis* Regulation and article 5 sub 1 of the Lugano Convention.

20 In an academic publication, the former deputy president of the Court, W.J.J. Los, explained the policy reasons why the

Court believes it should assume jurisdiction in international cases involving binding declaration of settlements. [See Endnote 12.] In its interim decision in *Ageas*, the Court confirmed the approach it had taken in *Shell* and *Converium*. [See Endnote 13.]

Notification in International Settlements

21 Notification of the persons for whose benefit the settlement agreement is concluded is crucial, both during the litigation aimed at obtaining a binding declaration and after the binding declaration has been issued. The WCAM provides for direct notification of interested persons known to the petitioners, as well as for public notification, through announcements in newspapers, of interested persons whose identity is unknown to the petitioners. Insofar as foreign, unknown interested persons are concerned, the Court may order announcements in relevant foreign newspapers, as is demonstrated in *Shell* and *Converium*. [See Endnote 14.]

22 Direct international notification, insofar as EU-domiciled persons are concerned, has, since 13 November 2008, been governed by Council Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the "**Notification Regulation 2008**"). [See Endnote 15.] Although the Notification Regulation 2008 takes as a starting point that service of documents is effected through the intermediary of central authorities appointed by each Member State, it provides in article 14 that each Member State will be free to directly serve judicial documents on persons residing in another Member State by postal services, namely a registered letter with acknowledgment of receipt or an equivalent.

23 If interested persons reside outside of the EU, notification must be effected pursuant to applicable treaties, most notably the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "**Service Convention**"). The Service Convention takes as a starting point that documents are served through the intermediary of central authorities. Depending on the country involved, certain formalities must be fulfilled. Normally, the central authority of the state receiving a request for service will require a translation of the notification in the language of the receiving state. Under Dutch law, a failure to prove that all requirements under the Service Convention have been met, may cause the Court to refuse issuing a default judgment against the defendant. It may also result in the Court requiring that the notification process be repeated.

24 The WCAM provides that notification, both during litigation and after the binding declaration, may take place by regular mail. The Court may provide otherwise at the litigation stage. In *Dexia*, grounds 5.2 through 5.4, the Court allowed for all persons, in the Netherlands and abroad, to be notified by regular mail only. Insofar as the procedural safeguards of these persons were violated because they were not notified in accordance with the Notification Regulation 2000, the Service Convention and similar instruments, these persons could invoke that circumstance if *Dexia* were to enforce the binding declaration against them, according to the Court. But the Court held on the other hand that these persons could invoke the binding declaration themselves, in which case they were bound by it. This liberal approach by the Court has been criticised by some legal scholars on the basis that it violates applicable international rules (such as the Notification Regulation 2000).

25 As of *Shell* and *Converium*, the Court took a more stringent approach, requiring the petitioners to follow the Notification Regulation 2000 and the Notification Regulation 2008, the Service Convention and similar instruments. [See Endnote 16.] The reason may be that *Shell* and *Converium* were much more international in scope than *Dexia*. In *Dexia*, all interested persons, being contractual counterparties of *Dexia*, were known and the large majority were domiciled in the Netherlands. In *Shell* and *Converium*, the majority of the shareholders were not known, as they were holding bearer shares or shares through nominee accounts. Moreover, the majority of the *known* shareholders were not domiciled in the Netherlands, but in the UK and Switzerland. Particularly, in *Shell*, the notification process was an extensive task: more than 110,000 notices in 22 different languages were sent out to shareholders located in 105 different countries. In addition, a notice was published in 44 different newspapers worldwide. In *Converium*, the notification process was similar to the one in *Shell*, sending out more than 12,000 notices and publishing a notice in 21 different newspapers worldwide. In addition, the notice was placed on five different websites and circulated through two different newswires. In both cases, the Court scrutinised whether this notification process had been carried out in accordance with all applicable national and international rules and decided that it had passed the test. The Court followed this approach in its later cases *DES II* and *DSB Bank* too, even though these cases had a less international scope than *Shell* and *Converium*. In *Converium*, the Court ruled that the notification of the binding declaration could take place by regular mail or by email, except for the shareholders residing in Switzerland, for which the Service Convention had to be followed.

26 In *Ageas*, the Court took the same approach but also allowed foreign and domestic shareholders registered with the claimant organisations with whom the settlement had been reached, to be notified of proceedings via email, and only required more formal notification for those shareholders for whom a confirmation of receipt was not obtained. [See Endnote 17.]

Representativeness in International Settlements

27 The requirement of representativeness of the parties representing the interested persons has not been specified in the WCAM. The Explanatory Memorandum to the WCAM states that representativeness can be derived from several factual circumstances and that it is not advisable to deem any one circumstance decisive. The following circumstances are mentioned as potentially relevant:

- the other activities of the representative on behalf of the persons involved;
- the number of persons involved;
- the acceptance of the representative by these persons; and
- the extent to which the representative has actually acted on behalf of the persons involved and has presented itself as representative in the media. [See Endnote 18.]

28 In *Dexia*, the Court applied these criteria meticulously. It looked at the statutory objects of the foundations and associations involved and the number of participants or members. It also looked at the activities that these foundations and associations were involved in apart from filing the WCAM request – such as their websites, mailings to interested persons, activities in the media – and at earlier activities in the field of litigation in connection with the issues that were covered by the settlement agreement. In *DES*, the Court applied the same standards, albeit in a less elaborate manner.

29 Insofar as international considerations are concerned, the Dutch government, when introducing the WCAM to parliament, initially appeared to believe that settlements for the benefit of non-Dutch persons were inappropriate for a binding declaration as a matter of principle. The government

based this on the ground that a Dutch foundation or association cannot "normally" be expected to be representative for a group of foreign claimants. [See Endnote 19.] However, the government seems to have retreated from the position that foreign interested parties cannot benefit from a binding declaration. [See Endnote 20.] Indeed, its more recent activities, such as the commissioning of a report on the private international law aspects of the WCAM and the paragraph on aspects of private international law in the Explanatory Memorandum to the WCAM amendments, show that the government is fully aware of the WCAM's international significance. [See Endnote 11.]

30 For international cases, it is particularly relevant that the Court in *Dexia* held that *each* petitioner does not have to be representative for *all* persons involved. The Court held that it is sufficient if the *joint* petitioners are sufficiently representative regarding the interests of the persons for whose benefit the settlement agreement was concluded, provided that each of them is sufficiently representative for a sufficiently large group of these persons (see *Dexia*, ground 5.26).

31 In *Shell*, a Dutch foundation was created which had the sole purpose of representing the interests of all non-US shareholders affected by the alleged misrepresentations by Shell. This foundation sought and obtained the support of participants and supporters, such as shareholder organisations in relevant foreign countries and institutional investors. In the WCAM petition, all interested persons were represented by this foundation – backed up, so to speak, by its participants and supporters and the Dutch Shareholders' Association (the "**VEB**"). The Court accepted these two parties as being representative. The text of the decision suggests that the Court very much looked at the articles of association of the foundation and the VEB and abstained from scrutinising the actual activities of these entities. In Converium, the shareholders were represented in a similar manner as in Shell, and the Court also accepted the Dutch foundation and the VEB as being representative. In both cases, the Court repeated the *Dexia* ruling in that it is not required that each petitioner be representative for *all* persons involved (see *Shell*, ground 6.3). A similar formula was employed in *Vedior* (grounds 4.20 and 4.21) and *DSB Bank* (grounds 6.2.3 and 6.2.4). In *Converium*, the Court added to this ruling that there is insufficient reason to set the extra requirement that each petitioner is sufficiently representative for a group of a sufficient size of interested persons (final decision, ground 10.2).

32 The Court followed the same approach in its interim decision in *Ageas* and confirmed that the formal requirement of representativeness was also met in that case. However, the Court criticised a distinction made in the compensation between "active" and "non-active" claimants, and fees payable to some of the claimant organisations. The court allowed the parties to present an amended agreement. [See Endnote 21.]

Reasonableness in International Settlements

33 The WCAM provides that the Court will refuse the binding declaration if the compensation awarded in the settlement agreement is not reasonable, having regard, among other things, to the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage. In *Converium*, the Court ruled that all circumstances are relevant, including those circumstances which occurred after the determination of the amount of compensation or after the conclusion of the settlement (final decision, ground 6.2). In *DSB Bank*, the Court also took into consideration that it is both in accordance with the law and in the interest of the parties involved that the number of opt-outs is as limited as possible (final decision, ground 4).

34 "Reasonableness" of the settlement has many aspects. The first aspect discussed here is the reasonableness of the criterion used to determine whether a person is included in the group of interested parties. Will the Court test whether the circle of persons covered by the settlement agreement is reasonably drawn? In *DES* (ground 5.19), the Court held that it will only test whether it is "incomprehensible" that a certain group of potentially eligible persons was excluded from the settlement agreement (in that case, the group of haemophilia patients). The Court applied the same test in *DES II* (ground 6.4.6). This test implies that the Court will not easily decide that a certain group was wrongly included in or excluded from the settlement. Obviously, if a group is excluded from the settlement, the binding declaration will not diminish their rights in any shape or form, that is: the binding declaration cannot be invoked against them; and they still have standing in court, without the need to issue an opt-out statement in time.

35 Please note that the type of exclusion described in the preceding paragraph is different from the situation where a certain group is *included* in the settlement, in the sense that the group is covered by the description of interested persons potentially eligible for compensation, but is not awarded anything. In that case, the binding declaration can be invoked against this group and these persons need to opt out in order to still have standing in court. In such case, the Court will fully test whether the limitation is reasonable instead of just testing whether it is not "incomprehensible".

36 The concept of "reasonableness" also refers to the *amount* of compensation awarded in the settlement agreement. It is an implied starting point of the WCAM that settlement agreements may differentiate between different groups of eligible parties based on the expected strength of their claim in court. [See Endnote 22.] In addition, the Court in *Dexia* held that a settlement agreement is the outcome of negotiations in which all parties have made concessions. The extent to which they have made concessions will not only reflect the legal strength of the parties' positions (as perceived by them), but also each party's perceived interest in having the matter resolved out of court. As a consequence, a settlement will normally not result in full compensation of the losses as originally presented by the claiming parties. The Court held that this in itself does not make a settlement unreasonable (ground 6.6). The Court also held in *DES* that the absence of a hardship clause in the settlement agreement did not make it unreasonable in the specific circumstances of that case. In *DSB Bank*, the Court initially doubted the reasonableness of drawing a distinction based on the timing of claimant's complaints (interim decision of 13 May 2014, grounds 7.4.5 and 7.9.4). However, the Court ruled that the settlement based on this distinction was not unreasonable (final decision, ground 4.4.3).

37 In *Shell* (grounds 6.15-6.17), the Court held on multiple grounds that the compensation granted was not unreasonable. It referred to the broad support the agreement had met, both from institutional investors and from shareholders' associations. It also referred to two US scholars' favourable opinions filed by the petitioners, which indicated that the settlement was somewhat better for the shareholders than the average of other settlements in comparable cases. It also referred to the fact that the alleged misleading statements had not given rise to litigation outside the US, which suggests it is uncertain that an award in a non-US court can be obtained that is better than the compensation awarded in the settlement, also taking into account the litigation costs involved. [See Endnote 23.]

38 In *Shell*, no question arose about unequal treatment of shareholders in different jurisdictions, as the shareholders were actually treated equally in all jurisdictions. [See Endnote 24.] However, one can imagine international cases

in which the settlement agreement differentiate between parties residing in different countries, on the basis that their claims have a different value under the laws that apply in each of their cases. For example: is it reasonable to grant higher compensation to claimants in France than to claimants in Germany because French law provides a stronger position than German law? This would mean that the Court will have to test the "reasonableness" of the settlement partly by having regard to several foreign laws.

39 In our view, this would not be problematic. The WCAM allows that the strength of the claim in court is taken into account in determining the amount of compensation (see the *Shell* and *Dexia* decisions quoted above). There does seems to be no good reason not to apply that principle in international cases. Applying foreign law is something Dutch courts do regularly on the basis of the Rome I Regulation (and its predecessor the 1980 Rome Convention), the Rome II Regulation and other international instruments. In practice, the application of foreign law may sometimes be problematic because the courts often rely on information about foreign law as provided by the parties. That information is not always comprehensive. In WCAM cases, however, it is to be expected that the parties can provide sound information about foreign law to the Court, as such cases will be prepared, in view of their complexity, with above-average thoroughness. Moreover, if the law in question is the law of a party to the European Convention on Information on Foreign Law, the Court may use that Convention to obtain information. [See Endnote 25.]

40 In *Converium*, just as in *Shell*, the settlement only regarded non-US shareholders. The Court found that the proposed non-US settlement amount was considerably lower than the US settlement amount. However, it held that, despite this difference, the settlement amount was not unreasonable. The Court ruled that the difference between the US and non-US settlement amount was justified, given the fact that the legal position of the US shareholders differed from the legal position of the non-US shareholders. According to the Court, the non-US shareholders were excluded from the US settlement, and it would be very difficult for them to get compensation outside the US, whereas it was improbable that they would get compensation in the US. Also, the non-US shareholders could opt out and start individual proceedings (final decision, grounds 6.4.1 through 6.4.5).

41 In its interim decision in *Ageas*, the Court has not yet declared the settlement binding but it has allowed the parties to present an amended settlement. The court considered a distinction made in compensation between so-called active and non-active claimants. The Court leave the possibility open of making some distinction, but emphasised the importance of an objective justification if it concerns claimants with exactly the same alleged damage. The Court also considered that in case of a capped total compensation, the reasonableness *vis-à-vis* certain shareholders whose loss is more likely (buyers), should be considered in light of the greater part of that amount potentially going to others whose loss is less likely (holders). The court also emphasised the importance of clarity in the release obtained by the potentially liable party under the settlement agreement. [See Endnote 17.]

42 In *Converium*, the Court also ruled that the proposed total settlement amount was not unreasonable, despite the considerable lawyers' fee of 20%. The Court found that, considering that most preparatory work had been done by US lawyers, in judging what is a reasonable fee, US standards of what is common and reasonable should be taken into account. The Court found that it was sufficiently established that the fee was not unreasonable according to those standards (final decision, grounds 6.5.1 through 6.5.7).

International Recognition and Enforceability of a WCAM Decision Abroad

43 Whether the WCAM procedure will prove to be helpful in declaring international settlements binding will ultimately also depend on whether foreign courts recognise and enforce a binding declaration by the Court. The criteria based on which foreign courts decide on recognition and enforcement of a foreign court decision, will differ from country to country. However, insofar as the foreign court is a court of an EU Member State, a solid argument can be made that the decision to declare a settlement binding is a 'judgment' as referred to in article 2(a) Brussels I*bis* Regulation. Such a judgment must be recognised by the courts of other Member States, unless one of the grounds to refuse recognition in article 45 applies. However, these grounds are rather narrow. A ground for refusal that may be relevant in these cases is that no proper service on the defendant took place (article 45 section 1(b)). The court that must decide on recognition may not review the binding declaration of the Court as to its substance (article 52) unless it is manifestly contrary to public policy in the Member State in which recognition is sought (article 45 section 1(a) Brussels I*bis* Regulation).

44 In *Shell*, the Court implies that its decision should normally be recognised by the courts in other EU Member States. It does so particularly in ground 5.23, where it discusses the position of a UK shareholder *vis-à-vis* the UK Shell entity after the binding declaration.

45 In a recent publication in a Dutch law journal, a German legal scholar, Professor Halfmeier, argues that because of substantial participation by the courts, the WCAM declarations should be treated as 'judgments' in the sense of the Brussels I*bis* Regulation and are thus objects of recognition in all EU Member States. He further argues that the opt-out system inherent in the WCAM procedure does not violate German public order, but is compatible with the fair trial principles under the German Constitution as well as under the European Human Rights Convention. He therefore considers the WCAM an attractive model for future reform of collective proceedings at European level. [See Endnote 26.] The same is argued in a recent European law journal by a Danish legal scholar, Professor Werlauff. [See Endnote 27.]

46 As previously stated, in countries outside the EU the criteria for recognition will differ from country to country, although it is likely that foreign courts will test the grounds for the Court's jurisdiction and whether public policy in their own jurisdiction is at stake. [See Endnote 28.]

Conclusion

47 The WCAM, in force since 2005, provides an opt-out mechanism that facilitates the implementation of collective settlements. *Shell* is a landmark decision on the international application of the WCAM, as it assumes jurisdiction with regard to all interested parties, irrespective of their domicile. The decision in *Converium* takes the matter a step further, by not requiring that any of the potentially liable entities has its seat in the Netherlands. However, also in *Converium*, some connection with the Netherlands appears to be required: one or more interested persons should be domiciled in the Netherlands; and one or more petitioners should be Dutch entities. This requirement will often be met in large international cases, since there will often be one or more interested persons with domicile in the Netherlands. The requirement that one or more petitioners should be Dutch will be met if the foundation or association representing the interested persons is a Dutch entity. Such a foundation or association may be an entity created for the occasion, provided it can meet the representativeness test.

Endnotes

1. No. 08/1191 (US June 24, 2010).
2. At least for the time being. The US Congress may decide to amend the relevant statutes.
3. See Amsterdam Court of Appeal 17 January 2012, JOR 2012, 51 (*Converium*) rendering final its interim decision of 2 November 2010, JOR 2011, 46 (*Converium*) and Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 (*Ageas*). De Brauw Blackstone Westbroek represented Zürich Financial Services Ltd. and Ageas parties involved in these matters. De Brauw Blackstone Westbroek also represented parties in other published cases discussed in this article (such as Shell in *Shell*). However, this contribution is only based on the public record.
4. Explanatory Memorandum (*Memorie van Toelichting*) to WCAM, p. 4.
5. Amendment to the WCAM (*Wet tot wijziging van de Wet collectieve afwikkeling massaschade*).
6. Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 (*Ageas*). These events relate to among others acquisition of parts of ABN AMRO and capital increase in September/October 2007, announcement of the solvency plan in June 2008, divestment of the banking activities and Dutch insurance activities in September/October 2008.
7. The Brussels I*bis* Regulation is a "rearrangement" of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 (the Brussels I Regulation). The Brussels I Regulation will remain applicable to judgments given in legal proceedings instituted before 10 January 2010 (article 66 section 2 of the Brussels I*bis* Regulation).
8. The Lugano Convention is also called the Parallel Convention, as it creates a regime of international jurisdiction and enforcement between the EU countries and Norway, Switzerland and Iceland that is quite similar to the regime between the EU countries based on the Brussels I Regulation. The Lugano Convention has not (yet) been rearranged to reflect the Brussels I*bis* Regulation.
9. The type of proceeding to have a settlement agreement declared binding is a *verzoekschriftprocedure*, that is: proceedings initiated by an application to the court rather than by a writ served on the opposing party.
10. Parl. Gesch. Burg. Procesrecht, Van Mierlo/Bart, p. 90.
11. Hélène van Lith, The Dutch Collective Settlements Act and Private International Law, Erasmus School of Law 2010, p. 39. Van Lith has published an updated version of this report under the same title, published by Maklu, Apeldoorn, 2011. The reference in this endnote is to be found in that updated version on p. 45. Explanatory Memorandum to the amendments to the WCAM, p. 2.
12. See W.J.J. Los, *Toepassing van de WCAM, Bespiegelingen over de rol en taak van de rechter*, NVvP 2013, nr. 28.
13. Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 *(Ageas)*.
14. See the minutes of the court session in *Shell* of 12 July 2007 and the minutes of the court session in *Converium* of 24 August 2010, both published on the website of the Court.
15. Until 13 November 2008, Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the "**Notification Regulation 2000**") was applicable. The Notification Regulation 2000 was applied in *Shell*.
16. See the minutes of the court session in *Shell* of 12 July 2007, published on the website of the Court.
17. Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 (*Ageas*).
18. Explanatory Memorandum, p. 15.
19. Explanatory Memorandum, p. 16.
20. See Memorandum of Reply, Parliamentary Proceedings 2004-2005 I, 29 414, no. C, p. 14.
21. Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 (*Ageas*).
22. Explanatory Memorandum, p. 12.
23. A few parties jointly objected to the reasonableness of the settlement in the Court. However, that objection referred to one rather technical aspect of the settlement agreement and not to the reasonableness of the settlement as a whole. The objection was refuted by the Court. It is not discussed here.
24. As the *Shell* settlement is in USD, differences may be caused by exchange rate differences. The Court found that this was not unreasonable, as the USD is internationally accepted and the shareholders were residing in several different jurisdictions.
25. European Convention on Information on Foreign Law, 7 June 1968, ETS No. 062.
26. See A. Halfmeijer, Recognition of a WCAM settlement in Germany, NIPR 2012, p. 176.
27. E. Werlauff, A Settlement Forum for Stock Quoted Companies and Shareholders Claiming Damage: To Which Extent Does It Create *Res Judicata*?, ECL 2013, p. 179.
28. M.H. ten Wolde and N. Peters, *De Wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?* NTBR, 2013/2, p. 4. See for an analysis of the recognition issues, Van Lith (2011), pp. 105–134.

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- Amsterdam Court of Appeal 29 April 2009, JOR 2009, 196 (*Vie d'Or*).
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Deal or No Deal? Increased Judicial Scrutiny of Class Action Settlements in the U.S.

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As more countries embark on experiments in allowing class or collective actions, and the European Commission considers implementing an EU-wide framework for collective redress, there has been a fear in many quarters of a coming global wave of "U.S. style" class actions, characterised by the filing of an enormous number of cases, many of which raise dubious claims, and settlements rubber-stamped by the courts in which class members receive little of value but class counsel reap a king's ransom in attorney fees. But over the last few years, U.S. courts (particularly federal courts) have become far more vigilant in scrutinising class settlements.[1] This chapter will explore this trend, highlight red flags that have led courts to reject settlements, and suggest strategies to avoid those problems. The chapter concludes with a proposal for how courts *should* approach review of class settlements, suggesting a sliding scale of judicial scrutiny that would allow the parties latitude to negotiate an arm's length deal while still protecting absent class members from collusive deals.

For Many Cases, It's All About the Settlement

In more than two decades of defending class actions in U.S. courts, I have seen many changes, but perhaps none promises to be more significant than the increasing judicial scrutiny of class action settlements. Nearly all class actions that survive initial motion practice settle, particularly if a class is certified. Indeed, as one federal court noted, a study of certified class actions in federal court in a two-year period found that "*all*" of the cases had settled. *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Even weak claims are often settled because the costs of losing can be so high; even a small probability of success multiplied by thousands or millions of claims aggregated into a class action can add up to potentially annihilating damages.

Of course, some class actions do go to trial. Years ago, I was part of the team that defended insurance giant State Farm in the trial and appeal of a class action challenging State Farm's use of the prices of quality generic replacement parts (rather than the more expensive "OEM" parts sold only by the car makers) to reimburse millions of policyholders for collision repairs. We were convinced that the case had been improperly certified as a class action and that the class would be decertified on appeal. State Farm's obligation under the insurance policy was to return the car to its "pre loss" condition. Because the condition of the car immediately before the collision would obviously vary from one policyholder to another – indeed, one plaintiff had headlights held onto her car by clothespins *before* the accident – the question of whether State Farm had met its contractual obligation would likewise turn on individual rather than common evidence. State Farm stuck to its guns and endured a $1 billion judgment from the trial court, but was vindicated on appeal when the Illinois Supreme Court agreed that the case should never have been certified as a class action in the first place. *Avery v. State Farm Mutual Automobile Ins. Co.*, 216 Ill.2d 100 (2005). But how many defendants have the resources and backbone to risk a billion-dollar judgment? As the Supreme Court has noted, "[f]aced with even a small chance of a devastating loss, [many] defendants will be pressured into settling questionable claims". *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

Multi-Factor Tests for Approval of Class Action Settlements

Because nearly all class actions settle, the level of scrutiny applied by courts to approve or reject class settlements is of enormous importance. Indeed, it would be hard to think of an issue of greater importance for the practical resolution of class actions. The standard for approval is quite general, leaving ample room for judicial interpretation. Federal Rule of Civil Procedure 23(e) provides that a district court may approve a settlement that is "fair, reasonable and adequate". Many state courts have a similar standard. Some courts have articulated multi-factor tests to elaborate on this standard[2] and proposed amendments to Rule 23 will specify factors that a court should consider.[3] Factor tests have the virtue of assuring that the court is thoroughly briefed on the various considerations relevant to whether the settlement should be approved or rejected, but the factors are inherently general and subjective; not all of the factors will apply in any given case; and the sheer number of factors, their indefiniteness, and the fact that the factors may sometimes point in opposite directions, requiring the court to weigh which are the most important factors, all leave ample room for judicial discretion. Factor tests inform rather than cabin the court's discretion. How that discretion is exercised is of course the critical matter.

Stricter Scrutiny of Class Action Settlements

In recent years, courts have exercised that discretion to provide more exacting scrutiny of proposed settlements. While there remains a "strong judicial policy in favor of settlements, particularly in the class action context", *In re Paine Webber Ltd. P'ships*, 147 F.3d 132, 138 (2d Cir. 1998), courts today are far less deferential to the parties. It would be hard today to find cases saying that courts have a "limited role" in evaluating settlements, *In re National Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974) or that, absent fraud or collusion, class action settlements are "not to be trifled with", *Granda Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992).

The reluctance to "trifle" has certainly passed, particularly in the federal courts. Indeed, some courts have deployed a level of heightened scrutiny bordering on hostility to – or at least suspicion of – class action settlements. In some cases, this disdain for negotiated settlements reflects an understandable underlying disdain for weak cases that the court believes should never have been brought, much less settled. Consider the recent litigation alleging that Subway misled consumers because its Footlong sandwiches occasionally measure just a bit less than a foot.

The case began when an Australian teenager measured his Footlong sandwich with a ruler and found that it measured just 11 inches. Apparently outraged, he posted the results on Facebook; the posting went viral; and lawyers across the U.S. filed class action suits, which were ultimately consolidated in multidistrict litigation. "In their haste to file suit, however, the lawyers neglected to consider whether the claims had any merit". *In re Subway Footlong Sandwich Marketing & Sales Practice Litig.*, No. 16-1652, 2017 U.S. App. LEXIS 16260, at *2 (7th Cir. Aug, 25, 2017). In fact, Subway already had strict standards specifying the amount of dough in its breads. Unbaked, all of the rolls weighed the same, but in the baking process minor variations in length could occur; uniformity of bread length was impossible due to the inherent variability in the baking process. Faced with a weak case, plaintiffs agreed to settle for injunctive relief, including a warning to consumers that the length of the rolls could vary and imposition of new procedures for franchisees to measure the rolls with a special tool. Subway was willing to agree to a settlement that dropped claims for damages and ended costly litigation. The proposed settlement did include more than a half-million dollars of fees for class counsel, however. The Seventh Circuit refused to approve the settlement, believing that the deal "enriches only class counsel and, to a lesser degree, the class representatives", while providing the class with "utterly worthless" injunctive relief since "after the settlement, just as before, the rare sandwich that falls short of the full 12 inches will still provide the customer the same amount of food as any other". *Id.* at *13. But the Seventh Circuit did not stop at criticising the settlement; the court denounced the suits themselves for seeking "worthless benefits for the class", and suggested that the cases "should have been dismissed out of hand". *Id.* at *14. The Seventh Circuit obviously hoped that refusing to approve the settlement of a weak case would lead to the case being dropped – and would send a salutary message to plaintiffs' lawyers not to bring such weak claims in the future – but it remains to be seen whether rejecting the settlement will merely inflict continuing litigation on Subway and the court system. However that turns out, it is an extraordinary development for a court to reject a settlement not because the settlement compromises class members' valuable claims for too little benefit, but rather because those claims are so weak in the court's view that the case should never have been brought. The later analysis reflects a fundamental shift in the role of the court in reviewing settlements.

Nor does the *Subway* case stand alone. Indeed, *Subway* relied on a decision of the same court rejecting a disclosure-only settlement to a shareholder suit challenging a corporate reorganisation. *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016). The reorganisation had received overwhelming shareholder support; it was ratified by 97% of shareholders. The agreed "curative" disclosures added by the settlement "represented only a trivial addition to the extensive disclosures already made in the proxy statement". *Id.* at 722. The court rejected the settlement because "[i]t is not to be believed that had it not been for these disclosures, not 97 percent of the shareholders would have voted for the reorganization but 100 percent or 99 percent or 98 percent". *Id.* at 724. The court was scathing in rejecting not just the settlement but the suit itself: "The type of class action illustrated by this case – the class action that yields fees for class counsel and nothing for the class – is no better than a racket. It must end." *Id.* at 724.

Focus on Disparities in Benefits to the Class and its Counsel

As the Seventh Circuit made clear in the *Walgreen* and *Subway* opinions, courts today are particularly attentive to what class members truly receive in the settlement (including whether the proposed injunctive relief has a real value to the class), particularly in cases where the named plaintiffs and class counsel are receiving significant awards. Parties seeking approval of a class settlement must carefully explain the value individual class members will receive and why that compensation is reasonable and supported by the record given what class members might be able to obtain in individual litigation and the risk that they would obtain less or nothing at all. And, of course, where a settlement confers modest benefits on the class, counsel for the class must be similarly modest in their fee request, or risk that the settlement will simply be rejected.

The Rise of Objectors

Recent judicial scrutiny of class action settlements has been fuelled by the rise of perennial objectors, class members who regularly object to settlements. Indeed, the *Subway* and *Walgreen* settlements were attacked by the Center for Class Action Fairness at the Competitive Enterprise Institute, led by Ted Frank, a group that has launched a number of successful objections to class action settlements. These days, nearly every significant class settlement in the federal courts will be attacked by objectors, who frequently file appeals when the trial court approves the settlement over their objections. Objections complicate and delay the approval process, which many professional objectors fully understand; often they file spurious objections not to improve the settlement but to obtain payments for dropping their objections, using their leverage to force the defendant to enter into a new round of settlements to consummate the earlier settlement.[4]

Objectors are more likely to appear in federal courts than in state courts, and their objections will receive a more sympathetic hearing in some courts than in others. For this reason, among others, plaintiffs' counsel should be mindful of where they file suit. To the traditional calculus – Where is there personal jurisdiction over the defendant? Where is the substantive law most favourable? – an additional consideration should be added: Where can a settlement be most efficiently approved?

Given the increasing challenges of shepherding a class action settlement to final approval, what can litigants and counsel do to avoid the obstacles? In addition to class counsel being realistic in fee demands and structuring the settlement to avoid or blunt the force of likely objections, there are other suggestions that parties and counsel should consider; whether any particular suggestion makes sense will of course depend on the dynamics of the particular case.

Consider an Individual Rather than Class Settlement

Plaintiffs and their counsel need to recognise that not every case is suitable for class settlement. (Indeed, not every possible case should be brought, period.) The parties should carefully explore the option to settle cases on an individual basis. Assuming that no class has been certified, individual settlements generally do not require court approval, leaving the parties with more flexibility to structure terms. *See* F.R.C.P. 23(e). Individual settlements also can be

concluded on a confidential basis. And individual settlements can be wrapped up quickly, in sharp contrast to the lengthy class notice and judicial approval process for class settlements, which can easily consume four months – or even more if an objector files an appeal. Although individual settlements have a number of advantages, particularly in the current environment of exacting judicial scrutiny of class settlements, the biggest disadvantage for the defendant is of course the absence of a class-wide release, leaving the defendant vulnerable to more suits. But the uncertain prospect of future suits can be preferable to a very public process of giving class members notice of the claims and of a proposed settlement, only to have the settlement rejected by the court.

I have negotiated individual settlements of a number of cases filed as class actions. The strategy works best where the nature of the claims are not such that new cases are highly likely to be filed; where timing issues make prompt resolution of the case preferable; or where the defendant can convince plaintiffs' counsel that a modest individual settlement makes sense because there are significant obstacles to the plaintiff's ability to certify a class or gain approval of a class settlement. A few years ago, I represented two manufacturers of a particular common household product in separate cases that challenged the defendants' warranty practices under state consumer fraud laws. In both cases, the facts showed that the defendants did not have a corporate policy to deny valid warranty claims, and most importantly that whether particular warranty claims were allowed or denied turned on individual issues on a claim-by-claim basis. Armed with this information, we made detailed presentations to plaintiffs' counsel at the outset of the cases, using real warranty claim files to demonstrate that plaintiffs would have difficulty certifying a class. Both cases settled for small sums on an individual basis.

Be Candid With the Court About the Case's Strengths and Weaknesses

Where a case must be settled on a class-wide basis, it is important for all parties to be candid with the court about the factors that drove the negotiation of the terms, particularly the strength not only of the claims but the defences, and the risks of continuing with the litigation. In determining whether a settlement is "fair, reasonable and adequate", many courts have noted that "the most important factor" is what the class likely would obtain at trial compared to what the class will obtain in the settlement. *Synfuel Techs, Inc. v. DHL Express (USA) Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *see also UAW v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2013). ("[W]e cannot judge the fairness of a proposed compromise without weighing the plaintiff's likelihood of success on the merits against the amount and form of relief offered in the settlement.") Yet, this factor often receives cursory treatment in motions for preliminary and final approval of class settlements. These motions are typically drafted by plaintiff's counsel, who may be reluctant to admit that their case has any weaknesses or that the defendant has any viable defences. The result too often is that the court may not be given a realistic assessment of the case, and may not realise that the certain if modest benefits of the settlement are preferable for the class to the risks and uncertainties of continuing with the litigation, with the possibility of no recovery at all.

Candour with the court concerning the strengths and weaknesses of the case is always important, but particularly crucial when settling a mega-case for a small fraction of the potentially enormous damages. In one such case, I defended Walgreens, the largest pharmacy chain in the United States, in a class action brought under the Telephone Consumer Protection Act, a statute that (among other things) restricts the placing of auto-dialled or pre-recorded/artificial voice calls to cell phones. The suit challenged automated prescription calls to the cell phones of more than nine million patients, many of whom were on maintenance medications and received multiple calls per month over a period of years. Given the TCPA's statutory damages scheme of at least $500 per violation, the potential statutory damages ran into the billions of dollars. But Walgreens had strong defences: prescription refill reminder calls are important health notifications that patients welcome and expect and we believed that the calls were made with their consent. In light of those defences, the parties agreed to an $11 million settlement and certain prospective relief. In presenting the settlement for approval, plaintiff's counsel were candid with the court about the strength of Walgreens' defences. Predictably, objectors denounced the settlement for providing "miniscule compensation" that "pales in comparison to the potential recovery plaintiffs could earn if they prevailed at trial". *Kolinek v. Walgreen Co.*, No. 2013 CV 4806, 311 F.R.D. 483, 2015 U.S. Dist. LEXIS 158069, at *22 (N.D. Ill. Nov. 23, 2015). But the court understood that if the case were to proceed to trial, plaintiff and the class would have "a tough row to hoe" in order to overcome Walgreens' "potentially meritorious defenses", and the likelihood of a complete win for the class was "dubious", while the risk of "total non-recovery" was "significant". *Id.* at *24, 27. Because the court was informed of the strength of the defences, the court approved the settlement as fair, reasonable and adequate.

Claims Made Settlements, Reversionary Funds and Conflicts of Interest

When I started defending class actions, it was a common practice for defendants to agree to a large settlement fund from which a fixed award would be paid to class members who submitted timely and valid claims, provided there was a "kicker" provision under which the remainder of the fund would revert back to the defendant if an insufficient number of class members submitted claims to exhaust the fund. Given that participation rates are typically low in many types of class actions (claims rates of less than five percent are common in consumer class actions),[5] the defendant could be confident that much of the fund would be returning to its coffers. But class counsel would point to the *availability* of the fund as a benefit to the class – the money was there to be claimed[6] – and seek attorneys' fees as a percentage of the entire fund. Claims-made settlements with reversionary funds have come under attack by the courts in recent years and are now less common. But a claims-made process is often necessary to identify class members or validate or quantify their claims. And there are many reasons for class members to decline to file claims, including that they oppose the suit and disagree with the plaintiff's contention that the defendant's actions harmed them.[7] Inertia and inattention are also undoubtedly powerful factors – despite well-designed and effective notice programmes. A low claims rate does not mean that the settlement is inadequate. And *pro rata* distribution of the entire fund to the consumers who submit claims can create outlandish, windfall awards to those claimants when claims rates are low.

The concern with reversionary funds is not that it is *per se* unfair for money to return to the defendant when class members decline to claim the funds, but rather that reversionary funds may create at least the appearance of a conflict of interest for class counsel ***if*** counsel's fee award is calculated based on the size of the entire fund, rather than the amount of money distributed to class members. The problem with reversionary funds is solved if class counsel's fees are awarded based on actual distributions from the settlement fund. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (calculating counsel's fee as a percentage of the fund actually distributed "gives class counsel an incentive to design the claims process in such a way as will maximize the benefits actually received by the class").

Proposed legislation attempts to address this problem. The Fairness in Class Action Litigation Act of 2017 (H.R. 985) would require that in any class action seeking monetary relief, attorneys' fees would not be determined or paid until the distribution of the monetary recovery to the class is completed, and most significantly, the fees awarded to class counsel would be "limited to a reasonable percentage of any payments directly distributed to and received by class members". For class actions that provide equitable relief, the fee award would be limited to "a reasonable percentage of the value of the equitable relief, including any injunctive relief". The bill was passed by the House of Representatives in March, but its prospects in the Senate are uncertain.

The Appropriate Level of Judicial Scrutiny of Class Settlements

No one would dispute that judicial review of class action settlements is an important safeguard to protect the interests of absent class members. Because both sides are seeking approval of the settlement, the normal protections of the adversarial process may be diluted and "there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own". *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("From the selfish standpoint of class counsel and the defendant, . . . the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees"). This suggests that courts should reserve close scrutiny for terms that suggest conflicts of interest or trade-offs to benefit counsel or the named plaintiff at the expense of the class. Settlements involving high fee requests by class counsel are the obvious example, particularly if other terms raise red flags, such as an excessively broad release from the class. An unexplained or unreasonable disparity between the benefits to the class and the benefits to the named plaintiff might be another example. But courts are less well-suited than the lawyers in the trenches actually litigating the case to understand and evaluate many factors that influence the settlement, such as the strength of the evidence that would be presented at trial, the efforts that would be required to litigate the case to conclusion, the anticipated future litigation costs, and the bargaining positions of the parties (influenced by the defendants' financial wherewithal, business strategy, overall litigation docket, and many other factors). Courts should be hesitant to substitute their judgment for the counsel's regarding those factors, as long as the settlement was negotiated at arm's length between competent and experienced counsel. In today's climate of judicial scepticism toward class action settlements, it is incumbent upon counsel to provide the court with candid and detailed explanations of the settlement terms and how they were negotiated, in order to show that the settlement is indeed fair, reasonable and adequate.

Endnotes

1. The reform efforts are not limited to the courts. In Congress, the House has passed reform legislation (which faces uncertain prospects in the Senate), the Judicial Conference has approved proposed amendments to the procedural rules governing class actions, and the Federal Trade Commission is conducting a study of the effectiveness of settlement notice programmes as part of its Class Action Fairness Project. More radical reforms, such as moving to an opt-in rather than opt-out system for consumer class actions, seem to be a bridge too far today, but it is likely that "U.S. style" class actions will face significant changes in the coming years.
2. The Third Circuit's multi-factor test is the most extensive. *See In re Prudential Ins. Co. of Am.*, 148 F.3d 283 (3d Cir. 1998). The factors include (among others): the anticipated complexity and duration of the litigation; the reaction of the class to the settlement (*i.e.*, the percentage of class members who elect to opt out of the class when notified of the settlement or to stay in the class but object to the settlement); the stage of proceedings and amount of discovery conducted; the risks of establishing liability and damages; the risks of maintaining the class action through trial (*i.e.*, the risk that the court could refuse to certify a class or decertify the class as the case proceeds); the ability of the defendant to withstand a greater judgment; the reasonableness of the settlement fund in light of the best possible recovery for the class and the risks of the litigation; the maturity of the underlying substantive legal issues based on experience adjudicating similar cases, development of scientific knowledge and other factors; the existence and probable outcome of claims by other classes and subclasses; a comparison of the results achieved in the settlement for individual class members with the results achieved by other claimants (*i.e.*, in individual suits); the reasonableness of the provision for attorneys' fees; and whether the procedure for processing claims under the settlement is fair and reasonable. *Id.* at 318–23.
3. The amendments, approved by the Judicial Conference on September 12, 2017 (on track to become effective December 1, 2018 after Supreme Court and Congressional review), specify that the court should consider the adequacy of representation by the class representative and class counsel; whether the settlement was "negotiated at arm's length"; the adequacy of the relief provided by the settlement (taking into account "the costs, risk and delay of trial and appeal", the effectiveness of the proposed method of distributing relief to the class, the terms of the proposed award of attorneys' fees, and any "side agreement" made in connection with the settlement); and whether "class members are treated equitably relative to each other".
4. The Center for Class Action Fairness recently filed an appeal seeking to force objectors who drop spurious objections in exchange for payments to disgorge those payments for the benefit of the class. *See Pearson v. Target Corp.*, No. 17-2275 (7th Cir. 2017) (pending). An amendment to Rule 23 would address the problem; new Rule 23(e)(5) would require objectors to "state with specificity the grounds for the objection" (prohibiting boilerplate objections filed merely for leverage) and require court approval, after a hearing, of any payment to an objector or his counsel for withdrawing an objection or dismissing an appeal from a judgment approving a class action settlement.
5. Even with extensive notice campaigns, response rates in consumer class actions "rarely exceed seven percent". *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*).
6. Nearly 40 years ago, the Supreme Court stated in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) that the right of class members to "share the harvest of the lawsuit" by filing a claim is a benefit, whether or not class members exercise that right.
7. In the *Kolinek v. Walgreen* case, discussed above, some class members refused to submit claims because they relied on prescription reminder calls and didn't believe Walgreens should have been sued for providing this valuable service. Indeed, one class member, a patient suffering from stage four liver cancer, wrote to the court to object not to the settlement but to the lawsuit itself, telling the court that she needed the notifications from Walgreens to keep on track in taking her various medications and could not in good conscience participate in the suit.

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Bradley J. Andreozzi is a partner in the firm's Litigation Group. He defends high stakes class actions, including cases brought under the federal securities laws, various federal and state consumer protection laws, and state false advertising statutes. He has represented clients in virtually every federal appellate court, including the Supreme Court, and in many trial courts throughout the country. His practice has a particular focus on early case assessment and development of creative arguments to dismiss or limit claims, defeat class certification or limit the size of any class, and where appropriate resolve cases promptly and strategically, in service of the client's larger business interests. He has represented Fortune 100 companies in significant class actions, including some of the cases discussed in this article, as well as government investigations and parallel governmental and private party proceedings.

Chapter 4

Australia

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

In Australia, a statutory regime exists in the Federal Court of Australia for representative proceedings. The regime is prescribed in Part IVA of the Federal Court of Australia Act 1976 (Cth) (representative proceedings). Identical provisions exist in one of the State Courts, the Supreme Court of Victoria – Part 4A of the Supreme Court Act 1986 (Vic).

Since March 2011, the New South Wales Supreme Court has had a separate class action procedure. It allows class actions to be brought where claims are based on negligence or for breaches of New South Wales statutes. There are several significant differences between the New South Wales class action procedure and the Federal and Victorian court systems. In New South Wales, class actions may be brought on behalf of a defined, limited group of identified individuals, not only an open, generally-specified class. Further, class actions may be taken against several defendants even if not all group members have a claim against all the defendants.

In November 2016, a class action procedure was enacted in Queensland. This legislative move appeared to reflect, in part, concern that a class claim arising from recent flooding in the Queensland, including the State capital, had been commenced in the NSW Supreme Court under the NSW class action procedure. Indeed, a number of major Queensland-based infrastructure-related class actions had been commenced in other states. This development also reflects the ongoing efforts by each of the principal Australian jurisdictions to attract and secure complex commercial litigation.

The Courts of the other states or territories have more limited provisions for group actions but there is no comprehensive statutory regime.

As the Federal procedure has been in force for more than 20 years, the balance of this chapter will refer to the provisions in the Federal Court of Australia Act (the Act).

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Representative proceedings are available in most areas of law where the Federal Court of Australia has jurisdiction. Representative proceedings may be commenced whether or not the relief sought is or includes equitable relief, or consists of or includes a claim for damages even if the claim for damages would require individual assessment. Representative proceedings may also be commenced whether or not the proceedings concern separate contracts or transactions between the respondent in the proceedings and individual group members or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Proceedings under Part IVA in the Federal Court of Australia are a form of class action. Representative proceedings were introduced to give the Federal Court an efficient and effective procedure to deal with multiple claims.

A judgment in representative proceedings binds all group members who have not opted out of the proceedings. Part IVA also provides for the determination of specific issues in the proceedings relating to "sub-groups" or even individuals. While the trial of representative proceedings is usually designed to determine all common questions, it is recognised that representative proceedings may not always determine the claims of all group members. Individual causation in product liability claims is usually not pursued as a common question.

1.4 Is the procedure 'opt-in' or 'opt-out'?

Part IVA currently prescribes an "opt-out" system for representative proceedings. At a relatively early stage in the proceedings, the Court will fix a date by which class members may opt out of the proceedings. This is done by way of written notice to the Court. If a claimant is within the class as defined but does not opt out before the fixed dated, then they will be bound by any judgment of the Court.

The Federal Court has, however, also permitted classes to be defined in such a way that only persons who had "signed up" with a particular litigation funder (and their lawyers) could be a class member. This is, in effect, a form of gate-keeping or informal opt-in system. It remains to be seen whether this leads the legislature to make more fundamental statutory changes.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

In order to commence a "Representative Proceeding" in Australia, the claims must satisfy three threshold requirements:

- at least seven persons must have claims against the same person or persons;
- the claims of all these persons must arise out of the same, similar or related circumstances; and
- the claims of all these persons must give rise to at least one substantial common issue of law or fact.

In the absence of a certification procedure, there is no other requirement as to numerosity. A representative proceeding can have as many class members as satisfy the class definition and elect not to opt out. The Courts have generally been asked to consider the problems associated with mixed or disparate classes rather than classes that are too small or too large.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

As noted in question 1.5, the Australian system has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding.

There is no requirement that the common issues between class members predominate over the individual issues. Rather, there is merely a requirement that there be at least one "substantial" common issue of law or fact. In this sense, Australia's highest Court has described "substantial" as meaning of substance rather than denoting a certain size. In effect, this means that, although mandatory, the requirements described in question 1.5 are not particularly onerous.

Once an Australian representative proceeding has been commenced, it will continue until resolved or the Court determines that the proceeding should not continue as a representative proceeding. The principal basis for that determination is either that the action does not satisfy the mandatory criteria or otherwise "in the interests of justice". As noted in question 1.5, the Australian system has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Representative proceedings are commenced by a single representative claimant, or sometimes several claimants. The proceedings are brought for and on behalf of group or class members. While the claimant(s) must describe the group in the originating process, there is no obligation to identify, name or even specify the number of group or class members.

There are Federal legislative provisions which allow the Australian competition regulator, the Australian Competition and Consumer Commission (ACCC), to pursue private enforcement (including by way of representative proceedings) on behalf of persons who have suffered, or are likely to suffer, loss or damage by reason of conduct which contravenes those Federal provisions.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Once a representative proceeding has commenced, notice must be given to group members advising them of their right to opt out of the proceeding before a specified date. Notice must be given as soon as practicable.

Under Part IVA, the Court has very prescriptive powers in this area. As a matter of course, Federal Court judges will settle both the precise terms of the notice(s) to be given and make specific orders as to the form and media for publication of that notice. Once proceedings have commenced, parties are otherwise not permitted to decline to "advertise" to claimants.

Notice is frequently given by way of press advertisements in national newspapers. However, it may also be given by radio or television broadcast. Publication through online and social media vehicles (i.e. through new media "apps") is becoming more commonplace as public consumption of print media declines. In appropriate cases, direct notification is regarded as sufficient.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Representative proceedings have been brought in many types of claims including those involving financial services, investment schemes, shareholder litigation, failure of infrastructure, environmental contamination, real estate investments/marketing, consumer finance, and immigration law, as well as product liability and anti-cartel proceedings.

The total number of product liability representative proceedings commenced in Australia in the last 15 years under Part IVA is in the order of 40. A continuing rise in the number of securities or shareholder representative proceedings brought in Australia reflects the trend away from claims concerning tangible consumer products towards claims concerning financial "products" or services. In part, this is attributable to the level of investment which litigation funders and plaintiffs' law firms are willing to make in non-commercial ventures.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

See question 1.2. Relief can include equitable relief and damages.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Yes. Federal legislative provisions expressly provide for the institution of proceedings by the ACCC on behalf of those who have

suffered, or are likely to suffer, loss as a result of contraventions of consumer protection and product safety provisions. Under these provisions the ACCC requires the prior written consent of the persons on whose behalf the application is being made.

The ACCC is, however, prevented from pursuing a representative action for personal injury or death under the unfair practice provisions relating to misleading and deceptive conduct.

Aside from the express power granted to the ACCC (see below), in order to bring proceedings under Part IVA as a class applicant, the representative body must have a "claim" and a "sufficient interest" on its own behalf to commence proceedings.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

The ACCC may bring a representative proceeding for breaches of the Federal anti-competitive statutory provisions on behalf of one or more persons. The ACCC can only pursue a representative proceeding on behalf of a group who have been identified and who have consented in writing to the action.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

The ACCC may commence an action on behalf of persons who have suffered, or are likely to suffer, loss or damage by conduct in breach of Federal statutory provisions.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Relief available to the ACCC is wide and includes injunctive and compensatory relief. It is not necessary for the class applicant and group members to seek the same relief, thus it is possible for the group members to claim compensation against the respondents while the ACCC makes a claim for injunctive relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Civil proceedings in Australia are generally heard by a judge sitting without a jury. However, there are provisions in the various Court rules for some matters to be heard by the jury.

As a matter of practice, juries are usually not available in matters before the Federal Court. However, juries are not uncommon in the State of Victoria.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The Federal Court of Australia utilises an individual docket system as the basis of its listing and case management. Each case commenced in the Court is allocated to a judge, who is then responsible for managing the case until final disposition.

In the State Courts, group proceedings are now commonly assigned to a docket judge (i.e. the NSW Supreme Court Class Actions List Judge) or a group of judges (i.e. the Victorian Commercial Court) for case management.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The Australian procedure has no certification procedure or requirement – that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding. Rather, once the action proceeding has been commenced, it will continue until resolved unless the defendant applies to the Court for an order terminating the proceedings as a representative proceeding.

Once proceedings have commenced, the Court must fix a date by which group members may opt out of the proceedings. A group member may opt out by providing written notice to the Court. See questions 1.4, 1.5 and 1.6. More recently, Federal and Victorian Courts have shown some willingness to fix an opt out date and to then require those claimants who do not opt out to positively signal their intention to claim through a registration process. In some cases that registration process is being ordered at the same time as the opt out cut-off date. Claimants who do not opt out but who fail to register may find their claims permanently barred.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both options are available and the actual process will depend on the case. There is no established precedent, but some representative proceedings proceed by a determination of the lead applicant's case first, in an attempt to answer common questions for all group members.

In some jurisdictions, the Court may try preliminary issues whether of fact or law or mixed fact and law.

Historically, Courts have been of the view that trials of preliminary issues should only be granted on special grounds, such as whether the preliminary issue will substantially narrow the field of controversy, shorten the trial and/or result in a significant saving in time or money.

Preliminary issues are usually heard and determined by a judge.

Where the determination of the questions common to group members will not finally determine the claims of all group members and there are questions common to the claims of only some group members, the Court may direct that those questions be determined by sub-groups. In addition, the Court can allow an individual group member to take part in the proceeding for the purpose of determining a question that relates only to the claim of that member. If the sub-group questions or the individual questions cannot be adequately dealt with, the Court can direct that further proceedings be commenced.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Yes. Representative proceedings are heavily reliant on constant judicial management.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The Federal Court of Australia may appoint a "court expert" to inquire and report on a question of fact arising in a matter before the Court or an "expert assistant" to assist the Court on any issue of fact or opinion identified by the Court (other than an issue involving a question of law) in the proceeding, should the need arise.

An expert is generally accepted to be a person who has specialised knowledge about matters relevant to the question based on that person's training, study or experience.

The role of court experts or expert assistants is advisory in nature and does not extend to sitting with the judge and assessing evidence presented by the parties.

Where the Court has appointed an expert in relation to a question arising in the proceedings, the rules provide that the Court may limit the number of other experts whose evidence may be adduced on that question, or that a party must obtain leave to adduce such evidence.

Court experts are rarely appointed, although there is increasing law reform discussion around this proposition. As a matter of course, parties adduce evidence from appropriate experts.

The nature and extent of expert evidence is subject to the discretion of the Court.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Depositions of the parties and witnesses are not taken before trial. However, the Australian legal system is more onerous in terms of the obligations imposed on parties to give discovery of documents.

In the Federal Court of Australia, pre-trial directions are made in the ordinary course that witness statements and expert reports be exchanged before hearing and that those statements and reports comprise the evidence in chief of those witnesses.

It is also common for directions to be made requiring the parties to exchange objections to their opponent's statements and reports before trial. Any objections that are not conceded or otherwise addressed are then argued, and ruled upon, before cross-examination of the witnesses at trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

The cost and time associated with documentary discovery is well recognised as a significant impediment to the rapid determination of civil litigation, especially in large group proceedings. As a consequence, Australian Courts, including the Federal Court, have significantly modified their approach to discovery. Where discovery was once available as of right, it is now subject to the leave of the Court and only where it has been demonstrated as being necessary to the determination of issues that are genuinely in dispute. Intense case management of discovery is now commonplace, with a focus on a party making reasonable efforts to give discovery and the increasing use of electronic solutions.

Where ordered, a party is obliged to discover − that is to identify and allow the other parties to access − all documents in its possession, custody or power which are relevant to a matter in issue in the proceedings. Discovery occurs at the pre-trial stage so that discoverable documents relevant to the case are disclosed by the parties before the hearing commences.

Broadly speaking, documents that are relevant to a case include those documents on which the party relies, documents that adversely affect the party's own case, documents that adversely affect another party's case, documents that support another party's case, and documents that the party is required by a relevant practice direction to disclose.

All discovered documents must be listed, and the parties' lists sworn and exchanged. Parties are entitled to inspect each other's documents and, if desired, copy them, save for those in relation to which a claim for privilege has been advanced. Much of this process now occurs via electronic protocols and will therefore also deal with document-specific metadata.

Preliminary discovery before the substantive proceedings assists parties in identifying prospective defendants, to determine whether or not they have a claim or to gain information from third parties where any party to a proceeding reasonably believes that a particular party holds a document which relates to any question in the proceeding.

The obligation to discover all relevant documents continues throughout the proceedings. This means that any document created or found after providing initial discovery must also be discovered.

3.9 How long does it normally take to get to trial?

Time to trial depends on the particular case and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined.

Proceedings in the Federal Court are usually heard faster than those in the state and territory Supreme Courts, due in part to the Federal Court's case management system whereby each proceeding is allocated to a particular judge who manages the case and usually hears and determines it, and the Supreme Courts' heavier case load.

There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

3.10 What appeal options are available?

In virtually all jurisdictions in Australia there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal.

A party dissatisfied with the decision of a state or territory Court of Appeal or the Full Federal Court may seek leave to appeal to the High Court of Australia, the country's ultimate appellate Court. Appeals to the High Court are essentially restricted to questions of law. The High Court will only grant leave to appeal if it is convinced that there is a significant question to be determined.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, time limits do exist under common law and statute.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, resulting from a profusion of specialist legislation and Court decisions, although recent tort reform has resulted in more uniformity in relation to the limitation period applicable to personal injury actions.

In general terms, limitation periods are routinely defined by reference to the nature of the cause of action, including whether the claimant alleges fault-based or strict liability. In most jurisdictions the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff ("the date of discoverability") or 12 years from the date of the alleged act or omission (the "long-stop period"); or
- three years from the date the cause of action accrued.

Limitation periods, including those applicable to personal injury claims, are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability which impedes them from properly managing their affairs.

Australian Consumer Law

A person has three years in which to commence a defective goods action including actions against manufacturers for goods with safety defects. Time commences to run from when a claimant becomes aware or could reasonably have become aware of each of the following three elements:

(a) the alleged loss or damage;

(b) the safety defect of the goods; and

(c) the identity of the person who manufactured the goods.

A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

A person who suffers loss or damage because of the conduct of another person, in contravention of a provision of Chapter 2 or 3 of the ACL may commence an action for damages at any time within six years after the day on which the cause of action that relates to the conduct accrued. In addition, an affected person may commence an action for damages against manufacturers of goods for a breach of certain consumer guarantees within three years after the day on which the affected person first became aware, or ought reasonably to become aware, that the guarantee to which the action relates has not been complied with.

Representative proceedings

Upon the commencement of representative proceedings under Part IVA, the running of any limitation period is suspended and does not begin to run again until either the group member opts out of the proceedings or the proceedings are finally determined.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Most Australian jurisdictions provide for the postponement of the commencement of the limitation period where the plaintiff's right of action or the identity of the person against whom a cause of action lies is fraudulently concealed. The limitation period is deemed to have commenced from the time the fraud was discovered or the time that a plaintiff exercising reasonable diligence would have discovered it. Throughout all Australian jurisdictions the Courts have various discretionary bases for extending the time period where it is just and reasonable.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The following damages are available at common law for claims of bodily injury:

- general damages, including pain and suffering, loss of amenities and loss of expectation of life; and
- special damages, including loss of wages, medical and hospital expenses and the like.

Tort reforms have resulted in caps, thresholds and other limitations being placed on the amount of such damages that can be recovered.

Damages are assessed on a "once and for all" basis.

Damages are also recoverable for mental damage provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for "pure economic loss" but the nature and extent of such damages is extremely complex.

Under Part 3-5 of the ACL, damages are recoverable for losses suffered as a result of personal injuries, including medical expenses (subject to similar caps, thresholds and other limitations imposed on common law damages following the tort reforms). A person other than an injured party may also claim compensation where that person suffers loss as a result of the other person's injury or death, for losses relating to personal, domestic or household goods other than the defective goods, and losses relating to private land, buildings and fixtures.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

As a general rule, damages for the costs of medical monitoring in the absence of any established injury or loss are not recoverable.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Exemplary, punitive or aggravated damages can be awarded by the Courts, although not in relation to claims brought under the ACL and, in some jurisdictions (as a result of the tort reforms) not in negligence actions seeking damages for personal injury.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Generally, no. However, tort reform has resulted in caps, thresholds and other limitations being placed on the amount of damages a personal injury claimant can recover.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are quantified on a compensatory basis depending upon the nature of the claim. For example, whether for breach of contract or as a result of tortious conduct.

When the Federal Court makes an award of damages to group members in representative proceedings, it is required to make provision for the payment or distribution of the money to the group members who are entitled to receive it. The Court may give such directions as it considers just in relation to the manner in which an individual is to establish an entitlement to a share of the damages, and the manner in which any dispute regarding the entitlement of the individual is to be determined.

5.6 Do special rules apply to the settlement of claims/ proceedings e.g. is court approval required?

Representative proceedings may not be settled or discontinued without the approval of the Court. The approval process means that the settlement is therefore neither private nor confidential. In fact, group members will usually be notified of the proposed settlement by Court ordered and settled notices.

In approving a settlement and determining whether it is a fair and reasonable outcome of the litigation for all group members, the Court must form a view as to whether to approve a settlement on the material presented and the advice provided by counsel as to the prospects of success and risk of loss considered to apply in the particular case. It must take an active role, as the approval of the Court is a protective mechanism safeguarding the interests and rights of group members. The Court will scrutinise whether any settlement or discontinuance of representative proceedings has been undertaken in the interests of the group members as a whole and is not solely beneficial to the class applicant and respondent. The Court may well reject a privately negotiated settlement if it is not satisfied that the outcome is in the interests of group members as a whole.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The "loser pays" rule applies in representative proceedings – the unsuccessful party is usually ordered to pay the costs of the successful party. These costs include not only Court filing fees, copying charges and other out-of-pocket expenses, but also lawyers' professional fees. In this context, a reference to costs is not a reference to the total or actual costs incurred by the successful party. Recoverable costs are generally calculated by reference to a Court scale, which invariably limits the amounts a successful party can claim for disbursements and services performed by their lawyers.

However, in representative proceedings, Part IVA restricts a costs order being made against class members other than those who actually commenced the proceedings. Where the representative action is successful, a costs order may be made in favour of the class members who commenced the representative proceedings in an amount determined by the Court.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In a representative proceeding, only the lead applicant(s) is liable to pay costs and is entitled to recover costs. In addition, if the Court has made an award of damages in a representative proceeding, the lead applicant may apply to the Court for reimbursement of costs that exceed the amount recoverable from the other party. If the Court is satisfied these additional costs have been reasonably incurred, it may order the excess paid out of the damages awarded.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Costs are not to be awarded directly against a group member. However, a lead applicant may be liable to pay costs if a claim is discontinued.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Costs are either agreed or assessed. This will usually occur at the end of the proceedings.

See questions 6.1 and 6.2.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, public funding is available.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid services rigorously apply means and merits tests to determine eligibility for aid. As a general rule, very limited funding is available to assist claimants to bring civil actions, including product liability claims. Funding is available at the Federal level for, *inter alia*, consumer protection matters, arising under a Federal statute.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Recently, rules prohibiting lawyers from entering into contingency fee arrangements were relaxed and a variety of arrangements are now sanctioned. These new arrangements allow lawyer and client to enter into an agreement which provides for the normal fee, or a fee calculated by reference to some pre-determined criteria such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an "uplift fee", where an additional fee may be levied, calculable by reference to

the initial fees. All jurisdictions continue to prohibit contingency fee arrangements where lawyers' fees are calculated by reference to a percentage of a client's verdict.

In recent Federal Court cases, the Court has seemingly willingly embraced the concept of a "common fund" approach whereby a funder may at the outset of the case obtain an order that will, if the claim is successful, entitle them to recover a pecuniary return (or risk reward) from each group member out of the amount awarded or recovered – regardless of whether that group member entered into an agreement with the litigation funder. The Court has signalled an intention to closely supervise what that return amounts to in a given case and that such a decision will likely be reserved until the case is determined or, more likely, settled.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding of claims is permitted in Australia, subject to the rules set out in question 7.3 above.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

See question 2.1.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

No. A litigation funder may fund an action as discussed above, but they cannot bring the action. See question 2.1.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The Court may, by order, refer the proceedings to a mediator or an arbitrator. Arbitration is very rare in representative proceedings.

8.5 Are statutory compensation schemes available e.g. for small claims?

Yes. Statutory compensation schemes are available in respect of workplace accidents and motor vehicle accidents.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Any agreement recorded by the parties at mediation is subject to Court approval. In addition, the Federal Court of Australia may make an order in the terms of an award made in arbitration.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

In Australia, matters of substantive law are governed by *lex loci delicti* and matters of procedure are governed by the *lex fori*. The usual rules of *forum non conveniens* apply with respect to individual claimants.

Australian Courts are yet to address how conflicts of law issues can be efficiently addressed in a representative proceeding. It is a difficult issue to determine in a representative proceeding comprising unnamed and, very often, unknown group members.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The Federal Court has now completed the process of reforming its management of cases through the implementation of a national court framework. These reforms involved placing matters on the dockets of federal judges using a national rather than regional approach in accordance with their individual levels of experience and specialisation. In this model, a revised practice note for the management of representative proceedings (class actions) was issued. The two key areas of procedural reform involved more extensive disclosure requirements in litigation funded class actions and the foreshadowed use of a two-judge management model for the larger and more complex claims. This latter measure has been tried once with no appreciable benefit to the particular case. In part, it is because the two Judges are, generally, peers, but it is the Trial Judge that actually has to run the case if it is to be heard. Federal Judges are, by nature, individualised and particular about the matters they are expected to hear. At first instance, there appears to really only be room for one judicial captain.

The now perennial debate in the context of Australian class actions remains whether the federal or state governments, acting alone or through the Council of Attorneys General, will move to regulate litigation funders or those providing litigation funding services given their rising importance in and promotion of financial loss class actions. The mature players in the field are keen advocates for regulation. The more entrepreneurial players and a number of ambitious law firms are far less enthusiastic. While there is a lively debate whether regulation will have any appreciable impact on the ambitions of the active class actions market players, there remains little doubt that the Courts continue to be asked to adjudicate issues about funding. These issues are not at the heart of the controversies that brought the matters to the particular Courts, but the management of competing interests in the potential financial outcome appears set to continue to absorb a reasonable amount of judicial thinking.

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Andrew's experience in all forms of grouped proceedings reflects the development of modern Australian class actions practice and the breadth of the firm's experience. Since 1992 he has been involved in and led the defence of the major mass product liability claims including involving intra-uterine contraceptives, breast implants, diet pills, anti-acne medication, non-steroidal anti-inflammatory drugs and pelvic mesh. As product-related class actions have evolved into financial loss class actions, Andrew's work has included cases regarded as amongst the first of their kind in this country.

Andrew has twice served as President of Australia's National Product Liability Association. He is an active member of the Defense Research Institute. He is also a member of the International Association of Defense Counsel and the Australian Insurance Law Association.

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Belgium

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1 Introduction

In 2014, Belgium introduced the possibility of launching class actions or group actions through the adoption of the Belgian Act on Claims for Collective Redress of 28 March 2014 (the "Act"). Although the Act is rather limited in scope and does not provide for a general class action open to every single market player and individual as is the case in the US legal system, its adoption meant the introduction for the first time in Belgian law of an Anglo-American-style class action procedure. By doing so, Belgium followed the footsteps of other European countries that had already taken measures to introduce class action procedures in their internal legal system. The European Commission stimulated these introductions by issuing a recommendation to Member States in 2013 which adopted legal mechanisms concerning compensatory means of collective redress.

The Belgian legislator's main goal was to provide a legal basis for claims for collective redress of damages inflicted by an undertaking upon a group of consumers. The legislator's concern originates from the fact that, in practice, several hurdles exist for an individual claim of a consumer, such as, *inter alia*, lack of knowledge about rights and remedies, as well as the costs associated with legal proceedings. The Act, which was published as Chapter II of Book XVII of the Belgian Code of Economic Law, introduced a procedure allowing a (potentially large) group of consumers to obtain compensation for damages caused by an undertaking, without requiring these individual consumers to be involved as parties in the proceedings. Hence, the former requirement to individually identify each plaintiff no longer applies.

This contribution first broadly discusses the main features of the Act (section 2). It then outlines the way in which class action proceedings under this Act are conducted (section 3) and concludes with an assessment and evaluation of this type of procedure under Belgian law (section 4).

2 The Main Features of the Act

The main features of the class action procedure under the Act can be summarised as follows.

2.1 Limited scope of application

The scope of application of the Act is limited in several respects.

First, only consumer rights are protected. Indeed, the class action can only be instituted by consumers, i.e. natural persons who are acting for purposes that are not related to their trade activities, business, craft or profession. Other possible claimants, such as undertakings, shareholders or employees, are thus prevented from filing and/or participating in a class action against, respectively, another undertaking, the directors of the company or their employer. It is, however, noteworthy to mention that at the time of writing of the present article, a preliminary draft bill was circulating in which the access to collective actions is extended to small and medium-sized enterprises (SMEs).

Second, the class action can only be initiated against undertakings. It is thus not possible to file a class action against other consumers or public authorities.

In other words, only consumer-to-business (C2B) class actions are possible under the present Act; business-to-business (B2B) or consumers/businesses against public authorities (C2G and B2G) are thus excluded.

Many consider this limitation to be a missed opportunity as it seriously decreases the impact of the present Act.

Third, the claim for collective redress will only be admissible if the damage suffered by the consumers were to be the result of a breach by the undertaking of either (i) its contractual obligations, or (ii) the provisions of one of the national or European laws and regulations that are exhaustively listed in the Act.

This list includes laws and regulations on, among others, the protection of competition, market practices and consumer protection, price evolution, payment and credit services, intellectual property, liability for defective products, data protection, electronic communications, the sale of financial products, pharmaceuticals regulation, etc.

All other claims by consumers against an undertaking fall outside the scope of application of the Act; this includes claims based on extra contractual grounds for breach of the general duty of good care or of legal provisions that do not appear in the exhaustive list of legislations.

It is, however, noteworthy to stress that the Act does not change the basic rules governing liability claims under Belgian law. Indeed, for the class action claim to be successful, the group will still need to prove that the defendant undertaking committed a fault as a result of which the group suffered damage.

The damage suffered by the consumers need not, however, be identical. It is sufficient, but necessary, that it originates from a common cause (e.g. the same deficient product).

2.2 Composition of the group: two systems are possible

Depending on the circumstances of each case, the group of consumers (the "class") will be constituted either by consumers "opting in" (*i.e.* the relevant consumers must formally and actively join the group) or consumers "opting out" (*i.e.* all consumers falling

within the definition of the group form part of the group, unless they formally request to be excluded from the group).

The legislator left it up to the court to decide, on a case-by-case basis, which system is to be applied in a given case. However, in specific cases, an opt-out is not available, namely where compensation for physical or moral collective damages is sought or when consumers are involved who are not habitually resident in Belgium.

It is expected that most of the cases will be dealt with under the "opting out" system as this system best fits the vast majority of C2B cases, *i.e.* cases relating to a large number of people suffering small amounts of damage.

Consumers that do not form part of the group can of course still pursue their rights by filing an individual claim in separate proceedings.

2.3 Crucial role for the group representative

The class action is led on behalf of the group of consumers by one authorised group representative. That representative acts on behalf of the group of consumers, without there being a need for any formal or individual mandate being given by such consumers.

The group representative plays a key role in the proceedings. He is the driving force in the pursuit of the class action claim. That is also why the legislator restricted the possibility to act as group representative to one of the following three entities:

- an association for the protection of consumer interests that has legal personality and either holds a seat in the Council for Consumer Affairs or has been recognised by the Minister for Consumer Affairs;
- an association having legal personality for at least three years and which has been recognised by the Minister for Consumer Affairs. The statutory purpose of that association must be directly related to the collective harm suffered by the group and may not include long-term commercial activities; or
- the Consumer Ombudsman, though only when negotiating a settlement agreement.

The requirement that the association needs to be recognised by the Minister for Consumer Affairs for it to be able to act as group representative meant that, in practice, only Test-Aankoop/Test-Achat, the well-known Belgian consumer organisation, could act as a representative in class actions. The European Services Directive, however, stipulates that a Member State cannot restrict the provision of services by obliging a provider to obtain prior authorisation from a public body. In a judgment of 17 March 2016, the Constitutional Court, therefore, partly annulled the Act for being discriminatory *vis-à-vis* other European consumer organisations and confirmed that the latter are permitted to act as a group representative without prior authorisation. This significantly increases the chance of class actions being launched in Belgium.

Associations that do not have legal personality, such as trade unions, can thus not act as group representative. The same goes for *ad hoc* associations, *i.e.* associations that are specifically established to bring a class action in the aftermath of an event that caused collective damage. Lawyers, bodies specialised in representing minority shareholders, or other commercial players, are not able to act as group representative either. Lawyers do, of course, still play their usual role in the court proceedings, but they are not a party to the proceedings, as opposed to what is often the case in US class action proceedings.

The group representative can only be compensated for his own costs incurred and is thus prevented from making a profit based on the compensation awarded to the group of consumers. A settlement agreement in which the group representative is rewarded compensation that exceeds his own costs will thus not be ratified. In doing so, the Belgian legislator attempted to avoid what is traditionally seen as a pitfall of US class actions.

2.4 Claim can only be aimed at compensation

The class action can only be aimed at compensation for collective damage, either in kind or in money.

Hence, the Act does not allow claims for injunctive relief or punitive damages.

2.5 Only for claims arising after the entry into force of the Act

The class action can only be instituted if the common cause of the collective damage arose *after* the entry into force of the Act.

The Act entered into force on 1 September 2014. Therefore, the Act only applies to collective damage caused *after* 1 September 2014.

2.6 Exclusive jurisdiction of the Brussels courts

Finally, the legislator opted to centralise all class action proceedings.

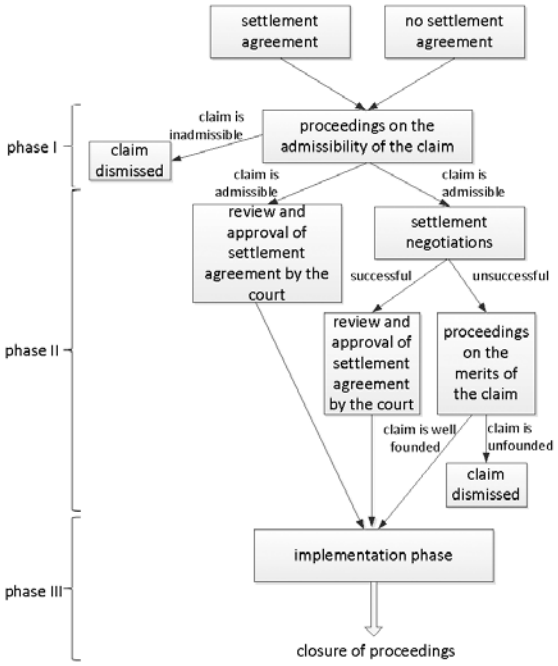
The Brussels Court of First Instance or (if the group representative so chooses) the Brussels Commercial Court has exclusive jurisdiction to hear and rule on the class actions proceedings. Appeal against the decision of either court must be brought before the Brussels Court of Appeal.

By doing so, the legislator aimed to avoid forum shopping and, at the same time, tried to create expertise and consolidated case law within the Brussels courts.

3 The Proceedings

The class action procedure may, if admissible, lead either to the approval by the court of the settlement agreement reached by the parties or to a ruling on the merits. The procedure consists of three phases: (1) the admissibility phase; (2) the settlement approval or the decision on the merits; and (3) the implementation phase.

The course and interplay of these subsequent phases can be schematically summarised as follows:



3.1 Phase 1: admissibility phase

3.1.1 Admissibility criteria

During this first phase, the court will determine whether the admissibility criteria as provided for by the Act have been met. These criteria are threefold:

- First, the court will examine whether the claim is based on a breach by the undertaking of either (i) its contractual obligations, or (ii) the provisions of one of the exhaustively listed national and European laws and regulations.
- Second, the court will assess whether the claim is filed by a group representative qualified to act in such capacity and whether that group representative is suitable to act, which calls for an assessment *in concreto*. The Act does not, however, provide clear guidance or parameters that the court could or should take into account when conducting this suitability test. Aspects that the court could consider in this regard are, for instance, the representative's familiarity and experience with the product sector and/or class action procedure, the adequate and sound financing of the group representative, his ability to manage proceedings on behalf of a large group of consumers, etc.
- Finally, the court will examine whether the class action is more efficient than the initiation of individual procedures. Indeed, it might be that the class action is not the preferred route to seek compensation for the damage suffered, e.g. if the (potential) group of consumers is very small or if the collective damage suffered is of a specific and different nature for each consumer individually.

3.1.2 Two-track approach

Two different types of proceedings are available within the admissibility phase. Which type should be pursued depends on whether the parties have reached a settlement of the claim.

In the first scenario, the parties have already reached a settlement of the claim before the start of the proceedings. Parties can then ask the court to ratify their settlement agreement. If the court finds that the admissibility criteria are met, it will ratify the settlement agreement and immediately appoint an execution administrator in charge of the claim settlement (see *infra*, section 3.3). If the court deems certain terms of the agreement unreasonable or incomplete, it can have the parties modify their agreement before its final approval.

The court's decision confirming the settlement is published in the Belgian State Gazette and on the website of the Federal Public Service for Economy, SMEs, Self-Employed, and Energy. The period to opt-in or opt-out starts to run from the day after the decision is published.

If the parties cannot reach an agreement prior to the commencement of the proceedings, the group representative can seize the court by filing a petition and the court will then examine the admissibility of the claim. If the court finds the claim to be admissible, it will render a judgment in this regard and set the formal framework of the class action, including the description of the damage to be compensated, the asserted cause of the collective damage, the choice between opt-in and opt-out, the deadline to exercise such option, the description of the group of consumers (possibly with subcategories) including an estimate of the number of consumers involved, and possible additional measures for publication of the judgment in case the court would deem the standard publication in the Belgian State Gazette and on the website of the Federal Public Service for Economy, SMEs, Self-Employed, and Energy insufficient (e.g. publication in newspaper).

The court must also decide on the period within which consumers can declare whether they wish to opt-in or opt-out. This period starts to run from the publication of the judgment in the Belgian State Gazette and can vary between 30 days and three months.

The Act provides that the court must render a decision on the admissibility of the claim within two months after the filing of the petition, but does not provide for any sanction if this deadline were not to be met (which will be the case more often than not).

The judgment on the admissibility of the claim can be appealed in accordance with the common rules of Belgian procedural law. In case the court finds the claim inadmissible, the decision whether or not to appeal relies exclusively with the group representative, without there being an obligation incumbent on the latter to consult with the members of the group.

3.2 Phase 2: the settlement approval or the decision on the merits

After the expiry of the period within which the consumers have to declare whether they wish to opt-in or opt-out, the group representative and the undertaking are obliged to enter into amicable negotiations. The period within which parties should conduct these negotiations is set by the court and can vary between three and six months, only extendable once at the request of both parties and with a maximum of another six months. If the parties agree, the court can appoint a recognised mediator to assist with the negotiations.

The legislator thus clearly wishes to encourage amicable settlements, both before and during the proceedings.

If the parties reach an agreement during this so-called "cooling-off period", they should present it to the court for ratification and, once ratified, the court will appoint an execution administrator in charge of the claim settlement (see *infra*, section 3.3). The ratification of the agreement makes it binding for all members of the group.

In the event that the parties do not reach such an agreement, the procedure will continue on the merits in accordance with the common rules of Belgian procedural law and will entail a debate on issues such as the prescription period, the misconduct, the damage, the causal relationship between the latter two, the amount claimed, etc. The parties can, however, still conclude a settlement agreement up until the point at which the court renders a final decision on the merits.

If the undertaking is found liable, the judgment will include, *inter alia*, a description of the collective damage and group of consumers, the modalities and conditions of the redress and the amount of the damages. In case the court awards monetary compensation, it can impose either an overall amount of compensation for the whole group or a fixed or variable amount per individual consumer. The modalities of the redress can also differ for each subcategory of consumers.

Just as for the judgment on the admissibility, the judgment on the merits is published in the Belgian State Gazette and on the website of the Federal Public Service for Economy, SMEs, Self-Employed, and Energy. The judgment is subject to appeal in accordance with the common rules of Belgian procedural law, and the group representative can decide to institute an appeal without there being an obligation incumbent on the latter to consult with the members of the group.

The judgment on the merits is binding on all members of the group, *i.e.* all persons that have either opted in or not opted out depending on which system was declared applicable in the judgment on the admissibility of the claim, unless the individual consumer proves that he or she had or could have had no knowledge of the admissibility judgment.

3.3 Phase 3: the implementation phase

If the court ratifies the settlement agreement or, alternatively, finds the claim to be well-founded, it will appoint a so-called execution administrator. The execution administrator has the task to implement and ensure the proper performance of either the ratified settlement agreement or the court decision on the merits. The primary responsibility of the execution administrator will be to allocate the right sum of damages to each member of the group.

The execution administrator is chosen from a list of persons drawn up by the competent courts of Brussels. Only lawyers, ministerial officials or judicial representatives are eligible to be placed on such list and must prove that they possess the necessary competencies in claim settlement.

The execution administrator must establish within "a reasonable time" a preliminary list of the consumers composing the group, based on the applicable option mechanism. This list includes all individuals that wish to obtain compensation and have informed the court thereof. The execution administrator can also refuse to include a particular consumer on the list in case that consumer does not meet the description of the (sub)category of consumers or the required modalities. The group representative and the undertaking can also object to the inclusion or exclusion of particular consumers on this list. After the court has heard all parties concerned, it will draw up the final list of consumers that are entitled to redress and communicate this list to the parties concerned. If a particular consumer is not included in the list, he or she might still launch an individual claim against the undertaking.

The execution administrator must monitor the actual compensation of the consumers concerned, awarded by the undertaking. In case of redress by means of monetary compensation, the undertaking must pay the ordered amount directly to the execution administrator, the latter then being in charge of the payment to the individual consumers.

The execution administrator must report on his activities to the court on a three-monthly basis.

After the settlement agreement or the judgment on the merits has been fully executed, the execution administrator must draw up a final report and communicate this to the court, the group representative and the undertaking. This report must contain all information necessary to enable the court to decide on the closure of the proceedings, including whether every group member has been properly compensated, the destination of any remaining balance of the paid compensation, and an overview of the total costs and fees of the execution administrator (which are to be borne by the defendant undertaking).

After verification of the final report of the execution administrator, the court will declare the proceedings closed.

4 Closing Remarks

The introduction of class action proceedings into the Belgian legal system has a considerable impact on the Belgian procedural model.

The intention of the legislator, aimed at facilitating claims for infringements of consumer rights through class action proceedings while at the same time avoiding the excesses to which such proceedings have led in the United States, is undoubtedly laudable. However, given the dimensions of the reform, some reservations are in order.

One of the main deficiencies of the Act is the total lack of provisions regarding the financing of the class action. Indeed, the Act is completely silent on the question of who will finance the group representative. This is, however, a crucial question as the latter will need to pay the costs of the proceedings, the lawyers' fees and the costs of publication in case of default by the defendant undertaking. The group representative also bears the procedural indemnity of the defendant undertaking in case the claim turns out to be unsuccessful. It is unlikely that the members of the group will be ready to make advance payments in this regard. It also remains to be seen whether third-party funders will be inclined to pre-finance the proceedings in exchange for a share of the proceeds of a successful claim. They might be reluctant to do so given that they have no direct say on the procedural strategy: e.g. the decision to appeal a judgment declaring the claim inadmissible or unfounded only lies with the group representative. It can, however, be expected that they will exercise a decisive influence behind the scenes.

Furthermore, the Act is limited in scope and the procedure is very complex, time-consuming and costly. This might partly be explained by the difficulty of introducing an Anglo-American type of procedure into a civil law system.

So far, only a few cases have been launched on the basis of the Act after its entry into force on 1 September 2014, each of which initiated by the Belgian consumer organisation Test-Aankoop/Test-Achat.

In May 2015, Test-Aankoop initiated a case against the Belgian national railway company NMBS. This class action, to which about 44,000 consumers signed up, is aimed at obtaining compensation for the alleged damage caused to train passengers as a result of strikes by NMBS personnel in the period between the Act's entry into force on 1 September 2014 and May 2015. It is further claimed that the compensation mechanism for cancelled and delayed trains is too complex and that the NMBS failed to properly compensate passengers affected by the strikes. Eventually, the class action was dropped in 2017, after NMBS had compensated a large majority of the group and had made its compensation mechanism more consumer-friendly.

Also in 2015, Test-Aankoop introduced a class action against Thomas Cook Airlines, aimed at obtaining compensation for the alleged unreasonable delay that passengers had suffered on a flight from Tenerife to Brussels in March 2015. Yet again, the initiation of the claim incited Thomas Cook to compensate the affected passengers on its own initiative.

Another group action was instituted in 2016 against nine internet sites specialised in the resale of concert tickets and in which Test-Aankoop claimed a compensation equal to the difference in price between the official concert ticket prices and the prices charged by the internet site.

Test-Aankoop also started class actions against Volkswagen in the wake of the diesel gate saga, against the e-commerce website Groupon for the reimbursement of diapers, and against telecommunication company Proximus in a case on outdated TV decoders.

The above class actions are interesting in many respects, not in the least in measuring the impact and success of the Act as an instrument for dealing with these types of cases.

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Canada

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Canada is divided into 10 provinces and three territories, each of which has authority over its own civil litigation procedure. Twelve of these jurisdictions are governed by common law and Quebec is a civil law jurisdiction. In the nine common law provinces where class action legislation exists, it is generally similar, with minor variations. The test for certification generally requires that: 1) the claim asserts a sustainable cause of action; 2) there be an identifiable class of two or more persons; 3) the claims of class members raise common issues; 4) a class proceeding would be the preferable procedure for the resolution of the proposed common issues; and 5) there be a representative plaintiff who would fairly and adequately represent the interests of the class, has a workable litigation plan, and has no conflicts with other class members.

In Quebec, the test for authorisation requires that: 1) the claims of the class members raise identical, similar or related issues of law or fact; 2) the facts alleged appear to justify the conclusions sought; 3) it would be difficult for the class members to have joined in the same suit or conferred a mandate to a representative to act on their behalf; and 4) the representative plaintiff be in a position to adequately represent the class.

If a class is certified or authorised, the proceedings will generally continue through documentary and oral discoveries followed by a trial of the common issues and then trials of any remaining individual issues if the representative plaintiff was successful in the common issues trial.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Class action legislation applies to all types of civil claims irrespective of their substantive nature.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

When a Court certifies or authorises a class action, the common issues in question are determinable on a class-wide basis. The determination of the common issues is binding on all members of the class.

1.4 Is the procedure 'opt-in' or 'opt-out'?

In Ontario, Manitoba, Saskatchewan, Quebec, Alberta and Nova Scotia, as well as at the Federal Court, class action decisions are binding on class members, unless they opt out of the class. In British Columbia, Newfoundland and New Brunswick, the same applies to residents of those provinces; however, non-residents must opt in to a class proceeding in order for the class action decision to be binding on them.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

In order to be managed under the class action procedure, there must be an identifiable class of two or more persons. In reality, a larger number of claimants is typically required; otherwise, the Court is unlikely to consider an action to be suitable for class treatment.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

A showing that there are at least some common issues of law or fact is required. While there is no single definition of the term "commonality", the Supreme Court has noted that the characteristics of a common issue include that it is a "substantial ingredient" of each class member's claim and that the answer to the question raised by a common issue must be capable of extrapolation to each member of the class.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

In all jurisdictions, both individuals and corporations may initiate class actions. In Quebec, representative bodies, including partnerships, associations and unions that represent a certain group but lack corporate status, may also be entitled to initiate class actions.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Notice to class members must be given upon the certification or authorisation of a class action by the Court. While there are no mandated restrictions, the Court must approve the content of the notice as well as when and by what means it must be given.

Notice is generally provided in newspapers or by mail and, increasingly, by various electronic means. The method of distribution largely depends on the nature of the class and whether direct notice is practicable.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

The Canadian Bar Association maintains a database which aims to track all class actions initiated across Canada. While likely understating the total number given that posting to the database is not mandatory, according to the database, at least 681 class actions have been initiated in Canada since the beginning of 2010.

Class actions have been brought in a wide range of substantive legal areas, including consumer claims, pensions, price fixing, human rights, product liability, securities, environmental and employment law.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

Claimants are not restricted by class action legislation in terms of the types of remedies they can be awarded, and may seek both monetary compensation as well as injunctive and declaratory relief.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Quebec expressly authorises representative groups to institute class proceedings if one of the representative body's members is a member of the class on behalf of which the organisation intends to bring a class action and the interest of the members is linked to the objects for which the organisation has been constituted.

Unlike a representative plaintiff, a representative body is not a formal member of the class with respect to which it institutes a proceeding.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

There is no requirement that a representative body be approved by any public body other than the Court. The Court must be satisfied that the interests of the members would be represented fairly and adequately and that there are no conflicts between the representative body and the class members with respect to the common issues.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Representative bodies may bring the full range of actions available to representative plaintiffs.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Representative bodies may seek the full range of remedies available to representative plaintiffs.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

With the exception of Quebec, class actions can be decided by a judge or a jury. Quebec does not allow jury trials in civil matters. Due to the general complexity of common issues trials, the length of the proceedings and the voluminous amount of records involved, class proceedings are often determined by a judge alone.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Class action legislation requires that a case management judge be appointed prior to the motion for certification or authorisation, who will generally hear all procedural and preliminary motions associated with the matter. Presently, Ontario and Quebec have rosters of judges who specialise in class proceedings.

In Ontario, Alberta and Manitoba, case management judges can only serve as the trial judge if the parties consent. By contrast, in Quebec, the case management judge must preside over the trial of common issues. In all of the remaining provinces, the case management judge may, but need not, preside over the trial of common issues.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The proposed class must have a rational connection with the common issues, and be defined on the basis of objective criteria in such a way that it would identify who is and is not a member of the class.

The class definition may be temporally circumscribed based on the nature of the claims. The court will also typically establish a date by which claimants who meet the class definition must opt-in or opt-out of the class proceeding.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

At the certification or authorisation stage, the common issues for trial are identified. These issues, which may be either factual or legal, are generally heard first, following which any remaining individual issues are determined in separate subsequent trials.

Parties have discretion to fashion a variety of motions – such as motions for summary judgment – at the pre-trial stage to streamline the determination of common issues at trial. Such motions differ from individual test or model cases, which are not typically used in Canada.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Canada is in the process of developing additional case management procedures to address the complexities arising out of multi-jurisdictional proceedings and to encourage inter-provincial cooperation in parallel or overlapping class proceedings.

In 2011, the Canadian Bar Association published and approved The Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions, which recommends that each provincial statute allow the Courts to make orders for the fair and expeditious conduct of an action. Multijurisdictional case management orders have been issued by Courts across the country to adopt the Protocol, which provides for the notification of counsel, and the approval and administration of settlements through multijurisdictional class settlement approval orders.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The Courts have the authority to appoint an expert, but usually, expert evidence is provided by the parties. Expert evidence is admissible if it is relevant and necessary to enable the trier of fact to understand the matters in issue, and the evidence comes from a properly qualified expert. To be properly qualified, the expert must be able to provide impartial, independent and unbiased advice. If an expert is not considered by a court to be impartial or independent, a Court is entitled to place less weight on their evidence or hold it to be inadmissible.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Fact witnesses are subject to documentary production as well as examinations for discovery (pre-trial depositions). However, expert witnesses are not normally subject to pre-trial depositions. Prior to trial, the parties will exchange witness statements and expert reports in accordance with the jurisdiction's Rules of Court.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In Canada, the post-certification and pre-trial disclosure of evidence – called "discoveries" – has both a documentary and an oral component.

Documentary productions require each party to list and disclose all non-privileged documents (including both electronic and paper documents) relevant to the identified common issues in the action that are or have been in their power, possession and control prior to the common issues trial. Documents relevant to any remaining individual issues must be produced at the individual issues stage.

During oral discovery, each party will have the opportunity to ask questions of the opposing side (or a representative thereof, in the case of a corporation or similar organisation) under oath or affirmation. If a person providing answers does not know the answer to a proper question given on discovery, they must undertake to make inquiries and to provide a follow-up response via written communication or through a follow-up examination.

3.9 How long does it normally take to get to trial?

Class actions generally do not proceed to trial for several years. The case management procedure, certification or authorisation application, strategic considerations along with interlocutory applications and appeals are all factors which contribute to the typical timeline.

3.10 What appeal options are available?

Generally speaking, any decision by a Court can be appealed by the parties, including certification or authorisation orders, judgments on common issues and costs awards. However, not all provinces grant a right of appeal without leave of the Court.

With respect to the common issues trial, any party has a right to appeal the judgment. The plaintiff's rights of appeal must be exercised by the representative plaintiff. If the representative plaintiff is unwilling or unable to appeal the order, another class member can seek leave of the Court to replace the representative plaintiff.

Any follow-on individual trials may be appealed by the individual plaintiff.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

All claims are subject to limitation periods. The length of the applicable limitation period can vary depending on the subject matter of the claim, the jurisdiction and particulars of the case.

Once a proposed class proceeding has been commenced, the limitation period applicable to the claim is tolled (except for Federal Court claims) for the benefit of all proposed class members. The limitation period may resume depending on the occurrence of particular events, including dismissal of the proceedings, partial certification or decertification.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Rules with respect to limitation periods differ amongst Canadian provinces and territories. Most limitations legislation provides for a "general" limitation period as well as an "ultimate" limitation period. The former period, which is two years in Ontario, runs when the claim is first "discovered" by the claimant (a number of factors are taken into account in the Court's discoverability analysis). The latter period, which is 15 years in Ontario, begins to run on the date the act or omission in question took place.

The age or condition of the claimant can affect the operation of the limitation period.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Fraud and concealment may delay the running of limitation periods under provincial legislation. A claimant may be able to show that they could not reasonably have been aware of the facts underlying their claim if someone else's fraud or concealment prevented such awareness. Certain provincial statutes also provide for the tolling of ultimate limitations periods in the event that the defendant wilfully conceals from the claimant the facts underlying their claim or misleads the claimant regarding the appropriateness of a proceeding as a means of remedying their loss.

Fraudulent concealment is also a recognised common law doctrine which may delay a limitation period when a defendant is in a "special relationship" with a plaintiff and unconscionably conceals the claimant's cause of action.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

In Canada, tort damages may be recoverable with respect to all of these categories depending on the underlying claim. Damages for bodily injury can be recoverable (although the amount awarded for any pain and suffering component is capped) as can damage to property.

While pure economic loss damages are not generally recoverable, the Supreme Court of Canada has expressly recognised five exceptional categories of circumstances where such damages may be recoverable (negligent misrepresentation; relational loss; the negligent supply of shoddy goods or structures; negligence performance of a service; and liability of statutory public authorities) and has left the door open for the establishment of new categories.

The availability of recovery for pure economic loss involving shoddy, but not dangerous goods, is somewhat unsettled although there is a growing body of case law limiting such recovery.

Damages for mental injury may also be recoverable provided that the claimant satisfies all of the negligence criteria, including that the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct and proves that their injury is serious and prolonged and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring claims have been certified for class treatment but there have been no reported decisions where a Court has determined the availability of damages as a matter of substantive entitlement.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages may be awarded by a Court in rare cases where the conduct of the defendant is so egregious as to "shock the conscience" of the Court. Such damages are typically awarded in small amounts and, in the case of individual plaintiffs, rarely exceed $100,000, with a handful of significant outliers.

One Quebec Trial Court recently awarded $1.31 billion in punitive damages to a class of just over 1 million people. This decision represents a marked departure from precedent and is currently under appeal.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no limit on damages recoverable from one defendant based on the circumstance that a series of claims arise from one product or incident.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Courts have discretion to quantify damages on both an individual and aggregate basis and may employ their broad case-management powers to craft an appropriate methodology in the circumstances of the class proceeding. While in most cases, damages are individually assessed, the facts of some cases may lend themselves to an aggregate award. Even in those cases, however, the aggregate amount may be subject to varying assessments for individual class members, depending on the facts at hand.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Yes. Court approval is required with respect to all settlements of class proceedings.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Court rules differ amongst provincial jurisdictions. Ontario, Alberta, New Brunswick, Saskatchewan, Nova Scotia and Quebec follow a "loser pays" model, whereby the losing party is typically required

to pay a portion of the other party's legal fees. The "loser pays" model applies to class actions, and the representative plaintiff is typically responsible for the defendant's costs and disbursements in the event the class action is unsuccessful, while non-representative class members are only liable for costs relating to their individual claims. In Ontario, Courts may use their discretion to depart from this rule in the event that a class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

In contrast, British Columbia, Manitoba and Newfoundland, as well as the Federal Court, employ a "no costs" rule whereby no party may be awarded costs unless a Court grants a special order. Nevertheless, Courts may award costs in the event that a party: has acted in a frivolous, vexatious or abusive manner; unnecessarily delayed proceedings or increased costs; or if there are exceptional circumstances that would result in injustice if costs were not awarded.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In class-wide claims, only the representative plaintiff is affected by adverse costs awards. However, after the common issues trial, claimants may be responsible for cost consequences with respect to a Court's determination of their individual issues if they choose to pursue an individual claim.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Class members do not have the option of discontinuing their claim after the opt-out period has expired in a class action. Class members retain discretion to pursue individual claims after the common issues trial and may be responsible for cost consequences with respect to a Court's determination of their individual issues.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Courts have wide discretion in awarding costs and often award less than was spent by the party to whom costs are awarded. Courts typically assess costs each time it makes a decision on a contested issue, although it may choose to defer its decision on a given matter to the end of the proceeding.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Public funding is available in both Ontario and Quebec. In Quebec, the *Fond d'aide aux recours collectifs* assists qualifying plaintiffs with the costs of their legal fees and various disbursements. In Ontario, the Class Proceedings Fund provides qualifying plaintiffs with financial support for disbursements and indemnifies them for adverse costs awards.

7.2 If so, are there any restrictions on the availability of public funding?

In both Ontario and Quebec, applicants must file an application and meet various criteria before being considered eligible for funding. In Ontario, these criteria include, among other things, the strength of the case, the public interests involved and the likelihood of certification.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fees are permitted in all provinces subject to Court approval. Contingency fees may be calculated in various ways, such as a percentage of the class's recovery, as a base fee, or using a multiplier or fixed sum per case approach. In all cases, Courts must be satisfied that the agreement in question provides fair value to the class before approving it.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Courts have determined that third party funding agreements are not *per se* illegal, but they must be disclosed to the Court and approved by it. The Courts will only approve funding agreements that are fair, reasonable and enhance access to justice.

In determining whether to approve such agreements, the Courts will look closely at the terms of the funder's remuneration and the funder's overall ability to influence the litigation. Courts have refused to approve funding agreements that do not place reasonable caps on the funder's commission or that allow the funder to exert undue influence over the litigation.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

There are no specific provisions authorising the assignment of consumer claims for the purposes of pursuing a class action.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

With the exception of Quebec, consumers' claims cannot be brought by a professional commercial claimant in return for a share of the proceeds of the action.

The Civil Code in Quebec allows persons to sell litigation rights to a third party.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Criminal proceedings cannot be used as a means of pursuing civil damages claims. However, in some circumstances, findings from criminal proceedings can be relied on in civil proceedings as

evidence of the convicted person's wrongdoing, thus advancing the civil claims. Additionally, criminal proceedings may result in restitution orders that benefit persons who have suffered damages caused by the convicted person.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

In certain limited circumstances, an ombudsperson may be available to review claims and make recommendations. In most of these cases, the process before the ombudsperson does not preclude the initiation of class actions proceedings if the moving parties are not satisfied with the ombudsperson's recommendations.

Mediation and arbitration are both common in Canada, both generally and in the class actions context. Mediation is widely available and almost universally attempted in class actions at the pre-trial stage. Parties may also agree to submit a dispute to arbitration. Case law suggests that generally speaking, arbitration agreements are presumptively valid and enforceable to bar civil proceedings, including class actions. This presumption will be rebutted, and an arbitration agreement will be considered unenforceable, if there is clear legislative language governing or relating to the substantive claims or rights in question that forbid a waiver of the right to proceed in court.

8.5 Are statutory compensation schemes available e.g. for small claims?

Statutory compensation schemes are available in some areas of the law, such as shareholder claims and claims related to workplace safety. In most instances, such as in the shareholder context, the scheme is flexible with respect to the quantum payable and allows for variation based on the circumstances of a given case. However, in contrast, Ontario workers' compensation legislation prescribes a specific formula which dictates precisely how much an injured worker may receive *in lieu* of lost earnings.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Arbitrators are granted the powers given to them by the parties that appoint them, which may include any of the powers available to a judge, such as the power to grant injunctive and declaratory relief and order monetary compensation. Arbitrators may not, however, assert rights over any party that has not expressly agreed to be bound by their decisions or orders.

Mediators in Canada do not make binding decisions with respect to any aspect of the dispute between the parties, and therefore do not have the power to award any form of remedy.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Unless principles of *forum non conveniens* dictate otherwise, Courts will typically be willing to certify or assume jurisdiction over a class action brought by a resident of another Canadian jurisdiction where there is a "real and substantial connection" between the provincial jurisdiction in question and the claimant or nature of the dispute.

Provincial Courts have, in the past, been willing to certify an international class but are displaying an increasing hesitancy to do so. Recent decisions have declined to certify an international class for various reasons, including concerns that foreign members of a potential class would not reasonably expect their claim to be adjudicated by a Court in Canada, and on the basis of comity.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The Law Reform Commission of Ontario (LCO) has recently undertaken an examination of the class proceedings legislation in Ontario with the ultimate goal of assessing whether it meets its underlying objectives, including access to justice.

While the project is currently on hold, the LCO has conducted extensive preliminary research and interviews in order to understand the key context in which the legislation operates, created a project advisory group, and formed a database of statistics from class actions cases in Ontario since the inception of the province's class actions legislation.

Acknowledgment

The authors would like to thank their colleague, Jessica Lam, for her contribution to writing this chapter. Jessica has a diverse litigation practice with a focus on product liability and class action matters for national and multinational clients. She also has experience in contract, administrative, media, privacy and constitutional law.

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Jill regularly provides proactive advice on product warnings, recalls and litigation risks. Jill was trial counsel in the successful defence of the first medical products class action (146 trial days) to go to trial in Ontario. The defence was successful and the action was dismissed in 2014.

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China

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

According to the *Civil Procedure Law of the People's Republic of China* (the CPL; the People's Republic of China as PRC), there are three kinds of procedure for handling a series or group of related claims: joint litigation; representative litigation; and public interest litigation:

Joint litigation

According to Article 52 of the CPL, joint litigation is a type of litigation where one party or both parties consist of two or more persons whose claims concern the same subject matter; or one party or both parties consist of two or more persons whose claims concern subject matter of the same category and the relevant court considers that, with the consent of the parties, the claims can be combined into one proceeding.

Representative litigation

Representative litigation is in essence a category of joint litigation. According to Article 53 of the CPL, representative litigation is joint litigation where the number of litigants on either party is large (see also Article 75 of the *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC* (the CPL Interpretations), which defines 'large' generally as 10 or more people). In representative litigation, the litigants may elect two to five representatives to represent the litigants in the litigation (see Article 78 of the CPL Interpretations).

According to Article 54 of the CPL, in joint and representative litigations for claims concerning subject matter of the same category and where the number of litigants is large but not fixed at the time of case filing, the court may issue a public notice of no less than 30 days, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the court within a fixed period of time. The registered litigants may elect representatives to represent them in the litigation.

Public interest litigation

Pursuant to Article 55 of the CPL, public interest lawsuits can be brought by relevant authorised organisations before courts against acts that harm public interest, including but not limited to those resulting in environmental pollutions (see also Article 58 of the *Environmental Protection Law of the PRC* (the Environmental Protection Law)) and those harming consumers' legitimate rights and interests (see also Articles 37 and 47 of the *Law of the PRC on the Protection of Consumer Rights and Interests* (the Consumer Protection Law)). Courts' acceptance of public interest litigations does not affect the victim bringing an action under Article 119 of the CPL. Where the procuratorate in performing its functions finds any conduct damaging public interest (such as undermining the protection of ecological environment and resources, or infringing upon consumers' legitimate rights and interests in the field of food and drug safety), it may file a lawsuit with the court if no authority or organisation exists in the field or the authority or organisation does not file a lawsuit.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Joint litigation and representative litigation are applicable to all areas of law in civil actions. Public interest litigation is generally considered to have been limited to areas that concern public interest, such as environmental pollution and infringement of consumers' rights and interest, as enumerated in the CPL.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

With respect to joint litigation and representative litigation where the claims of members on either side of the parties concern the same subject matter, for those that should be listed as plaintiffs and/or defendants, the court should notify them to participate in the proceedings unless they have waived their substantial rights; failure to join the proceedings does not affect the court's adjudication and judgment of the case (see Article 74 of the CPL Interpretations).

With regard to joint litigation and representative litigation for claims concerning subject matter of the same category, where the number of litigants is not fixed at the time of case filing and the court issues a public notice to inform those entitled to participate in the action to register their rights, the judgment rendered by the court shall be binding on those litigants who have registered their rights with the court. For those litigants who do not register their rights with the court but have initiated separate legal proceedings within the limitation period, the judgment is also binding on them.

1.4 Is the procedure 'opt-in' or 'opt-out'?

With respect to joint litigation and representative litigation where the claims of members on either side of the parties concern the same subject matter, the members are required to jointly participate in the litigation and the court shall notify these members to participate in the proceedings if they fail to do so. Upon notification by the court to join the action, if a plaintiff does not want to participate in the action, it must expressly waive its substantive rights (see Articles 52 and 132 of the CPL and Articles 73 and 74 of the CPL Interpretations). This is not an 'opt-out' procedure, as the plaintiff who has waived his substantive rights no longer has the basis to pursue the defendant for liability.

With respect to joint litigation and representative litigation where the claims of members on either side of the parties concern subject matter in the same category, it is not a mandatory requirement for those with the claims to participate in the same proceeding. They may choose to opt in to the consolidated action if the competent court deems the consolidation necessary and consent from other litigants has been obtained.

With regard to representative litigation for claims concerning subject matter of the same category and where the number of litigants is not fixed at the time of case filing, after the court issues a public notice to inform those entitled to participate in the action to register their rights with the court, one may opt in to the litigation by registering with the court. However, for registration, he should prove his legal relationship with the defendant and the harm that he suffered. Failing the proof, the court may reject registration but he may bring a separate action. If he fails to register his rights but initiates a separate proceeding within the limitation period, the judgments or rulings rendered by the court in the representative litigation shall be binding on him if the court finds that his claim should be upheld.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

See question 1.1.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

In joint litigation or representative litigation, claims concerning the same subject matter mean those claims where the litigants have common and inseparable obligations or rights and must participate in the proceedings together to resolve the dispute. In joint litigation and representative litigation, claims concerning subject matter of the same category mean those claims that essentially are of the same nature of legal relationship but the claims/disputes could be resolved through multiple and separate proceedings.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

There is no special standing requirement with regard to plaintiffs in class/group proceedings. Citizens, legal persons or other organisations may bring or participate in joint litigation or representative litigation if they have a direct interest in the case and their claims concern the same subject matter or subject matter of the same category. However, for public interest litigation, only relevant authorised organisations can bring the action, and if those organisations fail to act or do not exist, the procuratorate may file the lawsuit.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

With respect to joint litigation and representative litigation where the claims of members on either side of the parties concern the same subject matter, the members are required to jointly participate in the litigation and the court shall notify these members to participate in the proceedings if they fail to do so. These members are notified by notice of the court.

With respect to joint litigation and representative litigation, where one party or both parties consist of two or more persons whose claims concern subject matter of the same category, it is not mandatory for all of them to participate in the same proceeding. Therefore, the court is not obligated to inform all the potential litigants of the action.

In representative litigation for claims of subject matter of the same category and where the number of litigants is not fixed at the time of the case filing, the court may issue a public notice to inform those entitled to participate in the action to register their rights with the court within a fixed period of time. Such notice is not mandatory.

There are no laws or regulations explicitly prohibiting advertising of joint litigation or representative litigation.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Since the introduction of representative litigation, there is a continuing increase in the number of representative cases throughout China. However, there is no official data on the number of representative litigations each year.

In general, representative litigations are more common in land expropriation and requisition, housing demolition and relocation, immigration of reservoir area, enterprise reform, environmental pollution and the protection of the interests of migrant workers.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The remedies available in joint litigation and representative litigation are no different from those in general civil cases. There is no restriction that only certain remedies can be awarded. According to Article 134 of the *General Principles of the Civil Law of the PRC* (the GPCL), the remedies available respectively or concurrently in civil cases (including joint litigation) include:

- cessation of infringements;
- removal of obstacles;
- elimination of dangers;
- return of property;
- restoration of original condition;
- repair, reworking or replacement;
- compensation for losses;
- payment of damages for breach of contracts; and

- elimination of negative effects and rehabilitation of reputation and extension of apology.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

PRC law permits public interest litigations by representative bodies. See question 1.1.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

The standing requirements of the relevant bodies and organisations are prescribed by the specific laws.

Pursuant to Article 58 of the Environmental Protection Law, a qualified social organisation that satisfies the following requirements may bring public interest litigations to the competent court:

- registered with the civil affairs department of the government at or above the municipal level in accordance with the law; and
- must have engaged specifically in public service activities in environmental protection for five consecutive years without any record of violation of laws.

Pursuant to Article 47 of the Consumer Protection Law, the China Consumers' Association and the consumer associations established in the provinces, autonomous regions and centrally administered municipalities may bring litigations against acts that are detrimental to consumers' legitimate rights and interests.

The procuratorate may file a lawsuit when it finds any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers' lawful rights and interests in the field of food and drug safety, or any other conduct that damages public interest, and if there are no eligible bodies and organisations prescribed in the laws or the relevant bodies and organisations prescribed in the laws have not filed a lawsuit. See question 1.1.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Currently, public interest litigation is only available in environment protection and consumer rights protection. Relevant bodies and organisations prescribed by the law can bring public interest litigations against acts that result in environmental pollution and acts that harm consumers' legitimate rights and interests.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The remedies available in public interest litigation are no different from those in general civil cases as described in question 1.10.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In China, all cases before a court are adjudicated by a judge or a collegial bench composed of judges and jurors, or judges only. A juror is an individual citizen appointed upon application or selection, who exercises the same power as a judge when he is on a collegial bench.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The proceedings of joint litigation or representative litigation are managed the same as other civil proceedings by court clerks and judges. No specialist courts or judges are appointed to manage or hear the case.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The process of certification of a class does not exist under PRC law. If the claims concern subject matter of the same category and the court considers it necessary to consolidate the claims into one proceeding, with the consent of the parties, the court may combine the claims.

As to the special procedures in joint litigation and representative litigation where the claims of members on either side of the parties concern subject matter of the same category, please see question 1.4.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

No matter whether it is joint litigation or representative litigation, the court shall try and decide all the issues of law and fact.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

See question 1.4.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court may, upon parties' application or at its own discretion, appoint experts to assist it in considering technical issues. Parties may also engage experts on their own and present expert evidence. If the expert, upon notice by the court, does not appear and testify in front of the court, his expert evidence will not be admitted as evidence.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

There is no pre-trial deposition procedure under PRC law. Witness statements or expert reports are generally exchanged prior to trial. However, sometimes defendants choose to present evidence during the hearing. In that case, the plaintiff will not have the chance to know the defendant's evidence before the hearing.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Generally, there is no discovery procedure under PRC law. However, pursuant to Article 75 of the *Several Provisions of the Supreme People's Court on Evidence in Civil Procedure*, if one party can prove that the other party possesses a certain piece of evidence but refuses to provide the evidence without justifiable reasons, the court may draw adverse inference against the party who refuses production.

3.9 How long does it normally take to get to trial?

There is no limitation on how long the court may take to commence a trial. However, except for special circumstances, the first instance of a civil case under normal procedures shall be concluded within six months (three months if under summary procedures) from the day of case acceptance. For the second instance, the limit is three months from the acceptance of the appeal.

3.10 What appeal options are available?

A party dissatisfied with a judgment or ruling may file an appeal to the court at one level above the first instance court, but the petition to appeal itself should be filed via the first instance court. The judgment or ruling made by the appellate court shall be final.

However, under the CPL, one may apply for retrial based on certain grounds. If the number of litigants on either party is large, it may also apply for retrial at the court that makes the final judgment. The time limit for applying for a retrial is six months from the effective day of the judgment or ruling, while for some bases, the six-month period starts from the time of the party's awareness of the relevant situations.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Pursuant to the GPCL, the general limitation period to bring a claim in China is two years (starting from 1 October 2017, pursuant to the new law, the limitation period is extended to three years), subject to suspension and tolling, starting from the time when the plaintiff knows or should know that his rights have been infringed upon, unless otherwise stipulated by laws. However, the long limitation period lapses after 20 years starting from the time of the infringement, regardless of if the victim is aware or not.

The limitation period for the following claims is one year: (a) claims for compensation for bodily injuries; (b) claims on sales of substandard goods without proper notice to that effect; (c) claims on delays in paying rent or refusal to pay rent; and (d) claims for loss of or damage to property left in the care of another.

The limitation period for some other claims is prescribed by laws as follows:

- With regard to claims for damages caused by environmental pollution, the limitation period is three years.
- With regard to claims for damages due to defective products, the limitation period is two years. The long limitation period lapses after 10 years starting from the time the defective products causing damages were first delivered to the consumers, except for those where the specified safe use period has not yet expired.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Please see question 4.1 for the different limitation periods for different claims. A plaintiff may still file an action even after the limitation period lapses. However, if the other party contends that the limitation period for such claim has lapsed, the court has to rule against the plaintiff. The court cannot apply such rule on its initiative and hold against the plaintiff if the defendant fails to raise such defence.

The age or condition of the plaintiff may stop the limitation period from running only if the age or condition of the plaintiff makes the plaintiff unable to assert his claims and such circumstances occur within the last six months before the limitation period lapses. The limitation period will continue to run after such circumstances cease to exist.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Limitation period starts from the time when the plaintiff knows or should know that his rights have been infringed upon. Therefore, in the case of concealment or fraud, where the plaintiff does not know and has no reasonable ground to know the infringement upon his rights, the limitation period will not start to run.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Bodily injury, damage to property and economic loss are recoverable, if the plaintiff can establish his claims. Mental damage is recoverable by individual only (not available for legal person or organisation) against tortious infringement upon rights of personality, such as right of health and right of reputation.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

The law is silent on whether such cost is recoverable or not.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

In general, punitive damages are not recoverable in civil actions, unless explicitly stipulated by laws. Circumstances where punitive damages are recoverable include:

- Where a manufacturer or seller knows the defect of a product but continues to manufacture or sell the product, and the defect causes a death or any serious damage to the health of the victim (see Article 47 of the *PRC Tort Liability Law*).
- Where a producer of food fails to meet the food safety standard or a trader knowingly sells such food (see Article 148 of the *PRC Food Safety Law*).
- Where a business operator conducts a fraudulent act in providing commodities or services (see Article 55 of the Consumer Protection Law).

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Generally, only compensatory damages are recoverable in civil actions. Punitive damages are allowed in certain cases with a limit depending on the claim. For instance, in consumer protection cases where a business operator commits fraudulent acts in providing commodities or services, the victim consumer may claim for increase of compensation for his losses and the increase shall not exceed three times of the purchase price it paid.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The plaintiff bears the burden of quantifying his damages with evidence. With regard to joint litigation and representative litigation, compensation is paid based on each plaintiff/member's damages incurred and proved.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

In joint litigation, if two or more members of either party share common rights and obligations with respect to the subject matter of the litigation, the act of any member (including reaching a settlement with the opposing party) is binding on the other members who acknowledge such act. If two or more members of either party do not share common rights and obligations with respect to the subject matter of the litigation, the act of any member is not binding on the other members (see Article 52 of the CPL).

In representative litigation, settlement with the opposing party by the representative shall not be binding on those it represents unless with the latter's consent (see Articles 53 and 53 of the CPL).

In general, court approval is not required for settlement, unless the parties ask the court for a mediation statement to be issued on the basis of the terms of the settlement agreement. However, with regard to public interest litigation, after the parties reach a settlement agreement, the court shall publicise the settlement agreement and the announcement period shall be no less than 30 days. Upon expiration of the announcement period, if the court finds upon review that the settlement agreement is not against the public interest, the court shall issue a mediation statement (which records the terms of the settlement agreement and bears the same binding effect upon the parties as a court judgment). Where the court finds the settlement agreement is against the public interest, the court shall not issue any mediation statement, and shall continue to hear the lawsuit and render a judgment or ruling pursuant to relevant law (see Article 289 of the *CPL Interpretations*).

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Under PRC law, the 'loser pays' rule does not apply, except under certain exceptional cases (for example, where stipulated by laws or agreed by the parties). Each party has to bear its own attorney's fees. However, with regard to public interest litigation including environment and consumer rights protection, the successful plaintiff may claim for reasonable attorney's fees, examination fees and other reasonable legal costs (see Article 22 of the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations* and Article 18 of the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Consumer Civil Public Interest Litigations*).

The court fees shall be borne by the losing party. If both parties partially lose the case, the court shall determine and divide the court fees as between the parties.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The law is silent on how the litigation costs shall be divided amongst the members in joint litigation or representative litigation. It is generally understood that common costs shall be divided among the members of the group, while individual costs shall be borne by the member who incurs such costs.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

The law is silent over this specific question. Under PRC law, if a plaintiff in civil proceedings withdraws his claim before the conclusion of the proceedings, he should be refunded half of the case acceptance fee.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

As described in question 6.1 above, with regard to public interest litigation, only reasonable legal costs are recoverable. The court will not manage the costs incurred by the parties. At the end of the proceedings, if it is a situation where the losing party should pay the costs, the court will at its discretion, considering the substantive and procedural aspects of the case, determine what costs are reasonable and recoverable.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Pursuant to Article 10 of the *Regulation on Legal Aid*, legal aid is available for citizens with financial difficulties in cases requesting state compensation, social insurance treatment or minimum living support, pension for the disabled or for the family of the deceased, alimony payment, child or parent support, payment of labour remuneration and civil rights, and interests arising from good Samaritan acts. Therefore, if in joint litigation or representative litigation where it concerns the above subject matters, litigants with financial difficulties may apply for legal aid.

With respect to public interest litigation, public funding is also available. For instance, the Kunming municipal government in 2015 set up a special fund for the sole purpose of supporting public interest litigation.

7.2 If so, are there any restrictions on the availability of public funding?

Whether public funding is available depends on whether the conditions and requirements for granting the fund are met. Please also see question 7.1.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fees are permitted in civil cases, except for joint litigation or representative litigation where the number of litigants in either party is more than 10 people. In addition, contingency fees are prohibited in the following cases: (a) cases of marriage or inheritance; (b) claims for social insurances or minimum living costs; (c) claims for alimonies, pensions for the disabled or the family of the deceased, or welfare payments, or compensations for work-related injuries; and (d) claims for labour remunerations (see Articles 11 and 12 of the Measures for the Administration of Lawyers' Fees). Contingency fees are not allowed to exceed 30% of the disputed amount.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

The law is silent on the issue of third party funding. However, in public interest litigation, since compensation shall be used for repairing the damaged environment, rather than flowing into the plaintiff's pockets, practically it would hinder third party funding.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

A qualified consumer association does not need to be assigned claims from consumers to bring public interest litigation; instead, a qualified consumer association may bring public interest litigation on its own against acts harming consumers' legitimate rights and interests. See Section 2.

The law is silent on whether an individual consumer may assign his specific claims to a consumer association. If the claim arises from a contract, the consumer may assign his claim to a consumer association or other organisations or individuals by assigning his relevant rights under the contract. However, the precondition is that such rights must be assignable under PRC law and do not belong exclusively to the assignor. If the consumer's claim arises from non-contractual rights, PRC law does not have general rules over the assignability of such rights, except for the restriction that the right to claim consolation money for mental injuries is not assignable.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

See question 8.1.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Generally, the victim of a crime may bring collateral civil action in criminal proceedings and claim for civil damages. However, the law is silent on whether such approach is available when the claim is to be raised on behalf of group or class.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

There are no laws or regulations expressly prohibiting the use of alternative dispute resolution mechanisms. Many arbitration institutions in China have now adopted procedures for consolidating a few related claims into one proceeding upon the parties' consent.

8.5 Are statutory compensation schemes available e.g. for small claims?

No, this is not available in China.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

See question 1.10.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Residents from other jurisdictions may bring claims at courts in China. The law is silent over the issue of 'forum shopping'. However, if there other ongoing proceedings in other jurisdictions concerning the same subject matter, the court even with jurisdiction may, upon the application by the party, suspend or even conclude the proceedings in China.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

With respect to joint litigation, the Supreme People's Court in 2016 released a draft judicial interpretation regarding issues on evidence in the civil trial for public consultation. Article 21 of the draft purports to further articulate the effect of acknowledgment of fact by a party in joint litigation. In joint litigation concerning subject matter of the same category, the acknowledgment of fact is only binding on joint litigants who make such acknowledgment. In joint litigation concerning the same subject matter, acknowledgment of fact by a joint litigant is not binding on other joint litigants if they expressly deny the fact acknowledged; however, if other joint litigants are silent after the judge has made detailed explanations and inquiries, the acknowledgment of fact shall be binding upon all joint litigants.

Due to the rapid development in capital markets and the lack of an effective mechanism for resolving disputes in securities transactions, various stakeholders are promoting a more efficient and cost-effective approach, instance the introduction of "opt-out" mechanisms, to handle such disputes.

With respect to public interest litigation, changes are proposed to expand the scope of application and to lower the financial burden of the plaintiff, which are usually NGOs with limited funding.

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Yes. Where claims give rise to common or related issues of fact or law, the court has the power to make a group litigation order ("GLO") enabling it to manage the claims covered by the Order in a coordinated way. Before granting a GLO, the court must be satisfied that it is the most proportionate means of resolving the claims, and that no other order is more appropriate. A GLO must establish:

- a group register on which details of the claims to be managed under the GLO must be entered;
- the GLO issues, which will identify the claims to be managed under the GLO; and
- the 'management court' responsible for managing the claims.

Claims can also be pursued in a representative action where one representative Claimant or Defendant acts on behalf of a class of individuals. However, the procedure is rarely used as it is only available where the class of litigants have the same interest in one cause of action. It is not available where members of the class have different defences or different remedies. The procedure is therefore most commonly used where the claims arise out of one accident or tort or the breach of one contract. This restrictive approach to bringing a representative action has been confirmed in *Emerald Supplies Ltd and Others v British Airways plc* [2009] EWHC 741 (Ch) which concerned a claim by importers of cut flowers who alleged that BA had entered into concerted practices with other airlines to inflate air freight prices. Emerald brought proceedings itself and as representatives of all other direct and indirect purchasers of air freight services affected by the alleged concerted practices. The representative element of the claim was struck out as it was not possible to say at the time the action was begun who was a member of the class and the relief sought was not equally beneficial to all members of the class. The court rejected the Claimants' attempts to widen the representative action procedure to encompass elements of a 'class action', finding that the GLO procedure provided a mechanism for avoiding multiple actions and that it was not in the interests of justice for actions to be pursued on behalf of persons "who cannot be identified before the judgment in the action".

The court also has general powers to consolidate a number of individual proceedings into one action and can order that two or more claims be tried together.

Specific rules also apply to claims for breach of competition law. Under the Competition Act 1998, the Competition Appeals Tribunal (CAT) may approve collective proceedings or a collective settlement, and these provisions are outlined in more detail in Section 2 below.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The group action rules apply to all areas of law. Separate rules apply to claims for compensation in respect of certain infringements of competition law and these are outlined in Section 2 below.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Management is by means of a group action. The claims that make up the group litigation remain individual actions which are managed collectively. The outcome of any one case (including any 'lead action' or 'test case') does not automatically determine liability in the remaining claims in the cohort. Lead actions establish findings of law and fact that may, in practice, allow the parties to compromise or simplify resolution of the remainder of the litigation by focusing further proceedings on clarifying any remaining points of principle.

However, consistent with the principles of estoppel, the court rules provide that, where a judgment is made on one of the GLO issues, that judgment is binding on the parties to all of the other claims that are on the group register at the time the judgment was given, unless the court orders otherwise.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The GLO procedure is 'opt-in'. It provides a mechanism by which claims that are being pursued individually may be managed together.

There is no general 'opt-out' class action procedure in England and Wales. However, under the Competition Act 1998, a representative party may bring collective proceedings in respect of competition law claims, with claims managed on either an 'opt-in' or an 'opt-out' basis (see the answer to question 2.1 below).

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, but it is generally accepted that there must be at least five claims to justify coordination in a GLO. In deciding whether to make a GLO, the court will take account of the number of claims threatened as well as the number of actions commenced.

Because the making of a GLO commits the parties and the court to the allocation of substantial resources to conduct group litigation, the court may decline to grant a GLO where there are an insufficient number of Claimants who have funding in place and intend seriously to proceed with the litigation (*Alyson Austin v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928).

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The claims must give rise to common or related issues of fact or law. In *Hobson & Others v Ashton Morton Slack Solicitors and Others* [2006] EWHC 1134 (QB), the court refused to grant a GLO in respect of claims brought by a group of miners and ex-miners regarding the enforceability of agreements made between the Claimants and their trade unions under which the Claimants agreed to pay to the trade union a proportion of the compensation awarded to them in separate litigation, as no group litigation issue had been sufficiently or precisely identified: the only unifying feature in the litigation was that all of the Claimants were miners or ex-miners. The individual agreements between the Claimants and the trade union were different and the assessment of liability depended on the facts of each case. The court also found that a GLO was not an appropriate means of resolving the dispute, as the cost of pursuing this grossly exceeded the amount of damages claimed. Consolidation of the actions or the trial of selected cases were a more appropriate and cost-effective means of resolving the claims.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Group actions can be brought by any person or legal entity that has a claim. Representative bodies may bring proceedings on behalf of persons seeking compensation for losses caused by infringements of competition law (see the answer to question 2.1 below). A company's shareholders may also bring a derivative claim against the company's directors (regarding breach of duties owed to the company) in certain limited circumstances, with the court's permission.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Where a GLO is approved, the court will commonly order the parties to publicise the existence of the GLO so that all relevant claims can be managed within it. This usually takes the form of an advertisement, which will be approved by the court if the parties are unable to agree on the wording.

Solicitors also advertise their involvement in potential group claims and seek to gather additional Claimants, for example through postings on a firm's website. Such publicity must meet certain standards laid down in the Solicitors' Code of Conduct 2011 and, in particular, it must not be misleading or inaccurate. Solicitors cannot make unsolicited visits or telephone calls to members of the public.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

GLOs remain uncommon. The Ministry of Justice website indicates that since 2000 a total of 98 GLOs have been managed by the courts, but only 20 GLOs have been commenced since 2012. The cases cover a range of different areas of law and include claims relating to personal injuries, defective products and medicines, cases of industrial disease, claims arising from accidents or disasters, cases of physical or mental abuse, shareholder claims, claims relating to the provision of financial advice, employment matters, tax matters and environmental claims.

Legislation permitting collective proceedings in the competition field has only recently been introduced. However, the first proceedings have been brought against Pride mobility scooters; it remains to be seen whether this procedure will prove popular and how many actions will be brought in future.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The full range of remedies are available, including monetary compensation and injunctive or declaratory relief.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

There is no general procedure which permits collective actions to be brought by representative bodies.

However, under the Competition Act 1998, as amended, collective proceedings combining two or more claims may be brought before the CAT by a representative person on behalf of any person (including both individual consumers and companies) who has suffered loss or damage as a result of specified infringements of competition law. The representative person does not need to be a member of the class of persons eligible to bring the claim (class member), but can be a third party organisation, such as a consumer organisation or interest group, if the Tribunal considers it just and reasonable for them to act as the representative person.

Collective proceedings may only be continued with the approval of the Tribunal, which will make a collective proceedings order identifying the class of persons whose claims are eligible for inclusion in the proceedings, approving the representative person and stating whether the proceedings are to be managed on an 'opt-in' or an 'opt-out' basis. The claims may be both 'follow-on' actions, brought where the relevant competition authorities have established that a breach of competition law has taken place, or independent actions, provided they raise similar or related issues of law or fact and are suitable to be brought together.

In *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9, the CAT considered for the first time what approach should be adopted in deciding whether to make a collective proceedings order. The case was a 'follow on' damages action brought by a group of consumers who had purchased mobility vehicles from Pride between 2010 and 2012, at a time when the UK competition regulator had determined that Pride had entered into concerted agreements with eight of its dealers precluding them from advertising the scooters at below the recommended retail price. The CAT indicated that the certification process under the Competition Act was intended to be a short procedure held within months of the claim being issued, with either no, or very limited, disclosure of documents. Although expert evidence would be required to determine whether common issues could be established in relation to matters of loss and damage, the CAT stated that it would not decide between the methodologies of the parties' experts, but would merely need to establish that the expert methodology was sufficiently credible to establish some basis for commonality. The CAT found on the facts that the Claimants' methodology did not meet that test, as it sought to seek damages on behalf of a much larger group of consumers who had not purchased their mobility vehicles from the relevant dealers. However, the CAT indicated, in principle, that if that issue could be addressed, the claim justified certification on an 'opt-out' basis because of the large size of the class, the fact that the class members were individual consumers and the relatively low level of estimated damages claimed by each class member. The case was subsequently withdrawn by the Claimants. A similar decision was reached by the CAT in *Walter Hugh Merricks CBE v MasterCard Inc and Others* [2017] CAT 16, in which the CAT declined to grant a collective proceedings order because both the methodology for calculating the aggregate sum of damages and for estimating individual loss were impractical.

The Tribunal may also make an order approving the settlement of a group of claims, whether or not these have been managed under a collective proceedings order, if it is satisfied that such a collective proceedings order could have been made when the proceedings were commenced and the terms of the settlement are just and reasonable.

At present there is no other procedure by which representative bodies can bring collective damages actions on behalf of a group of Claimants. However, the Government indicated in its report 'Improving Access to Justice through Collective Actions' (see question 9.2) that representative bodies could be authorised to bring collective actions in areas other than competition law if there is a need.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

See the answer to question 2.1 above. Collective proceedings under the Competition Act may be brought by a representative person approved by the Tribunal. This can be any person that the Tribunal considers appropriate to represent the interests of the class including, in appropriate cases, consumer associations. There is no requirement for state approval.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

See the answer to question 2.1 above. The procedure is only available in respect of certain infringements of competition law.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Under the Competition Act, claims may be brought for both monetary compensation and injunctive relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Trials are by a judge.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Once a GLO has been made, a judge will be appointed with the responsibility for case management of the litigation. He will commonly also hear the trial of the case. He may be assisted by a Master or another judge appointed to deal with certain procedural matters.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

There is no certification procedure in group litigation. The court will often impose a 'cut-off date' by which claims must join the GLO. This is a case management measure and does not directly affect the law on limitation. Subject to possible arguments on abuse of process, it does not prevent a Claimant from seeking permission to apply to join the GLO at a later date, nor does it prevent Claimants from issuing their own proceedings and pursuing these separately.

It is not uncommon for there to be different groups of claims managed under one GLO; for example, if a group of claims are unable to join the GLO by the cut-off date, they may be managed as a separate group 'B'. Such claims will commonly be stayed by the court pending the outcome of the first group of claims.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both approaches are available and may be combined in appropriate cases. The English courts will usually order that one or more actions that are representative of the cohort of claims are tried as test cases. Any generic issues of law or fact will be addressed in the trial of those test cases.

In accordance with his general case management powers, the judge can also order the trial of generic preliminary issues of law and fact in separate proceedings prior to the main trial, and can decide the order in which issues are to be tried in the main trial.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Judges have extremely wide discretion to manage the litigation as they see fit, and may make directions including:

- the transfer of claims to a different court that will manage the litigation;
- appointing lead solicitors to act on behalf of the Claimants and Defendants;
- specifying the details to be included in the pleadings – it is common for the courts to order that test cases should be pleaded in full or that generic pleadings are prepared, but they may only require limited information to be provided for the remaining claims, by means of a schedule of information or questionnaire; and
- as to recoverable costs and other measures, see section 6 below.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Experts are generally appointed by the parties rather than by the courts. No expert may give evidence, whether written or oral, without the court's permission and the court may, in appropriate cases, dispense with expert evidence or require that evidence on a particular issue be given by a single joint expert. (The court will select a joint expert from a list prepared by the parties if they cannot agree on who should be instructed.) The extent of the expert evidence that is permitted will depend on the complexity and value of the claim.

Experts can only give evidence on matters of opinion falling within their expertise. Their evidence should be independent and comprehensive. An expert owes a duty to the court to assist it on relevant matters and this duty overrides any obligation to the party instructing the expert.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

The factual and expert evidence that the parties intend to rely upon at trial must be provided in the form of witness statements and expert reports that are disclosed by the parties prior to the trial. The court may make directions limiting the scope of factual and expert evidence by, for example, identifying those disciplines or issues to which such evidence may be directed. Evidence is usually mutually exchanged, but the court may, in appropriate circumstances, direct that it is served sequentially.

Factual and expert witnesses are required to give oral evidence at the trial unless the court orders otherwise. However, the witness can only amplify the evidence given in his/her written statement or report with the court's permission. Expert evidence is usually given sequentially, but the court may order that it is given concurrently (so-called 'hot-tubbing').

Witnesses are not generally required to present themselves for pre-trial deposition. However, the court may order evidence to be given by deposition if the witness is unable to attend the trial. The increased use of video conferencing facilities has reduced the use of such depositions. Evidence can be taken by video if the witness is abroad or too ill to attend court.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

The Court Rules provide a flexible approach to disclosure of documents. In determining the scope of disclosure, the court will take account of the costs of giving wide-ranging disclosure of documents and will ensure that these are proportionate to the overall sums in issue in the proceedings. In most claims (except certain low-value claims), the court can tailor the disclosure order to reflect the circumstances of the individual case and can choose from a menu of options including: dispensing with disclosure; requiring disclosure of documents on which a party relies and specific documents requested by their opponent; issue-based disclosure; 'train of inquiry' disclosure; standard disclosure; or any other order that the court considers appropriate. In claims involving personal injuries, the general rule is that a party to an action is required to disclose the documents in his control on which he relies and which adversely affect his own case or support another party's case (so-called 'standard disclosure'), although the court may dispense with or limit such disclosure in appropriate cases.

A party to an action is required to disclose the documents (including paper records, drawings, microfilms, information held on tape, video, CD or DVD, and electronic documents) in his control. A document is in a party's control if he has, or has had, physical possession of it, a right to possession of it, or a right to inspect and take copies of it. The parties are required to conduct a reasonable and proportionate search for disclosable documents.

Disclosure usually takes place after pleadings have been served setting out the parties' cases. However, the court also has the power to order pre-action disclosure in appropriate cases in order to dispose fairly of the proceedings. Such disclosure may only be ordered in respect of specific documents or classes of documents that would have to be disclosed in any event once the proceedings are underway. A party may also seek an order for disclosure of specific documents or classes of documents.

Disclosable documents are identified in a List of Documents served on the opposing party. All disclosed documents can be inspected, save for those which are privileged from inspection.

The obligation to give disclosure continues until the action is at an end and applies to documents created while the proceedings are underway. A party may not rely upon any documents that it does not disclose. Moreover, if a party withholds documentation that should have been disclosed, the court may impose cost penalties or draw an adverse inference.

3.9 How long does it normally take to get to trial?

This depends on the complexity of the case and the value of the claim. According to the Court Statistics Quarterly for July to September 2016, published by the Ministry of Justice, unitary civil actions proceeding in the County Court (excluding certain small claims which are fast-tracked), on average, took 54.5 weeks from the issue of proceedings until trial. Equivalent statistics are not available for High Court actions, but these cases are generally more complicated and therefore take longer to come to trial.

Complex group actions may take many years to come to trial. For example, in the third generation, oral contraceptives litigation it took approximately six-and-a-half years from the issue of the first proceedings until judgment. In all cases, delay is largely a result of the conduct of the parties and is not inherent in the court system.

3.10 What appeal options are available?

An appeal may only be made with the permission of the court (either the appeal court or the lower court that made the decision subject to appeal) and such permission will only be granted if the appeal appears to have a real prospect of success or there are other compelling reasons why it should be heard.

The appeal will usually be limited to a review of the lower court's decision, but the court retains the power to order a re-hearing in the interests of justice. An appeal will be allowed where the decision of the lower court was wrong (because the court made an error of law, or of fact, or in the exercise of its discretion) or was unjust because of a serious procedural or other irregularity. In practice, the courts will rarely disturb findings of fact made by the trial judge who had the benefit of hearing first-hand the factual and expert evidence.

The appeal court may affirm, vary or set aside any order or judgment made by the lower court, order a new trial or hearing or make any other appropriate order.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, see our answer to question 4.2 below.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Under the Limitation Act 1980, the basic limitation period for tortious actions (including negligence claims) and for breach of contract is six years from the date on which the cause of action accrued (when the damage occurred in tortious claims, and when the breach occurred in contractual claims). Special requirements apply in the case of latent damage caused by negligence.

Separate rules apply to personal injury claims for damages in respect of negligence, nuisance or breach of duty. In such cases, the claim must be brought within three years from the date on which the cause of action accrued (i.e. the date of injury or death) or the date of knowledge (if later) of the Claimant of certain facts. The date of knowledge is when the Claimant is aware of the identity of the Defendant, that the injury was significant, and that it was attributable in whole or part to the alleged negligence, nuisance or breach of duty. The court has a discretionary power to disapply this time limit where it would be equitable to do so.

Where product liability proceedings are brought under the Consumer Protection Act ("CPA"), there is also a general long-stop provision. A right of action under the CPA is extinguished 10 years after the defective product was put into circulation and this applies irrespective of the other provisions of the Limitation Act.

Special rules apply to persons under a disability, during such period as they are a minor or of unsound mind. In general, time only begins to run for limitation purposes when such Claimant dies or ceases to be under a disability. However, the 10-year long-stop for CPA claims still applies.

The rules on limitation outlined above do not apply to claims relating to infringements of competition law brought under the Competition Act 1998.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Where an action is based on the Defendant's fraud, or the Defendant has deliberately concealed any fact relevant to the Claimant's right of action, the relevant limitation period does not begin to run until the Claimant has, or could with reasonable diligence have, discovered the fraud or concealment.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

In contract claims, damages are intended to put the injured party into the position he would have been in if the contract was performed. Damages are usually awarded for monetary loss (for example, in respect of damage to property), but they can include non-pecuniary losses, such as damages for death or personal injury (including mental injury) where this was within the parties' contemplation as not unlikely to arise from the breach of contract. Economic losses, such as loss of profits, are recoverable if these are a foreseeable consequence of the breach.

In negligence claims, damages are awarded to put the injured party into the position he would have been in if the negligent act had not occurred. Damages can be recovered for death or personal injury (including mental injury) and damage to property. Pure economic losses which are not consequent on physical damage are not generally recoverable in negligence, save in some cases of negligent advice.

In the case of product liability claims pursued under the CPA, damage includes death or personal injury (including mental injury) or loss of, or damage to, property for private use and consumption (provided the damages recoverable in respect of property loss exceed the minimum threshold of £275). Damages are not recoverable in respect of damage to the defective product itself.

Additional restrictions apply to the recovery of damages for mental injury. In the absence of physical injury, the English courts will generally only permit recovery of damages for personal injury where the claimant has suffered a recognised psychiatric injury. Mere anxiety or distress are not, on their own, sufficient to ground a claim for damages in tort. However, they may be recoverable in limited exceptional circumstances for breach of contract where the object of the contract was to give pleasure (e.g. claims for compensation arising from a failed holiday).

Compensation claims may also be made under specific statutes (e.g. employment legislation), which may impose restrictions on the types of damage recoverable.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring claims of the type pursued in the USA in recent years have not been litigated before the English courts. English law does not generally permit recovery of the cost of tests or investigations unless the product has actually malfunctioned and caused physical or psychiatric injury or damage. Such medical

monitoring costs are recoverable only as medical expenses consequential upon the main injury or damage. In addition, the courts will not usually allow a Claimant to recover damages where he/she sustains a recognised, but unforeseeable, psychiatric illness as a result of becoming aware that he/she is at risk of sustaining a disease/illness, or to recover the costs of future medical monitoring to determine if that disease/injury has arisen (*Grieves v FT Everard & Sons Ltd* [2008] 1 AC 281).

Where claims are pursued under the CPA, it is unclear whether the position set out above remains good law in the light of the Court of Justice of the European Union's ("CJEU") decision in *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt*, Case C-503/13. In that case the CJEU ruled that if a product, such as a pacemaker, has a potential defect, products belonging to the same production series may also be classified as defective without the need to establish that each individual product is faulty. Damage was construed broadly to include compensation "that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect" including, in that case, the costs of replacing the defective device. Although the relationship between the decision in the *Boston Scientific* case and medical monitoring claims has yet to be explored, the widened definition of damage applied by the CJEU may be used by Claimants to argue that the restrictions of English law are no longer appropriate.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive or exemplary damages are rarely, if ever, awarded. They are not generally available in respect of claims for breach of contract. Although they are available in tort claims (see *Kuddus (AP) v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789), exemplary damages will only be awarded in certain limited circumstances, including where the Defendant's conduct was calculated to make a profit that exceeds the compensation recoverable by the Claimant or where there has been oppressive, arbitrary and unconstitutional conduct by Government servants (see *Rowlands v Chief Constable of Merseyside* [2006] All ER (D) 298 (Dec)). Exemplary damages may be awarded in claims regarding infringements of competition law, but only where the breach was intentional or reckless and the Defendant's conduct was so outrageous as to justify an award (see *2 Travel Group Plc (in Liquidation) v Cardiff City Transport Services* [2012] CAT 19). Exemplary damages are not generally recoverable in circumstances where a Defendant has already been fined in respect of his conduct (see *Devenish Nutrition Limited v Sanofi-Aventis SA and Others* [2007] EWHC 2394 (Ch)).

Exemplary damages may not be recovered under the Competition Act collective proceedings rules outlined above.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

No, there is no maximum limit.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are awarded to individual Claimants based on the damage/losses that they have personally sustained.

Different requirements apply to damages awarded by the CAT under the collective procedure rules relating to infringements of competition law. The Tribunal is not required to carry out an individual assessment of the amount of damages recoverable in respect of each claim. In the case of 'opt-out' proceedings, any damages not claimed by the class members must be paid to a prescribed charity, or the Tribunal may order such sums to be paid to the representative person in respect of the costs of bringing the proceedings.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

In general, a Claimant may unilaterally discontinue all or part of his/her claim at any time. However, the court's permission is required for compromise or settlement of proceedings instituted against or on behalf of a minor (aged under 18) or an adult who is incapable of managing their own property and affairs. Court approval is also usually sought where there is a settlement or compromise of an unlitigated claim made by, or on behalf of, or against, such a person, as a compromise is not enforceable without the approval of the court.

There is no general requirement to seek court approval in other circumstances, for example, on the settlement of the claims comprising a group action. However, the Competition Act 1989, as amended, includes a collective settlement procedure in respect of claims relating to infringements of competition law. Under these rules, the CAT may approve the settlement of opt-out collective proceedings managed under a collective proceedings order. It also has the power to approve the settlement of a group of claims that were not managed under such an order, if it is satisfied that a collective proceedings order could have been made when the proceedings were commenced.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The general rule is that the unsuccessful party pays the legal costs of the successful party, (including expert fees and other incidental expenses such as court fees). However, 'Qualified One-way Cost Shifting' ("QOCS") applies to claims for death or personal injuries (provided a funding arrangement was not entered into prior to 1 April 2013). This means that a Defendant may only enforce an order for costs against a Claimant, without the court's permission, to the extent of any damages and interest ordered in favour of the Claimant. In practice, this means that in most personal injury claims an unsuccessful Claimant will not be responsible for the Defendant's costs, although this principle will not apply if the claim is struck out, or if the court determines that the Claimant is fundamentally dishonest. If the Claimant is successful they may recover their costs from the Defendant in the usual way, subject to a 'set-off' of any costs orders made in the Defendant's favour (provided such costs do not exceed the amount of damages awarded).

Costs are actively managed by the court throughout the proceedings. In most cases commenced after April 2013, except for some types of high-value claims (where the sums in dispute exceed £10 million excluding interest and costs), the parties are required to file and exchange costs budgets after the defence is served or prior to the

first procedural hearing, setting out their estimate of the costs they anticipate recovering from their opponent if successful. Strict time limits are applied to filing these budgets, and if these are not met the party in default may only recover court fees. If they are not agreed, the budgets will be reviewed by the court, which may make a costs management order. This may be revised as the litigation progresses, but only significant developments will justify such revisions. In assessing the amount of recoverable costs at the conclusion of the litigation, the court will not depart from the agreed budget unless it is satisfied that there is good reason to do so. The budget therefore effectively acts as a cap on the level of costs which the winner may recover from the losing party. This does not restrict the freedom of the parties to investigate and litigate claims as they consider appropriate (the parties may exceed the amount of the court-approved budget if they wish to do so), but those costs will not be recoverable from the opposing party on the successful conclusion of the litigation.

The court can also impose a cap limiting the amount of future costs that a party may recover where there is a substantial risk that without such an order the costs incurred will be disproportionate to the amounts in issue and the costs cannot be adequately controlled through usual case management procedures (see *AB and Others v Leeds Teaching Hospitals NHS Trust and in the matter of the Nationwide Organ Group Litigation* [2003] Lloyds Law Reports 355).

The assessment of costs is a matter for the court's discretion and the court can make such orders as it considers appropriate reflecting matters such as the parties' conduct and their success or failure on particular issues in the proceedings (either by reducing the costs award made in favour of the successful party to reflect the fact that they were unsuccessful on certain issues, or by making issue-based cost orders). In determining the amount of recoverable costs, the court will assess whether the sums claimed were reasonably incurred and were proportionate to the overall value of the case. However, they will only depart from the costs budgets agreed by the parties or approved by the court if there is 'good reason' to do so (*Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA 792). What amounts to a 'good reason' depends on the facts, but this may include the need to ensure that the costs incurred are proportionate to the damages paid following settlement of a claim (*RNB v London Borough of Newham* [2017] EWHC B15 (Costs)).

Where a party makes an offer to settle which meets certain procedural requirements (a "Part 36 offer") and this is not accepted by the other party in satisfaction of the claim, unless that other party achieves a better result at trial various sanctions will apply. A party which fails to 'beat' a Part 36 offer becomes liable to pay the costs incurred after the date the offer could last have been accepted. In the case of a Defendant failing to beat a Claimant's Part 36 offer, additional sanctions apply: the damages payable will be increased by between 5 and 10% (depending on the amount awarded) subject to a maximum uplift of £75,000; the costs incurred after the offer was made will be payable on an indemnity basis; and interest on the value of the claim will be payable at an enhanced rate.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The Court Rules provide a framework for sharing costs between the Claimants whose claims are entered on the GLO group register. Each litigant has responsibility for the individual costs of his/her claim together with his/her share of the common costs. Although the rules envisage that common costs will be shared equally, the court may make a different order if this would be unfair (*Greenwood and others v Goodwin and others* [2014] EWHC 227 (Ch) in the *RBS Rights Issue Litigation*). Unless the court makes a different order, any order for costs against group litigants imposes several (as opposed to joint) liability for common or generic costs. Each Claimant may be ordered to pay a share of any common costs incurred before he/she joined the group action, but not after he/she has concluded or compromised the claim and left the action.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Where a Claimant discontinues his/her claim, in the absence of any other order, he/she will be responsible for paying the Defendant's costs. Although liability for individual costs crystallises at the time of the discontinuance, the court will not determine liability for common costs until after the trial of generic issues in the main action (*Sayers v SmithKline Beecham Plc*; *XYZ v Schering Health Care Limited*; *Afrika v Cape PLC* [2002] 1 WLR 2274, C.A.). In some circumstances the individual costs of bringing test cases may be treated as generic costs because the actions illustrate issues common to many claims.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

See the answer to question 6.1 above. Costs are actively managed throughout the proceedings and, where costs budgets are not agreed by the parties, the court may make a costs management order after service of the defence. The court can also impose a cap limiting the amount of future costs that a party may recover where there is a substantial risk that, without such an order, the costs incurred will be disproportionate to the amounts in issue and the costs cannot be adequately controlled through usual case management procedures. Such orders have been imposed in group litigation (see, for example, *AB and Others v Leeds Teaching Hospitals NHS Trust and in the matter of the Nationwide Organ Group Litigation* [2003] Lloyds Law Reports 355 and *Multiple Claimants v Corby Borough Council* [2008] EWHC 619 (TCC)) and can be made against any party and at any stage of the proceedings and may relate to the litigation as a whole or to specific issues. These orders do not prevent parties from exceeding the cap, but merely bar recovery of costs above the cap from the unsuccessful other party.

Costs orders will be made in relation to procedural matters arising during the litigation and at the end of the case. Costs will usually be assessed and enforced at the end of the proceedings. However, the court can also make summary assessments of costs (for example, relating to matters addressed during procedural hearings), although such powers are less frequently exercised in the context of complex group actions. Where a summary assessment takes place, the costs ordered to be paid may generally be enforced immediately, before the conclusion of the case. However, where QOCS applies, costs orders may only be enforced at the end of the case.

In *Boake Allen Limited v Revenue and Customs Commissioners* [2007] UKHL 25, Lord Woolf stated that costs implications should be considered in making any procedural order in the context of a GLO, as such orders can cumulatively add to the total costs of the litigation, making them disproportionate. He concluded that it was important to ensure that such procedural steps generate the least possible costs.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Public funding is available in England and Wales, but such funding is not generally provided in civil claims (see below).

7.2 If so, are there any restrictions on the availability of public funding?

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 largely abolishes public funding for civil claims. Civil legal aid is not available in respect of contract or tort claims, including negligence actions and claims for personal injury and death. There are a number of limited exceptions to this general rule and funding is available in the case of certain clinical negligence actions (involving serious birth injuries and lifelong disabilities) and in other cases, including proceedings concerning certain family matters where there is evidence of violence or abuse, debt, housing, disability, mental health, welfare benefits and discrimination matters.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Yes, funding is available through Conditional Fee Agreements ("CFAs") and Damages Based Agreements ("DBAs") – a form of contingency fee. However, DBAs are unenforceable in 'opt-out' collective proceedings (they can be used in 'opt-in' proceedings) under the new Competition Act procedure.

There are broadly two types of CFA: "no win no fee" agreements; and "less (or nothing) if you lose" agreements. The precise terms of the CFA are strictly regulated and agreements that fall outside the legal requirements are unenforceable. Under a CFA, the client initially pays a reduced (or no) fee to his lawyers, but in the event of "success", the client becomes liable for the standard fees plus a percentage uplift on those standard fees. What is a "success" or "failure" is defined in the CFA, often by reference to a level of damages recovered. The uplift is based on the level of risk associated with the claim. Under a DBA, the lawyers' fees are set as a percentage of the sum recovered as damages in the claim, net of any costs recovered from the losing party.

Rules which came into effect in April 2013 have significantly changed the way CFAs operate and legalised DBAs (which were previously unenforceable). Prior to April 2013, a successful Claimant could recover from their opponent the CFA uplift or success fee in addition to their standard costs and also any premium payable to obtain After the Event insurance purchased to protect the client against exposure to the other side's costs in the event of defeat. Where agreements are entered into after this date, the CFA success fee and the ATE premium are no longer recoverable from the opposing party: a successful litigant will have to bear these costs and can only recover standard costs from their opponent. A CFA success fee of up to 100% of standard costs can be negotiated; the DBA payment is capped at 50% of damages. In personal injury claims, the success fee or percentage of damages payable under both CFAs and DBAs is capped at 25% of damages other than those for future care and loss.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes, in certain circumstances. In *Arkin v Borchard Lines* [2005] 1 WLR 2055, the Court of Appeal made it clear that, in principle, third party funding may be an acceptable means of funding litigation. However, certain third party funding arrangements may be unenforceable. In *R (Factortame Ltd) v Transport Secretary (No.8)* [2002] EWCA Civ 932, the court held that in deciding whether a funding agreement is objectionable (champertous), the courts will take into account whether the funder controls the proceedings, whether the agreed recovery rate is fair and whether the agreement facilitates access to justice. If the funder controls the proceedings, the agreement will usually be champertous and unenforceable. In addition, as he will generally be treated as if he was a party to the proceedings, he will be exposed to costs liability.

Arkin concerned the award of costs against a third party funder. The Court of Appeal held that in the case of an objectionable agreement, the funder will be liable to pay his opponent's costs without limit if the claim fails; in the case of an acceptable agreement the funder's cost liability is limited to the amount of the funding he provided.

A voluntary 'Code of Conduct for the Funding by Third Parties of Litigation in England and Wales' has been agreed by members of the Association of Litigation Funders and sets out standards of practice and behaviour for members.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

In general, no. Specific rules apply to claims for compensation arising from infringements of competition law which are outlined in section 2 above.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

A litigant may assign his/her cause of action to a third party that can then litigate the matter in their own name. In the insolvency context, liquidators are given statutory powers to sell a cause of action to a third party in return for a share of any proceeds recovered. Otherwise the legality of such an assignment will be subject to the rules on champerty outlined in the answer to question 7.4. The courts have upheld such assignments where the funder has a genuine commercial interest in the enforcement of the claim (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679).

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No (although in sentencing an offender, the criminal courts may make an order requiring the offender to pay compensation to a victim for any personal injury, loss or damage resulting from the offence).

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes. There are a variety of different methods including mediation, arbitration and neutral evaluation. A range of Ombudsman schemes are also available.

The courts encourage the use of alternative dispute resolution ("ADR") to resolve disputes and the pre-action protocols to the court rules provide that the parties should consider whether some form of ADR is more suitable than litigation before commencing proceedings. While the courts cannot compel the parties to use ADR procedures (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576), failure to follow the protocols may result in a costs sanction. Indeed, courts have refused to award costs to a successful party where they unreasonably refused to mediate (*Dunnett v Railtrack plc* [2002] EWCA Civ 303).

An Ombudsman will investigate complaints of maladministration. Examples include the Parliamentary and Health Service Ombudsman, the Local Government Ombudsman and the Financial Ombudsman. Although the exact procedures vary, in general, where a complaint is upheld, the relevant Ombudsman will write a report and make recommendations as to how to deal with the complaint, including suggestions as to compensation. Such recommendations are not usually legally binding.

8.5 Are statutory compensation schemes available e.g. for small claims?

There is no general scheme. However, specific statutory schemes are available. For example, the Criminal Injury Compensation Scheme provides statutory compensation to victims who suffer personal injuries as a result of violent crime. Under the Vaccines Damage Payments Act 1979, fixed compensation is paid to persons suffering severe disablement as a result of certain vaccinations. Compensation schemes are also available in other areas, such as the financial services sector (for example, the Financial Services Compensation Scheme provides compensation to customers of authorised financial services firms who are unable to meet claims against them). Schemes are sometimes also set up to resolve specific claims, e.g. the schemes relating to HIV and Hepatitis C contamination of blood products supplied by the National Health Service.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

In the context of an arbitration, the parties can agree on the powers exercisable by the arbitral tribunal by way of remedies. Unless otherwise agreed, the tribunal has the power to order the payment of monetary compensation, make a declaration, and require a party to do or restrain from doing something (section 48 of the Arbitration Act 1996). Mediation is a consensual process intended to reach agreement between the parties and no 'remedies' are therefore available.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Yes. Proceedings may be brought in England and Wales by foreign Claimants against English-based corporations or bodies based on the actions of their subsidiaries in other jurisdictions. For example, group actions have been pursued in England in respect of actions arising from exposure in South Africa to asbestos mined or processed by an affiliate of an English company (*Lubbe v Cape Plc* [2000] 1WLR 1545); by a group of Claimants from the Ivory Coast against a British-based oil trader, Trafigura, for damage allegedly caused by the dumping of toxic waste; by a group of Bangladeshi villagers against The Natural Environment Research Council, a British organisation which allegedly conducted a negligent survey, in respect of damage arising from contaminated ground water (*Sutradhar v Natural Environment Research Council* [2006] UKHL 33); and by a group of Zambian citizens for damages arising from pollution and environmental damage allegedly caused by a copper mine run by the Zambian subsidiary of an English holding company (*Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC)).

Broadly, where the parties are European, questions of jurisdiction will be governed by the Judgments Regulation (No. 44/2001(EC)); where the Claimants are non-EU, the English courts generally have jurisdiction to hear cases brought against persons domiciled in England. The courts no longer have discretion to refuse jurisdiction against such English Defendants on the ground that the courts in another jurisdiction would be a more suitable venue for the trial of the action (*Owusu v Jackson* [2005] ECR I-1383, *Lungowe v Vedanta Resources Plc (ibid)*).

Where the Claimants are domiciled outside the European Economic Area ("EEA"), the nature of the claim pleaded may be critical, even if the Defendant is domiciled in England. In *Allen v Depuy International Limited* [2014] EWHC 753, the court ruled that the Consumer Protection Act 1987, which implements the EU Product Liability Directive in the UK, provides no redress for non-EEA consumers who claimed for injury sustained outside the EEA from hip implants supplied outside the EEA but designed and manufactured in England.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

As outlined above, the UK Government has introduced a collective redress procedure in respect of competition law claims as part of a range of measures to try to encourage private actions arising from breaches of competition law. However, following the CAT's refusal to grant 'opt-out' collective proceedings orders in the only two claims to come before it (the *Pride Mobility* and *MasterCard* cases, see question 2.1 above), there remains uncertainty over the extent to which these procedures will, in fact, achieve this aim.

There do not appear to be any current plans to extend the existing general group action procedure to permit claims to be brought on an 'opt-out' basis. The UK Government has considered the adequacy of general measures for collective redress on a number of occasions, but these initiatives have not been progressed pending separate European reviews of collective redress, which are discussed in our overview chapter, 'EU Developments in Relation to Collective Redress'. The UK Government's position was most recently articulated in its consultation 'Private Actions in Competition Law: A Consultation on Options for Reform' published in April 2012. It stated that it does not favour the introduction of a generic collective redress mechanism covering all sectors, either in its domestic jurisdiction or at EU level. Instead, it favours an approach targeted at specific sectors where there is a need, based on minimum standards of access to justice.

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Arnold & Porter Kaye Scholer is an international law firm with over 1,000 attorneys in 13 offices in the US, London, Frankfurt, Shanghai and Brussels. The firm is recognised as one of the leading class action defence firms, providing clients with an integrated litigation service on a transatlantic basis. It handles the defence of class actions and coordinated litigation in a wide range of areas including product liability, antitrust, consumer protection/false advertising, counterfeit goods, securities, distributor disputes and environmental matters.

The firm's European lawyers are at the forefront of "group action" litigation with experience derived from the successful defence of many of the major multi-claimant cases that have been brought in the UK and elsewhere in the EU over the last 30 years. In the US, the firm has acted as both national counsel and trial counsel and its attorneys litigate in state and federal courts throughout the US.

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The first Class Actions proceedings was introduced in 2014 for consumers' matters. Since then, this specific procedure to four other areas: discrimination; environmental protection; personal data protection; and health law.

1.1.1 Class Actions in Consumer Disputes

Law No. 2014-344 March 17, 2014 and the Decree No. 2014-1081 of September 24, 2014 (inserted at articles L.623-1 to L.623-32 and R.623-1 to R.623-33 of the Consumer Code) entered into force on October 1, 2014 and introduced Class Actions for consumers in France. An accredited consumer association may take legal action to obtain compensation for consumers placed in an "identical or similar situation" for individual economic damage resulting from the same breach of contract or statutory duty, by the same professional, and that must be in connection with the purchase of goods or services or from antitrust practices.

Two procedural routes are provided for by the 2014 law:

- Standard proceedings divided in two phases:
  - The first phase, deals with a judgment on liability and the setting up of a global judicial compensation scheme. The court rules on the admissibility of the Class Action, on the liability of the defendant(s) on the basis of the individual cases submitted by the association, on the extent of the group of the consumers to whom the professional is liable and the criterion to be a part of the group, as well as on the type of losses to be compensated. Once all recourses are exhausted, the judgment is published.
  - The second phase deals with the enforcement of a judgment and individual compensation. The liable third party compensates the individual losses suffered by each consumer having joined the group as defined by the court. The amount of the compensation is decided by the parties on the basis of the criteria given by the first judgment.
- Simplified proceedings: if the identity and the number of affected consumers are known, and if they have suffered a loss of the same amount, the court can order the professional to indemnify the consumers directly and individually in the same judgment.

1.1.2 Class Actions in Health Law

Law No. 2016-41 January 26, 2016 and the Decree no. 2016-1249 of September 28, 2016 (inserted at articles L.1143-1 to L.1143-22, R.1143-1 to R.1143-11 and R. 1526-1 of the Public Health Code) introduced Class Action proceedings in the health sector. Only accredited associations of users of the health system can bring such Class Actions on behalf of victims placed in an "identical or similar situation" who suffered individual bodily injuries resulting from the same breach of duty whether based on contractual liability or a tort liability regime. The claim can be brought against producers or suppliers of health products or their insurers.

The proceedings is divided into two phases:

- The first phase deals with a judgment on liability and the setting up of a global judicial compensation scheme. The court rules on the admissibility of the Class Action, on the liability of the defendant(s) on the basis of the individual cases submitted by the association, on the extent of the group of victims to whom the professional is liable and the criterion to be a part of the group, as well as on the type of losses to be compensated. Once all recourses are exhausted, the judgment is published.
- The second phase deals with the enforcement of a judgment and individual compensation. The liable third party compensates the individual losses suffered by each user having joined the group as defined by the court. The amount of the compensation is decided by the parties along with the criteria given by the first judgment.

1.1.3 Class Actions in Discrimination, Environmental and Personal Data Disputes

Law No. 2016-1547 November 18, 2016 (known as "Justice 21") (inserted at article 10 of the Law No. 2008-496 May 27, 2008, articles L.77-11-1 to L.77-11-6 of the Code of Administrative Justice, articles L.1134-6 to L.1134-10 of the Labour Code, article L.142-3-1 of the Environmental Code, article 43*ter* of the Law No. 78/17 January 6, 1978, and articles L.77-10-1 to L.77-10-25 of the Code of Administrative Justice) introduced Class Action proceedings in the discrimination, environmental and personal data sectors. Only accredited associations of these sectors can bring such Class Actions on behalf of victims placed in an "identical or similar situation" who suffered individual bodily injuries resulting from the same breach of duty whether based on contractual liability or a tort liability regime.

- When the aim of the Class Action is a monetary compensation of individual losses, the proceedings are divided into two phases:
  - The first phase deals with a judgment on liability and the setting up of a global judicial compensation scheme. The court rules on the admissibility of the Class Action, on the liability of the defendant(s) on the basis of the individual cases submitted by the association, on the extent of the group of the health system users to whom the professional is liable and the criterion to be a part of the group, as well as on the type of losses to be compensated. Once all recourses are exhausted, the judgment is published.

- The second phase deals with the enforcement of a judgment and individual compensation. The liable third party compensates the individual losses suffered by each user having joined the group as defined by the court. The amount of the compensation is decided by the parties along with the criteria given by the first judgment.

- When the aim of the Class Action is an injunction relief, there will be have only one decision ruling on the existence of the breach and on the measures to be imposed on the party liable for the breach.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

As mentioned in question 1.1, Class Actions are limited to five areas in French law: Discrimination; Environmental Protection; Personal Data Protection; Consumer Protection; and Health Law.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

In the first phase of all five class actions, apart from the admissibility of the Class Action, the court rules on the liability of defendants after having examined the individual cases submitted by the accredited association.

Once the defendant's liability is established, the judge must determine criteria needed to define victims of the Class Action, damages subject to compensation and conditions to determine the amount of compensation.

Therefore, as related claims are managed together, the judge's decision creates a binding precedent for the others in the group.

1.4 Is the procedure 'opt-in' or 'opt-out'?

All five Class Actions have an opt-in procedure.

Potential victims must individually consent to be members of the group.

It can either be through the accredited association, in the first phase, or after the judge's decision, in phase two, where victims claim to be member of the group under conditions outlined in the decision. Regarding class action in health law, each health fund which paid for medical costs or allowances to the party joining the action shall be invited to present its claim.

This system is justified by the need to respect the right to bring individual actions.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

All five Class Actions do not mention a specific number as the law refers to "several persons". Two claims seem to be sufficient to initiate a Class Action but it could be argued that too few claims are not representative enough to allow identifying a group.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

In all five Class Actions, the law lists the same criteria:

- victims must be in an "*identical or similar situation*"; and
- their damages must result from the same breach of contract or statutory duty, by the same professional.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Only associations (the characteristics of which are defined for each specific class action) can bring a class action:

1.7.1 Class Action in Consumer Disputes

Only accredited, nationally representative consumer associations can bring a Class Action, of which there are 17 in France.

1.7.2 Class Action in Health Law

Only accredited, national or local associations of users of the health system (defined as per article L.1114-1 of the Public Health Code) can bring such a Class Action, of which there are dozens in France.

1.7.3 Class Action for Discrimination

1.7.3.1 General Discrimination

Only accredited associations of the protection against discriminations can bring such a Class Action.

1.7.3.2 Discrimination by a Public Employer

Only public sector workers' organisations can bring such a Class Action.

1.7.3.3 Discrimination by a Private Employer

Only trade union organisations can bring such a Class Action (defined as per articles L.2122-1, L.2122-5 and L.2122-9 of the Labour Code).

1.7.4 Class Action for the Environmental Protection

Only accredited associations as decreed by the *Conseil d'Etat* or as defined in article L.141-1 of the Environmental Code.

1.7.5 Class Action for the Personal Data Protection

Only accredited, national associations of the personal data protection system, or accredited, nationally representative consumer associations (defined as per article L.811-1 of the Consumer Code), or trade unions (defined as per articles L.2122-1, L.2122-5 and L.2122-9 of the Labour Code) can bring a Class Action.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

For all five Class Actions, should the defendant's liability be engaged, the court orders, within the same decision and at the defendant's expense, measures required to inform persons likely to belong to the defined group and be considered as a victim.

It is important to notice that the measures of information will be implemented only when the decision is irrevocable (i.e. when all recourses including the *Cour de cassation*'s petition have been exhausted).

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Eight Class Actions have been filed since October 1, 2014, in real-estate businesses, financial business, electronical communications, operations on a campsite and in the economic sector. As of today, one decision rendered in first-instance dismissing the class action for lack of identity of the situation.

One Class Action in Health has been filed in 2017.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

1.10.1 Class Action in consumers disputes

In principle, the remedy available for consumers is monetary compensation.

However, in certain cases the judge can order an in-kind compensation, if he considers it is more appropriate (article L.623-6 of the Consumer Code).

1.10.2 Class Action in Health Law

The remedy available for victims is monetary compensation.

1.10.3 Class Action in discrimination disputes

The remedy available for the victims is an injunction to cease the breach but monetary compensation may also be obtained.

1.10.4 Class Action in environmental disputes

The remedy available for the victims is monetary compensation but an injunction to cease the breach may also be obtained.

1.10.5 Class Action in personal data disputes

The only remedy available for the victims is an injunction to cease the breach.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Under French law, and despite the adage "*No one shall plead by proxy*", increasingly the legislator gives a person the right to initiate an action in front of the French civil and/or criminal courts for the interests of others.

The starting point is the Law N°92-60 dated January 18, 1992; some groups or associations have the right to initiate common representation actions. Article 31 of the Civil Procedure Code, provides that the law can attribute the right to raise a claim before the court to some associations. Under French law there are three possibilities:

- A group or an organisation has the capacity to initiate common representation actions for the defence of a general interest.
- A group or an organisation has the capacity to initiate common representation actions for the defence of a collective interest. It is the collective interest of a specific group; professional and social. In this case, the action of the group is for the interest's defence of a specific group of people, professional or a social one (for example: unions and authorised associations). The admission of association's lawsuits is largely accepted by French case-law. Initiating an action is possible since the protection of this specific group of people is part of objects of the association – Civ 1ère, September 18, 2008, N°06-22038.

But these actions do not allow compensation for personal injury.

- For the compensation the personal injuries, a nationally accredited association can act for several persons only if it received express mandate by individual consumers and can then bring a common representation actions ("*actions en représentation conjointe*") for the individual personal interests' defence (article L.622-1 of Consummation Code, and for specific common representation actions see question 2.2 below).

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

All nationally accredited associations (consumers, environmental, investors…) may start common representation actions for the defence of physical and identified individuals to obtain compensation for personal injury.

Under French law, several authorised associations in different sectors may initiate a lawsuit to defend the rights of parties.

French law gives the right to initiate lawsuits for civil or criminal aspects, without listing specific offences to:

- Environmental protection associations (article L.142-3 of the Environment Code).
- Associations of consumers (article L.621-7 of the Consummation Code).
- Trade unions (article L.2132-3 of the Labour Code).
- Investors' defence association (article L.452-1 of the Monetary and Financial Code).

Concerning the criminal aspect, articles 2-1 *et seq*. of the Criminal Procedure Code, give the right to initiate this kind of action, for any association that hold in their statutes the purpose of fighting racism or other listed discriminations and offences.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Nationally authorised associations may only exercise common representation actions if the association is mandated, and if several identified members have incurred individual injuries caused by the same act and having a common origin.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The remedies available, concerning the different types of injuries, are compensation in cash or/and in kind.

But other remedies can be found, for example:

- Consumers' associations can request from the judge to remove illegal terms from a contract which was or is still offered to consumers.
- Article L.452 of the monetary and financial code allows investor's defence associations, when a practice is illegal and can affect the rights of the investors, may request that the court orders that the responsible person comply with the legal dispositions to end the irregularity or eliminate its effects.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In civil and commercial matters, there is no jury, only judges (one or three depending on the claim amount and complexity of the case).

Even if criminal liability was pursued, the trial would still be held by judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

For both Class Actions, there is no specific court in the French justice system. Therefore, in case of a Class Action, the competent jurisdiction is determined by the common law of civil proceedings.

Before a Civil Court, the JME (*juge de la mise en état*) is designated by the President of the competent Civil Court to supervise the pretrial phase. The JME sets up the procedural calendar, the deadline of the pretrial phase and, afterwards, a trial date. The JME has authority to rule on procedural exceptions.

To be noted, the appeal proceedings for both Class Actions are based on a fast track procedure. Therefore, there is no equivalent of a JME in appeal.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The judge determines the criteria to identify victims of the Class Action.

As mentioned before, the association presents, before the court, selected cases of consumers or users of the health system, in an identical or similar position, who have suffered damages resulting from the same defendant. In his decision, the judge decides the admissibility of the Class Action, determines criteria needed to define victims and their compensation.

It is only after the second phase that there is a cut off for the victims/claimants.

Indeed, victims, after the publication/communication of the judge's final decision have a certain amount of time, that is determined by the judge (even if the law sets a legal frame) to declare themselves so they can benefit from the compensation (if they fulfil the criteria set by the judge).

This time period differs depending on the subject of the Class Action:

3.3.1 **Class Actions in Consumer Disputes**: no less than two months but no more than six months.

3.3.2 **Class Action in Health Law**: no less than six months but no more than five years.

3.3.3 **Class Action in Discrimination Disputes, Environmental Disputes and Personal Data Disputes**: the timelines are determined by the judge.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

As mentioned, there is no distinction in the first phase between the admissibility of the Class Action and the liability of the defendant. There are no preliminary issues that are decided by the judge other than in his last and only decision.

Cases selected by the association are submitted to the judge and it is on this basis that the judge will establish the criteria to determine victims of the Class Actions and their compensation.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

At this point in time, we do not have enough hindsight on this type of proceedings to answer this question.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Even though the court may appoint experts as necessary to establish proof, there are no expert assessors before the French courts. The court can, however, appoint one or several experts.

Although this expert opinion is not binding upon the judge, this latter will mainly rely on this expert opinion to rule over the case.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Factual or expert witness statements are admitted before the courts as evidence. Such statements can be made in writing or (almost never) orally.

The parties must disclose this evidence in the course of the proceedings to comply with the adversarial principle.

There are no pre-trial proceedings in France.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Under French law, there is no discovery proceedings. The French system requires each party to rely upon the evidence that they select to support their claim. A party can apply to the court for a disclosure order, which may be admitted or dismissed.

3.9 How long does it normally take to get to trial?

A judgment in a claim for civil liability is usually given within two years. It takes at least another year for an appeal, and the recourse before the *Cour de Cassation* usually lasts 18 months.

Several emergency procedures are also available, such as fixed-date proceedings.

3.10 What appeal options are available?

A decision rendered by a first instance court can be appealed before a Court of Appeal. Even though the appellant can raise new grounds and produce new evidence, it may not depart from its original claims except to: plead set-off; reply to the opponent's claims; or obtain a ruling on issues arising from the intervention of a third party.

The Court of Appeal's decision can in turn be subject to appeal before the *Cour de Cassation,* which only has jurisdiction to hear points of law, not fact. It may refer a preliminary question to the French Constitutional Court, if there is a doubt as to the constitutionality of a legal provision in the case.

It must be highlighted that new rules are under discussion regarding the role of the *Cour de Cassation,* which may lead to a more restricted access before this court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Depending on the cause of action, various time limits apply.

It should be noted that the first phase of the Class Action suspends the statutory limitation. Regarding Consumer Class Action, article L.462-7 of the French Commercial Code provides that the statute of limitation period is interrupted by any action before a local Competition Authority, the European Commission or any other competent authority and until the decision of these authorities, or the decision of the competent court (if an appeal is lodged) is "final".

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Under the French common rules of time limits, a claimant can bring a claim on a contractual or tortious basis within five years from the date it knew or should have known the facts that enabled it to exercise its rights.

For bodily injuries, the time limit is 10 years as from the date of the stabilisation of the state of health.

For product liability, the time limit is three years with an absolute limit of 10 years from the date on which the defective product was put on the market.

In any event, no claim may be brought more than 20 years after the facts giving rise to the right except for claims in compensation of a personal injury or actions against health professionals in the public sector.

However, these time limits vary depending on the age or condition of the claimant. As provided for in article 2234 of the FCC, "*time does not run or is suspended where it is impossible to act following an obstacle resulting from the law, an agreement, or force majeure*". It is suspended for non-emancipated minors, or adults with diminished capacity except for specific actions set out in article 2235 of the FCC.

There are other specific rules which bar the time limit from running.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

There is no relief for a claimant who is time-barred, except whereby interruption or suspension is provided by law.

However, the *Cour de Cassation* has already ruled that fraud which affected the proper process of the claim suspended the running of time.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

5.1.1 Consumer disputes

Only individual economic damages, economic losses can be compensated.

5.1.2 Health law

Only individual bodily injuries can be compensated.

5.1.3 Discrimination disputes

Only damages caused by the discrimination can be compensated.

5.1.4 Environmental disputes

Only bodily injuries and property damages can be compensated.

5.1.5 Personal data disputes

The sole remedy in this case is an injunction relief.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring costs can be recovered when there is a serial defect, even though the product has not yet malfunctioned or caused an injury.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not granted by French courts.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no maximum limit on the amount of the damages recoverable. Any type of losses is compensable provided that a causal link is established.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

As mentioned before, the judge, in his first decision, rules on the admissibility, the liability, criteria to determine the persons who can join the group and their compensation. Regarding compensation, the judge determines the head of loss to be compensated for each

victim, each of the categories of victims that constitute the group that it has designated; it also determines the amount of the loss or all the elements necessary to calculate the losses.

5.6 Do special rules apply to the settlement of claims/ proceedings e.g. is court approval required?

Settlement of claims may be given judicial approval to be enforceable before the courts. However, when such settlements are contracted with minors or mentally impaired protected adults, the court will have to give approval on the settlements.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The losing party bears the court fees and other incidental expenses. A lump sum is also granted to the successful party for their legal costs, taking into account equity and the financial resources of the losing party.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In the first phase of the Class Actions, the accredited association supports costs. There is no legal disposition about the subject; therefore the load distribution can be put in place at the association's will.

In the second phase, the victim either takes a lawyer or seeks compensation through the association itself. In the first case, the fees are discussed between the victim and its lawyer. In the second case, it is up to the association (as it is in the first phase).

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

As a matter of principle, under article 699 of the French Civil Proceedings Code, the member discontinuing his claim should bear all costs (lawyer fees, expert fees…) except if the parties agree differently.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The decision to grant legal fees is up to the judge, who also determines the amount.

Its decision concerning the legal fees is given by its judgment, at the end of proceedings (article 700 of the French Civil Proceedings Code).

There is no cap. Usually the amount granted does not cover at all the fees engaged by the "winning party". But, in this case of Class Action, a higher amount is to be expected.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Legal aid is available in France. It may cover the costs totally or partially incurred during the trial.

7.2 If so, are there any restrictions on the availability of public funding?

As a matter of principle, public funding is aimed at low income litigants. Such financial thresholds are defined by decree and regularly revised. Legal aid can be granted to European citizens, foreigners legally residing in France, and asylum seekers.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fee arrangements are strictly forbidden under French law.

However, a written fee agreement with the client which is subject to uplift in the event of a particularly positive result and where the calculation is set out in advance is permitted.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding is not prohibited in France and is used mainly for international arbitral proceedings. Legal boundaries are not yet precisely defined in France.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

As "common representation" has already been presented in section 2 of this document, please refer to this section for more details.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Even if there are several mechanisms which would allow the transfer of rights to an individual claim, this is not at all a practice in France.

Regarding Class Actions, a transfer of right could only be considered between entities entitled by law to bring Class Actions, which are: nationally accredited associations for Consumer Disputes and accredited associations for Health Law.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Mediation proceedings are open provided that the person whose liability is sought and the association who brought the action consent to the mediation. The agreement to recourse to mediation must be published and registered.

For Class Actions in Health, the mediation process is very specific and differs from the mediation process already contained in the French Civil Proceedings Code.

The mediator is chosen among members of a list established by the Ministry of Health and not by the Ministry of Justice and can be assisted by a mediation commission.

The mediator and the mediation commission will be subject to professional secrecy regarding any document or information disclosed and discussions held in the context of the mediation.

The mediator will have a proactive position conversely to the usual position of go-between given to a mediator.

The mediator is empowered by the court to propose to the parties a global settlement protocol dealing with all the conditions applicable to the amicable compensation of the losses and the measures of information to be made on the existence of the settlement protocol, along with the time limits and arrangements to benefit from the amicable compensation agreed.

8.5 Are statutory compensation schemes available e.g. for small claims?

Specific compensation schemes are provided by the National Compensation Office of Medical Accidents outlined in article L.1142-22 of the Public Health Code for:

- victims who contracted AIDS, Hepatitis B, Hepatitis C or Human T-Lymph tropic after transfusion of blood products or medicinal products derived from human blood in France;
- victims who suffered damage caused by mandatory vaccinations, administration of Benfluorex (Mediator®) or Human Growth Hormones; and
- victims who suffered damage which is the result of side effects of drugs stated on the package leaflet of the medicinal products. Such realisation is considered a therapeutic risk.

Another fund, the FGAO (Funds for mandatory insurance warrantees) mentioned in article L.421-17 of the Insurance Code, is provided for victims who suffered damage resulting from mining subsidence.

There is also a specific fund, the FIVA, for the compensation of damages suffered by the victims of asbestos.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

As mediation is a consensual mechanism, the final decision is taken by both parties. As long as the parties agreed to it, within limits of the law, all remedies are available.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

There are no special rules restricting forum shopping.

The European rules (Regulation n°864/2007 of 11 July 2007 and Regulation n°593/2008 of 17 June 2008) give two possibilities for the claimant for the seizure of the court:

- the domicile of the defendant is in France; and
- the damage occurred in (or is related to) France.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The Justice 21 Act provides a canvas allowing for a potential extension to other areas. As of today, there has been no activity in that regard.

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Valérie acts for leading companies in sensitive product liability and life sciences litigation in relation to individual claims but also in large mass claims.

Valérie has also particular experience in complex expert-appraisal proceedings and industrial risks litigation. She has developed a recognised practice in environmental liability and has intervened in several of the massive pollution cases in France over the last years.

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SQUIRE PATTON BOGGS

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The office's clients span all sectors of the business world and include many household names and companies listed on French, English or North American stock exchanges, as well as several of France's largest state-owned concerns. Industry sectors in which the Paris office has particular experience include Chemicals, Marketing Services, Life Sciences, Aerospace & Defence, Energy, Automotive and Diversified Industrials.

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Germany

Clifford Chance

Burkhard Schneider

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Under German law, there is no specific procedure for handling a series or group of related claims applicable under all circumstances. While the general rules of civil procedure permit groups of claimants to aggregate their claims into a single action, no specific procedures exist for handling these aggregated claims. Courts even have, and often use, discretion to split aggregate actions by multiple claimants into separate individual proceedings.

In Germany, claimants also normally only have standing to bring their own claims in litigation. Thus, series or groups of related claims generally cannot be brought by individuals or institutions in a representative capacity. However, the principle of individual standing is softened *de jure* by procedures that provide for representative or collective actions in selected areas of law, and *de facto* by private efforts to replicate collective procedures, by assigning numerous related claims to litigation vehicles established by plaintiffs' law firms, often supported by commercial third party funding.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The German Capital Investors Model Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz*, *KapMuG*) enables investors to have elements of pending securities actions adjudicated collectively.

The Act came into force in 2005, seeking to address the German courts' difficulties with administering large numbers of similar securities actions, in particular over 13,000 individual actions brought against Deutsche Telekom. It introduced a unique procedure permitting claimants to collectively litigate common issues of law or fact that arise in their individual securities actions before a single higher court. In 2012, the German legislature amended the Act, including various revisions aimed at simplifying and streamlining model proceedings, as well as new provisions for a collective-settlement mechanism on an opt-out basis. The 2012 Model Proceedings Act also gives investors the opportunity to benefit indirectly from model proceedings by simply registering their claims with the court.

Originally, the law only applied to damages claims directly based on public information concerning securities, and claims for specific performance under the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, *WpÜG*). Yet, the 2012 amendment has broadened the scope of the Act to include mis-selling claims in which false or misleading public information concerning securities is an element of a claim against a broker or dealer in financial products. Thus, not only can parties responsible for prospectuses and *ad hoc* notices be defendants in model proceedings, but also brokers and dealers.

The basic procedures of the Act, however, remain unchanged. In essence, the law permits claimants to apply in their pending lawsuits for a collective action regarding common factual and legal issues before a Higher Regional Court. If a sufficient number of claimants apply within a certain time frame, the first trial court to receive an application will aggregate the applications and submit them to a Higher Regional Court. The Higher Regional Court will then select a lead claimant to represent all other claimants in the model proceedings while all individual actions are stayed. Nevertheless, all other claimants may still file briefs in the model proceedings, but are not allowed to contradict the lead claimant's submissions. In practice, however, most ordinary claimants in model proceedings remain passive. Based on the lead claimant's and the defendant(s)' submissions, the Higher Regional Court will rule on the common issues of fact or law raised in the aggregated applications. Hence, the model proceedings resemble a class action led by one claimant on behalf of all similarly situated claimants who have brought a lawsuit. The model ruling will bind trial courts in all individual actions affected by the common issues of law or fact – irrespective of whether a party in these proceedings was an applicant for the model proceedings.

Under the revised Act, instead of bringing a lawsuit, investors are alternatively able to register their claims with the Higher Regional Court handling the model proceedings. These investors do not become parties to the model proceedings and are barred from pursuing their individual claims while the model proceedings are pending. *De jure*, the registered claimants only enjoy a tolling of the statute of limitations for the duration of the model proceedings. Yet, one can expect registered claimants to benefit from the *de facto* precedential value of model proceedings in practice.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The Model Proceedings Act resembles a class action insofar as the model ruling automatically creates a binding precedent not only for

the lead claimant but for all similarly situated claimants of pending lawsuits. However, the model rulings do not adjudicate entire claims but only issues of fact or law common to a class of securities litigants. Yet, the 2012 amendments to the Model Proceedings Act introduce class settlements that may settle entire claims.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The Model Proceedings Act combines elements of "opt-in" and "opt-out" procedures. If a claimant applies for model proceedings, his or her application is published in an internet-based register (*Klageregister*) and the underlying action is automatically stayed. If nine similar applications are filed within six months, the first court to receive an application for model proceedings will submit the common issues of fact or law to the Higher Regional Court for adjudication. At this point, all actions affected by the common issues of fact or law are stayed. All claimants who lack the ability to continue their individual actions – including those who have not applied for model proceedings – are bound by the model ruling. Affected claimants are only granted the right to withdraw, and thereby essentially waive their claims, within one month of the stay of their actions. Once the common issues have been decided, the individual actions are resumed to adjudicate the remaining individual issues of fact or law.

The revised Model Proceedings Act also enables the lead claimant in model proceedings to negotiate a settlement with the defendant(s) (see question 5.6 for details), which is, after approval by the Higher Regional Court, binding on all parties, provided that no more than 30 per cent of the claimants opt out.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

A trial court can only submit cases to the Higher Regional Court for a model ruling if, after publication of a first application for model proceedings, at least nine further applications regarding common issues of fact or law are registered within six months.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The applicant needs to show that the issues of fact or law proposed for model proceedings may have significance beyond its own case in "similarly situated disputes" (*gleichgelagerte Rechtsstreitigkeiten*). Due to the vagueness of the "similarly situated disputes" requirement, considerable uncertainty remains in practice. Recent court judgments have found similarly situated disputes, particularly in situations where all claims have a common factual situation at their core.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Under the Model Proceedings Act, applications for model proceedings can be brought by capital investors who have standing to bring securities actions, i.e. individuals and institutional investors as well as defendants in such actions. The Act does not give groups or representative bodies standing to apply for a model proceeding.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Applications for model proceedings are published in an internet-based litigation register to invite other claimants to file similar applications. Moreover, if enough applications have been filed and submitted to the Higher Regional Court, the court will also publish information about the initiated model proceedings, inviting other claimants to join the proceedings by filing additional lawsuits or to toll applicable statutes of limitation by registering their claims with the court. The Model Proceedings Act does not provide for or restrict other forms of publication or advertisement.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Only a relatively small number of model proceedings have been registered since the inception of the Model Proceedings Act in 2005, and so far less than a handful of them have led to decisions on the merits. Yet, the 2012 extension of the scope of the Model Proceedings Act has increased the number of model proceedings – and probably will do so in the future. A recent rise in the number of entries in the model proceedings register seems to point in this direction. While in all of 2015, the register received 17 entries, in the first half of 2016, the number of new entries had already doubled to 34.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

Model proceedings do not deal with remedies, but only decide common issues of law or fact. The remedies available in individual actions depend on the substantive rights upon which claimants decide to base their claims. Securities actions under the Model Proceedings Act usually allege various forms of statutory causes of action, e.g. prospectus liability, breach of advisory contracts, or sound in tort – for all of which pecuniary damages are the principal remedy (see question 5.1 for details).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Collective interests are enforceable through representative actions in a number of legal areas. In particular, consumer protection, competition and environmental laws give certain non-profit organisations a right to sue.

a) **Consumer protection law**. The German Injunctions Act (*Unterlassungsklagengesetz*, *UKlaG*) of 2001 grants, *inter alia*, authorised consumer associations the right to enjoin

defendants from using or recommending "unfair" standard terms, and seek injunctions against violations of consumer protection laws relating to business-to-consumer contracts.

b) **Competition law**. Violations of consumer protection laws may simultaneously constitute violations of the German Unfair Competition Act (*Unlauterer-Wettbewerb-Gesetz*, *UWG*), which also allows associations entrusted with the observance of German competition law to seek injunctions against anti-competitive behaviour. The Act also enables such associations to seek injunctions where a business's action unduly compromises competitors' interests as well as in cases of unfair marketing behaviour.

c) **Environmental law**. Representative actions are provided for in the recently amended Environmental Damage Act (*Umweltschadensgesetz*, *USchadG*) and the Environmental Judicial Review Act (*Umwelt-Rechtsbehelfsgesetz*, *UmwRG*). The former Act covers the powers of public authorities to combat environmental damage and grants authorised environmental associations the right to seek judicial review of any such action or omission. The details of environmental associations' right to sue are set out in the Environmental Judicial Review Act, which transposed Council Directive 2004/35/EC into national law. To succeed in a judicial review claim, associations need to establish: firstly, that there has been a violation of laws aimed at environmental protection; and secondly, that this violation runs counter to the environmental protection goals spelled out in the association's constitution. The association loses its standing to sue if the public authority had consulted the association before reaching a decision and the association failed to assert its concerns at this consultation stage.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Injunctive actions in all areas outlined under question 2.1 can only be brought by non-profit organisations approved by the government. To have standing for an injunction action against "unfair" standard terms, the organisation must either be a registered consumer association approved by national or EU authorities or a Chamber of Commerce regulated under national law. Registered consumer groups only have standing if business-to-consumer contracts are at issue. If an association does not fall under these limbs, it must demonstrate for approval that it is a non-profit organisation pursuing commercial interests and representing a significant number of businesses from the same or similar sector, as well as that the injunction action it pursues aims at protecting its members' interest in due market competition. These requirements also apply to organisations alleging business-to-business competition law infringements which are not related to the use of "unfair" standard terms. Environmental associations seeking judicial review must likewise be registered. To be registered, they must demonstrate: firstly, that according to its charter the organisation's principal aim is environmental protection; secondly, that it has been active in this respect for at least three years; thirdly, that its purpose is "charitable" under national law; and fourthly, that its interior structures are democratic, particularly that any interested person can join and exercise membership rights.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Representative actions can only be brought in the areas of consumer, competition and environmental law (see above question 2.1).

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

In consumer protection and competition actions, only injunctive relief is available. Yet, injunctions against the use of "unfair" standard terms also have *res judicata* effects that inure to the benefit of consumers affected by the use of "unfair" standard terms, providing a potential basis for contractual remedies including monetary compensation. Judicial reviews initiated by environmental protection groups are ordinarily directed at quashing a public authority's decision and only exceptionally lead to a damages award.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In Germany, trials are generally conducted by professional judges, albeit that in some areas of law, lay judges join them on the bench.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

There are no courts in Germany that deal specifically with class or group actions. There are, however, specialist panels, in particular at Higher Regional Courts, which deal with model proceedings. Regional courts as well as Higher Regional Courts generally allocate cases to particular panels or chambers according to the area of law to which the dispute is related.

A significant change in the 2012 Model Proceedings Act is the extension of the Higher Regional Court's responsibility for managing model proceedings. The Court is now responsible for deciding whether and to what extent the model proceedings should include any additional issues to be covered by its ruling.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

Providing that common issues of fact or law underlying parallel cases are identified, the issues are bundled and sent for determination to the Higher Regional Court under the Model Proceedings Act. Hence, certification of the class is not made on the basis of a particular group of claimants, but with reference to substantially comparable issues of law or fact underlying a number of cases.

Courts cannot impose a cut-off date for joining model proceedings by filing a lawsuit involving the common issues of law or fact to be adjudicated. Yet, registration of similarly situated claims for purposes of tolling the statute of limitations is only possible within six months of the publication of the Higher Regional Court's notice regarding the initiation of the model proceedings.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Under the Model Proceedings Act, the Higher Regional Court only rules on the issues of law or fact raised in applications for a model ruling that have been aggregated by the first trial court to grant an application. Thus, the Model Proceedings Act provides for the determination of generic or preliminary issues of law or fact with respect to the affected securities actions. However, in all areas of law, litigants may agree on litigating only "test" or "model" cases (*Musterklage*) while staying all others. Such "test" or "model" cases will only lead to persuasive precedents.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Courts in mass litigation cases are often willing to coordinate the management of numerous parallel cases with the litigants and informally agree, for example, on filing deadlines and scheduling as well as bifurcating common dispositive issues. Increasingly, courts accept the coordination of mass proceedings through less formal communication channels such as emails, focusing on representative sample briefs for all parallel cases. However, paper copies still need to be filed in each and every case of the mass proceedings.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

There are two kinds of experts in the German judicial system: court-appointed experts whose reports may be used as evidence; and private experts who are selected by the parties and whose reports are considered particularly reliable party submissions of fact. Hence, a party submitting expert reports will raise the opposing party's bar for proper factual pleadings in response. Moreover, private expert opinions can also be used to challenge opinions of court-appointed experts.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Pre-trial depositions do not exist in Germany. There is no rule that witness statements or expert reports must be exchanged prior to trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In Germany, parties are generally not required to disclose evidence. While a few statutory provisions allow courts to order the production of evidence, they are often interpreted narrowly and rarely used in practice. However, pleading rules, in particular the truthful pleading rule and the shifting of the burden of pleading may, under certain circumstances, lead to some degree of disclosure of information by the defendant. Yet, the reversal of the burden of pleading does not compel defendants to disclose documents.

3.9 How long does it normally take to get to trial?

German civil trials, particularly in complex cases, are usually extensively prepared by written submissions of the parties. Hence, a first trial hearing can on average be expected after six to 12 months. However, the scheduling of hearings also depends on the workload of the court and varies a lot between courts. In proceedings under the Model Proceedings Act, a hearing of the Higher Regional Court may only occur after a considerably longer period of time.

3.10 What appeal options are available?

There are generally two appeal options available in Germany: an appeal on points of law and fact; and a subsequent appeal on points of law only.

As regards model proceedings under the Model Proceedings Act, the model ruling of the Higher Regional Court may be appealed to the Federal Supreme Court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, there are.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The standard limitation period for bringing court proceedings is three years. Longer limitation periods of 10 years exist, for example, for interests in real property, or of 30 years, for example, for personal injury claims as well as adjudicated claims.

The standard limitation period commences at the end of the year in which the claim arose and the plaintiff had knowledge of the circumstances giving rise to the claim, or would have obtained such knowledge if he had not shown gross negligence. Irrespective of knowledge, claims to which the standard limitation period applies become time-barred 10 years after they arise.

Under the Model Proceedings Act, investors who have not filed an action may register their claims with the Higher Regional Court responsible for the model proceedings within a period of six months from the model proceedings' public announcement.

Environmental protection groups seeking judicial review of public authorities' decisions must usually file their claim within one month after the authority's decision has been made public. The limit extends to one year if the authority's decision has not yet been made public, or the authority fails to comply with its respective duties.

The age or condition of the claimant does not affect the calculation of any time limits. Courts also do not have discretion in the application of time limits. Under certain circumstances, however, the limitation is suspended, e.g. in cases of *force majeure* that occur within the last six months of the limitation period.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Neither issues of concealment, nor those of fraud, directly affect the running of time limits, but both may be relevant for the claimant's knowledge of the facts underlying the claim and therefore the running of the statute of limitations. Moreover, in certain cases, concealment and fraud may give rise to new claims and, therefore, new limitation periods.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The provisions on damages are contained in the "General Part of the Law of Obligations" in the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) and generally apply to damages arising out of contract, tort and other statutory actions. Generally, damages are fault-based, i.e. they are only recoverable if the wrongful act or omission was either intentional or negligent. Yet, apart from the Civil Code, many specialised statutes provide for compensation for damage caused irrespective of fault (for instance, in the field of product liability).

Furthermore, damages are generally only compensatory. According to the provisions of the Civil Code, natural restitution, usually by means of specific performance, is the norm of compensation, stipulating that the person liable has to perform those acts which will make good the loss suffered by the party entitled to compensation. Pecuniary damages are only available if natural restitution is impossible or insufficient for just compensation, and always in cases of bodily harm or damage to property. Yet, given the broad scope of these exceptions, in practice, pecuniary damages are the principal remedy available in German courts.

Lost profits and consequential losses are generally recoverable through pecuniary damages. In tort claims, pure economic loss is only recoverable if the claimant can demonstrate that the wrongdoer has acted in breach of a law designed to protect the claimant, or, in the absence of such a law, if the claimant can establish that the wrongdoer's action was intentional and in violation of public policy.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Costs of medical monitoring are potentially recoverable under German law. However, this issue is highly fact-sensitive and requires meticulous scrutiny of all the circumstances in the individual case at hand.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Under German law, non-pecuniary losses are only recoverable for bodily harm, illegal restraint and violation of sexual autonomy. Yet, recently the notion of non-pecuniary damages has been taken to include "satisfaction" for the victim for what has been done to him or her, and the German Supreme Court has also emphasised the "deterrent" function of non-pecuniary damages in mass media cases involving the invasion of privacy of celebrities. Likewise, the Federal Constitutional Court (*Bundesverfassungsgericht*) has held in response to the European Court of Human Rights' *Caroline of Monaco (No 1)* judgment that claimants seeking redress for infringements of their constitutionally protected right to privacy must have effective remedies available. In those limited cases, therefore, the German notion of damages comes close to the concept of punitive damages. In practice, however, the amounts recoverable under this theory are a far cry from those awarded in certain other jurisdictions, particularly in the United States. The concept of "*damage per se*" is not recognised under German law.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Under the general concept of damages under German law, damages must always be compensatory and generally provide redress for all losses. Specific statutes, however, set limits on recoverable damages (for instance, the German Product Liability Act (*Produkthaftungsgesetz*, *ProdHaftG*) limits liability arising from one defective product to EUR 85 million). If there is more than one tortfeasor, the claimant can bring an action against any one of them and invoke the principle of "joint and several liability" to recover full damages. The defendant sued can then claim contribution from the other tortfeasors, proportionate to the degree of fault and causal connection between breach and harm.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The German Civil Code stipulates that he or she who is liable for damages has to restore the state of things that would exist if the fact making him or her liable had not occurred. Accordingly, damages are calculated by comparing the claimant's position with and without the defendant's act causing the damage. This approach flows from the general approach that damages under German law are compensatory in nature.

Model proceedings only adjudicate issues of law or fact common to all similarly situated claimants and therefore do not rule on individual issues such as damages.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

German law normally permits the settlement of claims between the parties without court approval. Settlements reached while litigation is pending and recorded by the judge terminate the proceedings and are enforceable *in lieu* of a judgment.

The revised Model Proceedings Act has implemented the option of a "collective settlement" (*Kollektivvergleich*), making it easier to reach a settlement in model proceedings. Before the amendment of the Act, every claimant in a particular set of model proceedings was required to give his or her express consent to any settlement. However, unanimous consent is difficult to obtain in model proceedings with numerous claimants. Since the amendment, it is now possible for lead claimants to negotiate a settlement with the defendants which will – after approval by the Higher Regional Court – be binding on all parties, unless at least 30 per cent of the claimants choose to opt out.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Under German law, the successful party can recover those costs of the legal dispute that were required in order to bring an appropriate action or to appropriately defend against an action brought by others. These costs generally include, but are not limited to, lawyers' fees in the amount of the statutory lawyers' fees, and incidental expenses such as court fees, expert witnesses' statutory fees, and expenses for any necessary travel or for the time the successful party has lost having been required to make an appearance at hearings.

Where each of the parties has partially prevailed, the costs are either cancelled against each other, or shared proportionally. The court may further impose the entire costs of the proceedings on one of the parties if the amount the other party claimed in excess of the award was relatively small, or has resulted in only slightly higher costs, or if the amount of the claim brought by the other party depended on the judge's discretion, on expert assessments, or on the parties settling their reciprocal claims.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In the event of an unsuccessful appeal of the Higher Regional Court's model ruling to the Federal Court of Justice, the costs of the model proceedings are shared *pro rata* by all claimants who have filed their claim, in proportion to the value of each party's alleged claim.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Claimants affected by model proceedings can withdraw their claims within one month of their individual proceedings being stayed to avoid having to bear their *pro rata* share of the costs of the model proceedings.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

German law limits the amount of litigation costs that are recoverable. Only costs that are deemed necessary in order to bring an appropriate action, or to appropriately defend against an action brought by others, are recoverable. Necessary costs, in general, are costs that have been incurred or expended by the parties in direct connection with the litigation in question. Lawyers' fees are only considered necessary in so far as they do not exceed the statutory fee schedule for lawyer services. Litigation costs are generally awarded in the judgment as a matter of procedural law. In appropriate circumstances, additional reasonably necessary pre-litigation costs may be claimed as damages. Hence, courts do not directly manage litigation costs incurred by the parties, but German law essentially caps costs awards at what it considers a reasonable level.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, it is. Public funding is available in the form of legal aid. Legal aid, if granted, covers the court fees and the applicant's own lawyer's fees, but it does not cover the costs expended by the opponent, which the applicant must bear in accordance with § 91 of the German Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*), if he or she loses. Legal aid, in general, is available for domestic as well as for cross-border disputes within the EU.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid is available to parties who, due to their personal and economic circumstances, are unable to pay the costs of litigation, or are only able to pay them in part or in instalments. Upon filing a corresponding application, parties receive legal aid – provided that the action they intend to bring, or the defence against an action that has been brought against them, has sufficient prospects of success and does not seem frivolous. These rules apply equally to legal and natural persons irrespective of their nationality, citizenship or residence.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

In Germany, contingency fee arrangements are generally contrary to lawyers' standards of professional conduct and, until recently, were flatly prohibited. A contingency fee arrangement exists if the amount of the remuneration depends on the outcome of the case or on the lawyer's success, or if the lawyer receives a percentage of the sum recovered from the opposing party as a fee. The prohibition was eased in 2008 after a ruling of the German Federal Constitutional Court which declared a flat prohibition of contingency fee arrangements unconstitutional because it unduly restricted the professional freedom of lawyers (*BVerfG*, Judgment of 12 December 2006, 1 BvR 2576/04).

German law now provides that a contingency fee may be agreed upon in individual cases, but only if the client, because of his or her economic situation, would otherwise reasonably refrain from pursuing his or her claim. This includes cases of insufficient funds as well as cases involving high cost risks that might prove ruinous.

Nevertheless, contingency fee arrangements are still rare in Germany.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding of claims is permitted in Germany. Third party funding, as the term is generally understood in Germany, means that a private or commercial third party advances the funds required for court or arbitral proceedings and bears the risk of an adverse cost award in exchange for a fixed percentage of any judgment or settlement.

In Germany, the claimant and the funder usually enter into a financing contract which forms the basis of their legal relationship, i.e. typically an undisclosed or "silent" partnership under the German Civil Code with the purpose of bringing the claimant's case before the court or arbitral tribunal (*Prozessfinanzierungsvertrag*). It is only the claimant, however, who, under the financing contract,

is entitled to represent the partnership *vis-à-vis* third parties. The funder's role in the silent partnership is restricted to funding its partner's costs of court or arbitral proceedings, to bearing the risk of an adverse cost award, and to partially reaping the benefits of any judgment or settlement in favour of the claimant.

A specific characteristic of this silent partnership is that the claimant assigns the asserted claim against the defendant to the funder by way of security. It is a particularity of such a silent security assignment under German law that the assignor, with the authorisation of the assignee (here: the funder), continues to be entitled to assert the claim in his own name before the court or arbitral tribunal without being legally obliged to disclose the security assignment to the court or arbitral tribunal (*Einzugsermächtigung des gewillkürten Prozessstandschafters bei stiller Sicherungszession*).

In Germany, the role of third party funders is more restricted in theory than in practice. Third party funders are neither allowed to direct their customers to certain lawyers, nor do they, according to market practice, have any direct control over the lawyer's actions. Only the claimant and the funder are parties to the financing contract. That means that the lawyer has no legal obligation to the funder. Typically, however, the claimant, according to the financing contract, waives the attorney-client privilege and promises that both he and his lawyer will keep the funder informed at all times. In practice, all correspondence between the court and the parties to the lawsuit has to be forwarded to the third party funder. If the claimant fails to keep the funder informed, the latter may, depending on the gravity of the infringement, terminate the contract. Typically, the claimant is further obliged under the financing contract not to agree to a settlement or any other comparable act of disposal of the claim without the funder's prior approval. It is this latter provision of a financing contract that enables the funder to exert considerable influence on the claimant, and indirectly also on the lawyer.

Third party funding can be distinguished from other litigation funding options in Germany such as legal aid and before-the-event legal expense insurance. Legal aid, if granted, covers the court fees and the applicant's own lawyer's fees, but it does not cover the costs expended by the opponent, which the applicant must bear in accordance with § 91 of the German Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*), if he or she loses. Before-the-event legal expense insurance, on the other hand, covers court fees, the insured person's own lawyer's fees, and also the costs of the other party to the lawsuit, if the insured person loses the case. In Germany, before-the-event legal expense insurance is especially designed for private citizens and is not open to commercial disputes.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, consumers' claims may be assigned to and enforced by consumer associations. In addition, consumer associations may, if the law does not mandate the representation by an attorney and if bringing consumers' claims is within the associations' scope of responsibilities, represent consumers in court. In both instances, consumer associations are enabled to aggregate claims under the ordinary rules of civil procedure and initiate quasi-group actions if authorised by the claimants. Consumer group actions as defined in this paragraph thus differ from actions brought by consumer associations pursuant to the German Injunction Act or the German Unfair Competition Act.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Consumers' claims can be brought by a professional commercial claimant who purchases the rights to individual claims in return for a share of the proceeds of the action. Typically, litigation SPVs are employed to acquire and enforce assigned claims. It should be noted, however, that contingent claims purchases may not be used to circumvent permit requirements for collection agencies or by lawyers to circumvent the general prohibition of contingency fees for lawyers in Germany (see question 7.3).

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

In Germany, victims can pursue civil damages in criminal proceedings only on behalf of themselves, however, not on behalf of a group or class. Members of a group of victims of a particular crime would thus have to file individual applications for civil damages with the criminal court. Theoretically, the criminal court could then use group or mass claims techniques to deal with the group members' individual applications. The latter scenario, however, is unlikely to occur in practice as criminal courts are reluctant to accept applications for civil damages in the first place.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes, they are. In Germany, parties are free to agree on alternative methods of dispute resolution. The German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*, *DIS*), for example, provides sample procedural rules for various alternative dispute resolution mechanisms such as arbitration, conflict management, conciliation, mediation, expert determination, and adjudication, which the parties may choose to incorporate by reference into their ADR agreement. The following paragraphs highlight the German rules on arbitration and court-connected conciliation, before commenting on circumstances under which matters can be referred to an ombudsperson.

a) **Arbitration**. In 1998, Germany adopted the UNCITRAL Model Law on International Commercial Arbitration in its entirety, with minor qualifications and clarifications for avoidance of doubt. Its provisions can be found in the German Code of Civil Procedure. The provisions on arbitration in the German Code of Civil Procedure apply equally to international and commercial arbitration, as well as to domestic and non-commercial arbitration. Under German law, arbitration agreements must be in writing. German courts have no discretion to stay the proceedings, but must reject the action as inadmissible if they find an arbitration agreement to be valid. Parties seeking enforcement of an arbitral award must first obtain *exequatur* from a German court before the award, whether domestic or foreign, can be enforced. Germany is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

b) **Conciliation**. German law distinguishes between court-annexed and private conciliation. Because German courts, in all circumstances of the proceedings, are to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue, the German

Code of Civil Procedure requires that any hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an alternative dispute resolution entity, or unless the conciliation hearing obviously does not have any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects. The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to make a decision (conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation. Additionally, German courts may suggest throughout the proceedings that the parties pursue mediation or other alternative conflict-resolution procedures. Should the parties decide to pursue mediation or other alternative conflict-resolution procedures, the court shall order the proceedings stayed.

c) **Ombudsperson**. In Germany, there is no single Office of the Ombudsperson. Instead, there are several offices of ombudspersons dealing with complaints against members of specific industries (e.g. investment funds, banks, building societies, utilities companies, insurances, companies of the public transport sector) or against individuals (e.g. lawyers).

8.5 Are statutory compensation schemes available e.g. for small claims?

There are a few statutory compensation schemes available, e.g. the German Private Commercial Banks' Statutory Deposit Guarantee and Investor Compensation Scheme, which *inter alia* secures all private individuals' deposits at each member bank up to a limit of EUR 100,000 and 90 per cent of liabilities arising from securities transactions, limited to the equivalent of EUR 20,000. There is, for example, also a compensation scheme for the victims of accidents with uninsured or unidentified motor vehicles.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Statutory compensation schemes, as their name suggests, only offer monetary compensation. Arbitral tribunals, on the other hand, may grant monetary and non-monetary relief, including injunctive and declaratory relief. Other alternative dispute resolution mechanisms may, depending on the parties' agreement, offer injunctive and declaratory relief and monetary compensation as well, albeit any such amicable settlement may not be as easily enforceable as an arbitral award. Amicable settlements, for example, are only enforceable if concluded before an attorney, a notary or a dispute-resolution entity established or recognised by one of the German States' Departments of Justice.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Residents of other jurisdictions are not restricted from bringing actions in Germany. Germany, however, tries to limit "forum shopping" by concentrating securities actions in a single forum. The issuer's place of incorporation is the exclusive venue for all damages claims against domestic issuers, their board members and their underwriters. In the case of a takeover bid, the venue is the place of incorporation of the domestic target. A seller or distributor of financial products may be sued at his or her place of business as long as the action does not name the issuer as a defendant. Foreign issuers may be sued in German courts under the Model Proceedings Act. However, in such cases, jurisdiction is governed by EU Council Regulation No 44/2001 or – in the case of defendants outside the EU – the general German rules on jurisdiction. For representative actions, the normal rules of jurisdiction apply.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The 2012 Model Proceedings Act contains a sunset clause of 1 November 2020. However, it seems likely that model proceedings will remain a permanent feature of the German litigation landscape. While not generating a lot of efficiencies, model proceedings appear to have increasing appeal to the plaintiffs' Bar, which seems to appreciate the nuisance value such proceedings create at the defendants' expense. Moreover, the Model Proceedings Act grants a quasi-monopoly to the lead plaintiff's lawyer by barring any parallel model proceedings and stopping all parallel litigation, enhancing the lead plaintiff's lawyer's position in the market. Furthermore, mass litigation around the globe against a German car manufacturer has highlighted the present limits of model proceedings in Germany, leading to renewed and more numerous calls for an extension of the law to consumer tort actions in all areas of law. According to internal sources, the German Federal Ministry of Justice and Consumer Protection is currently working on a bill that covers all types of mass damages claims and which, reportedly, also envisages their prosecution by consumer organisations.

On 29 January 2016, the German legislature passed a bill amending the German Injunctions Act (*Unterlassungsklagengesetz*, *UKlaG*). The law now provides for additional causes of action relating to violations of privacy and data protection standards outside the context of standard contract terms. The bill also adds new remedies to the Act. Consumer organisations are no longer only able to sue for injunctions to prevent future violations of consumer protection standards, but now may also sue for specific remedies aimed at counteracting the effects of existing or past violations. An example might be an order to publicly inform about statutory violations enabling affected persons to sue for damages. Damages claims themselves will, however, remain reserved to individual plaintiffs.

The German Federal Ministry of Justice and Consumer Protection has been working on a bill seeking to include a new collective redress mechanism in the German Civil Procedure Code. While such bill has not materialised due to reported resistance by Conservative Party ministers in the Federal Cabinet, a revised version has been published as a draft for discussion purposes by the Federal Minister of Justice and Consumer Protection in summer 2017. The success of this project will depend on the outcome of the Federal Parliament Election in September 2017. The revised draft combines elements of the Model Proceedings Act and the German Injunctions Act and would only allow registered non-profit consumer protection associations to enforce consumer claims against commercial defendants. The revised draft does not permit the enforcement of claims on behalf of unknown parties and can therefore not be compared to US-style class actions.

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C L I F F O R D

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India

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A. Class Action Litigation

1. Order I, Rule 8 of the Code of Civil Procedure, 1908 ("**CPC**") permits filing of representative suits, albeit with leave of the Court. Therefore, where there are numerous persons having the same interest in a suit, one or more of such persons may, with the permission of the Court, sue or be sued on behalf of or for the benefit of all persons so interested.
2. Order I, Rule 8 was included in the CPC in the public interest to avoid a multiplicity of litigation. The condition necessary for application of the provision is that the persons on whose behalf the suit is being brought must either have a common interest, or the grievance which they seek to get redressed must be common. This position was enunciated by the Supreme Court of India in the case of *Chairman, Tamil Nadu Housing Board, Madras v. TN Ganapathy*, (1990) 1 SCC 608.
3. It may be noted, however, as observed by the Supreme Court in the case of *State of A.P. v. G.V. Suryanarayana*, (1964) 4 SCR 945, that:

   "*A suit filed with permission to sue for and on behalf of numerous persons having the same interest under Order 1 Rule 8 is still a suit filed by the person who is permitted to sue as the plaintiff: the persons represented by him do not in virtue of the permission become plaintiffs in the suit. Such other persons would be bound by the decree in the suit, but that is because they are represented by the plaintiff, not because they are parties to the suit unless by express order of the Court they are permitted to be impleaded.*"
4. A representative suit is tried by Courts in the same manner as ordinary suits. However, if permission is granted by the Court under Order I, Rule 8, notice of institution of the suit must be given, at the plaintiff's cost, to all persons interested in the suit. Similarly, before the suit can be withdrawn or settled, similar notice will have to be issued to the interested persons.
5. The law with respect to the applicability and purpose of Order I, Rule 8 was recently reiterated in the cases of *Tata Sons Limited & Others Pramod Premchand Shah & Ors. v. Ratan N. Tata & Ors.*, (2017) SCC OnLine Bom 5269 and *K.S. Varghese & Ors. v. St. Peter's & Paul's Syrian Ors.*, (2017) SCC OnLine SC 815.
6. However, representative suits and class action litigation are not a common phenomenon in India. Factors such as the impermissibility of charging a contingency fee and the risk of costs being imposed on the unsuccessful party combine to deter such actions being initiated, and recourse to Order I, Rule 8 of the CPC is rare.

B. Special Statutory Remedies

(a) Consumer Protection Act, 1986

7. The rights of consumers in India are governed by the Consumer Protection Act, 1986 ("**CPA**"). Consumer complaints are heard by specialised tribunals set up under the CPA.
8. Section 12 of the CPA permits the following individuals/groups to file consumer complaints:
   a) a consumer;
   b) any voluntary consumer association registered under Companies Act, 1956 or under any other law;
   c) one or more consumers, where a number of consumers have the same interest; and
   d) the State Government or the Central Government.
9. The concept of class action litigation has been incorporated into the consumer protection laws by permitting a group of consumers to jointly file a complaint where they have a common grievance. Similarly, the concept of public interest litigation also finds recognition in permitting duly registered voluntary consumer organisations to file complaints on behalf of consumers.
10. The objects and requirements of initiating a class action under the CPA [under Section 12 (1)(c)] were recently laid down in the judgment of *Ambrish Kumar Shukla v. Ferrous Infrastructure Pvt. Ltd.*, (2016) SCC OnLine NCDRC 1117 wherein it was, *inter alia*, held that:
    - A complaint under Section 12(1)(c) of the CPA can be filed only on behalf of or for the benefit of all the consumers, having a common interest or a common grievance and seeking the same/identical relief against the same person.
    - A complaint under Section 12(1)(c) of the CPA is maintainable before the NCDRC where the aggregate of the value of the goods purchased or the services hired or availed of by all the consumers on whose behalf or for whose benefit the complaint is instituted and the total compensation, if any, claimed in respect of all such consumers exceeds Rs. 1.00 crore. The value of the goods purchased or the services hired and availed of by an individual consumer or the size, or date of booking/allotment/purchase of the flat would be wholly irrelevant in such a complaint where the complaint relates to the sale/allotment of several flats/plots in the same project/building.

- It is necessary to exercise due care and caution while considering such a complaint, even at the initial stage, and to grant the requisite permission only where the complaint fulfils all the requisite conditions in terms of Section 12(1)(c) of the CPA read with Order I, Rule 8 of the CPC.
- It would also be necessary for the Bench to either give individual notices or an adequate public notice of the institution of the complaint to all the persons on whose behalf or for whose benefit the complaint is instituted. Such a notice should disclose *inter alia* (i) the subject matter of the complaint including the particulars of the project if the complaint relates to a housing project/scheme, (ii) the class of persons on whose behalf or for whose benefit the complaint is filed, (iii) the common grievance sought to get redressed through the class action, (iv) the alleged deficiency in the services, and (v) the reliefs claimed in the complaint.

11. Upon finding that the respondent in a consumer complaint is guilty of having supplied defective goods or deficient service; or having adopted an unfair trade practice, the tribunal concerned can, *inter alia*, order the following reliefs:
    a) to remove the defect from the goods or the deficiencies in service, as the case may be, in question;
    b) to replace the goods with identical/similar defect-free goods;
    c) to return to the complainant the price of the goods or any charges paid therefor;
    d) to monetarily compensate the complainant for any loss or injury suffered by the complainant; and/or
    e) to discontinue the unfair trade practice in question.
12. Tribunals under the CPA also have the power to grant interim relief for the protection of the complainant during the pendency of the complaint.
13. It has been noticed that the filing of complaints by a group of consumers or by a voluntary organisation is not very common in India. However, when the tribunal finds that various complaints have been filed based on the same cause of action and against a common respondent, the tribunal takes up and hears all such matters together. This not only saves time and cost for the parties but also prevents a multiplicity of orders, which may be conflicting.

(b) Competition Act, 2002

14. Under Section 53N(4) of the Competition Act, 2002 ("**CA**"), if due to a breach of the provisions of the CA by an enterprise, any loss or damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Competition Appellate Tribunal ("**COMPAT**"), make an application for and on behalf of, or for the benefit of, the persons so interested before the COMPAT, seeking compensation for such loss.
15. On such application being made, the provisions of Order I, Rule 8 of the CPC (as described above) would apply to the proceeding before the COMPAT, subject to the modification that every reference therein to a suit or decree would be construed as a reference to the application before the COMPAT and the order of the COMPAT thereon.
16. Recourse to this provision has not been seen thus far.

(c) Companies Act, 2013

17. The concept of class action, in relation to the affairs of a company, has recently been codified under Section 245 of the Indian Companies Act 2013 ("**Co Act**"). Section 245 of the Co Act came into effect from 1 June 2016. The said provision provides a remedy to the members and depositors of a company (except banking companies) to seek relief against the conduct of the affairs of the company, in a manner that is prejudicial to the company's or their interest.
18. The following persons are entitled to maintain a class action under Section 245:
    a) In case of a company having a share capital, not less than 100 members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed (subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares).
    b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members can initiate a class action.
    c) In case of depositors, the requisite number for initiating a class action should not be less than 100 depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.
19. Additionally, any person, group of persons or any association of persons representing the persons prejudicially affected by the conduct of the affairs of the company can also file a class action.
20. The National Company Law Tribunal ("**NCLT**") is the appropriate authority under the Co Act to entertain a class action. The NCLT has very wide powers under the Co Act to grant relief in a class action. The applicant or applicants may seek any or all of the following reliefs from the NCLT:
    a) to restrain the company from committing an act which is *ultra vires* or in breach of the articles or memorandum of the company;
    b) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors; and to restrain the company and its directors from acting on such resolution;
    c) to restrain the company from taking action contrary to any resolution passed by the members;
    d) to restrain the company from doing an act which is contrary to the provisions of the Co Act or any other law for the time being in force;
    e) to claim damages or compensation or demand any other suitable action from or against:
        - the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
        - the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
        - any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part; and
    f) to seek any other remedy as the NCLT may deem fit.
21. The costs or expenses connected with an application for a class action are to be borne by the company or any other person responsible for any oppressive act.
22. Interestingly, a class action can also be filed for a future cause of action, i.e. in cases where the cause of action is an act or omission that is yet to occur.

23. Any order passed by the NCLT in a class action is binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

24. To ensure compliance, the Co Act has laid down severe punishments for non-compliance of the orders passed by the NCLT, such as:

a) a defaulting company is liable to be punished with a fine of not less than five lakh rupees but which may extend to 25 lakh rupees; and

b) every officer of the company who is in default is liable to be punished with imprisonment for a term which may extend to three years and with fine of not less than 25,000 rupees but which may extend to one lakh rupees.

25. At the same time, if any application filed before the NCLT is found to be frivolous or vexatious, the NCLT is bound to, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees.

C. Public Interest Litigation

26. Beginning in the 1970s, the Indian judiciary evolved the concept of Public Interest Litigations ("**PILs**"). At that stage, PILs were intended to espouse the grievances of the poor and disadvantaged strata of society, who did not have the means or the wherewithal to protect their own interests.

27. Any member of the public can file a PIL seeking redress for a legal wrong or injury, caused or threatened, to a determinate class of persons, who, by reasons of socially or economically disadvantaged position are unable to approach the Court for relief. PILs have, therefore, become an instrument of socio-economic change. PILs, in their various forms, however, are almost always directed against Governments, instrumentalities of State and public authorities.

(a) Constitutional Provisions for Initiation

28. PILs are generally initiated under either Article 32 (before the Supreme Court of India) or Article 226 (before the High Court possessing territorial jurisdiction over the *lis*) of the Constitution of India. The aforesaid provisions empower the Supreme Court and the State High Courts respectively to enforce the fundamental rights enshrined in Part III of the Constitution of India and to pass writs in the nature of *habeas corpus*, *mandamus*, prohibitions, *quo warranto* and *certiorari* for such purpose. High Courts may also entertain complaints against any illegal or arbitrary act by the Government, instrumentality of State or public authority, which affects a large section of society.

(b) Scope of PILs

29. The Supreme Court of India, by way of a Notification dated December 1, 1988, identified the classes of cases which were to be treated as PILs. These were as follows:

a) Bonded Labour matters.

b) Neglected Children.

c) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).

d) Petitions from Jails complaining of harassment, for premature release and seeking release after having completed 14 years in Jail, death in Jail, release on personal bond, speedy trial as a right.

e) Petitions against police for refusing to register a case, harassment by police and death in police custody.

f) Petitions against atrocities on women, in particular harassment of a bride, bride-burning, rape, murder, kidnapping, etc.

g) Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes.

h) Petitions pertaining to environment pollution, disturbances of ecological balance, drugs and food adulteration maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance.

i) Petitions from plot victims.

j) Family pension matters.

30. The aforesaid Notification also excluded certain categories of matters from the purview of PILs.

31. While PILs were originally restricted to cases where there was a violation of human rights of a group of people, over time the jurisdiction exercised by Courts expanded to cover other areas as well. Some examples of these, as stated in the case of *Balco Employees' Union (Regd.) v. Union of India*, (2002) 2 SCC 333, would be:

a) Where the concerns underlying a petition are widely shared by a large number of people.

b) Where affected persons belong to disadvantaged sections of society.

c) Where judicial intervention is required to protect the sanctity of democratic institutions.

d) Where judicial law-making is required to prevent exploitation.

e) Where administrative decisions related to development are harmful to the environment and/or jeopardise people's rights to natural resources.

32. Pertinently, Courts do not ordinarily interfere with policy decisions or accept challenges to the constitutionality or validity of Statutes or the Rules made thereunder in petitions filed as PILs, as was recently reiterated by the Supreme Court in the case of *Santosh Singh v. Union of India*, (2016) 8 SCC 253.

33. At the same time, however, Courts have readily expanded the fundamental rights contained in Part III of the Constitution of India to include within their scope: the right to free legal aid; the right to live with dignity; the right to education; the right to work; and the right to freedom from torture, etc.

(c) Procedure For Filing of PILs

34. Ordinarily, PILs are filed in the same manner as any other Writ Petition under Article 32 or 226, as the case may be, upon payment of a nominal Court fee. However, the filing of a PIL need not necessarily be in the form of a formal petition. In some cases, the Supreme Court of India has even entertained letters, which have been converted into PILs.

35. PILs can be filed against the Central/State Governments as well as Municipal or Local Authorities. PILs cannot be filed only against an individual. However, in certain cases an individual can be impleaded as an additional respondent.

(d) Procedure After Filing

36. All letters/petitions that are received in the PIL cell are screened; and only after it is ensured that the letter/petition is covered in one of the above-mentioned categories detailed in paragraph 29, the same is placed before a bench concerned for hearing.

(e) Delay and Laches

37. While hearing PILs, Courts ordinarily relax the rules of procedure. However, in cases where the Petitioner has approached the Court after a large delay, or when any rights of third parties have crystallised during the period between the cause of action having arisen and the petition being filed, Courts are hesitant in entertaining PILs. Courts have repeatedly held that the rules of delay apply in equal measure to PILs.

(f) *Locus Standi* of Petitioner

38. A PIL can be filed by any member of the public on behalf of a determinative class of persons who are themselves unable to approach the Court for relief for reasons of poverty, helplessness or disability, on a showing that the legal rights of such class of people have been violated, or that a burden in contravention of law is sought to be imposed on such class of people.

39. However, though rules relating to *locus standi* are relaxed, before entertaining PILs, the Court has to be satisfied about:

a) the credentials of the applicant;

b) the *prima facie* correctness or nature of information given by him;

c) the information placed before the Court is not vague or indefinite; and

d) the information establishes the seriousness of the issues involved.

40. If the Court is satisfied in regard to the *bona fides* of the Petitioner with regard to the points mentioned above, it will entertain petitions filed on behalf of a class of people, all of whom may not be parties before it. In this regard, Courts have entertained PILs filed, amongst others, by representative non-profit organisations, lawyers, doctors and journalists.

41. Conversely, Courts are extremely strict in their outlook with respect to petitions filed under the garb of PILs, but which show that the intention was actually to agitate a private grievance between the parties, or which evidence an oblique motive on part of the Petitioner before the Court. In various cases, Courts have held that "meddlesome interlopers", "busybodies" and "*officious intervenors* having no public interest except for personal gain either for themselves or for the glare of publicity" ought not to be permitted to file PILs.

(g) Appointment of *Amicus Curiae* / Commissions

42. In exercise of their writ jurisdiction, Indian Courts do not conduct trials. Cases are decided on the basis of documents and oral submissions. Courts have refused to exercise their writ jurisdiction in cases where appreciation of evidence is required.

43. While dealing with PILs, however, Courts have regularly appointed senior lawyers, of a certain standing and eminence, as *amicus curiae*, or have appointed Commissions to submit a report to the Court on the issue in question.

(h) Reliefs Granted by Court

44. As stated above, since Courts are approached under either Article 32 or Article 226 of the Constitution of India, the reliefs issued in PILs are primarily writs in the nature of *habeas corpus*, *mandamus*, prohibitions, *quo warranto* and *certiorari*.

45. Courts also have the power to grant interim relief to the Petitioner during the pendency of the petition, especially if it is found that absent such relief being granted the matter would become infructuous.

46. On the contrary, when Courts find that a petition is bogus, motivated or oblique, they do not hesitate in taking strict action against the Petitioner, which can include the imposition of heavy costs.

47. In cases where there is a *prima facie* doubt as to the *bona fides* of the Petitioner or the issue involved in the petition, Courts have insisted on the Petitioner furnishing adequate security for the grant of the interim relief.

48. The principles of *res judicata* and constructive *res judicata* ordinarily apply with equal force to PILs. It has been held that a judgment in an earlier *bona fide* PIL would be a judgment *in rem* and would bind the public at large. Such earlier judgment would bar any member of the public from raising the same issue or an issue that ought to have been raised in the prior PIL. Accordingly, if a PIL is found to be barred by *res judicata*, Courts will not grant any relief therein unless the Petitioner can show the existence of special circumstances.

(i) Measures to Curb Frivolous PILs

49. To curb PILs which have been merely styled as such but are, in effect, in furtherance of personal motives, the Supreme Court has issued directions in the case of *State of Uttaranchal v. Balwant Singh Chaufal & Ors.*, AIR 2010 SC 2550:

a) The Courts must encourage genuine and *bona fide* PILs and effectively discourage and curb the PILs filed for extraneous considerations.

b) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging genuine PILs and discouraging those filed with oblique motives.

c) The Courts should *prima facie* verify the credentials of the Petitioner before entertaining any PIL.

d) The Court should be *prima facie* satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

e) The Court should be fully satisfied that substantial public interest is involved before entertaining the PIL.

f) The Court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

g) Before entertaining any PIL, the Courts should ensure that it is aimed at redress of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the PIL.

h) The Court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb such frivolous petitions.

50. Several High Courts have come up with rules on the aforesaid lines to discourage and curb frivolous PILs. The above directions, once fully implemented across the country, will go a long way in preserving the purity and sanctity of PILs.

(j) General Principles Regarding PILs

51. The principles evolved by Courts *qua* PILs have been succinctly summarised by the Supreme Court in the case of *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*, (2003) 7 SCC 546, as under:

a) The Court, in exercise of powers under Article 32 and Article 226 of the Constitution of India, can entertain a petition filed by any interested person in the welfare of people who are in a disadvantaged position and, thus, not in a position to knock the doors of the Court. The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfil its constitutional promises.

b) On issues of public importance, enforcement of fundamental rights of a large number of the public *vis-à-vis* the constitutional duties and functions of the State, if raised, the Court treats a letter or a telegram as a public interest litigation, upon relaxing procedural laws as also the law relating to pleadings.

c) Whenever injustice is meted out to a large number of people, the Court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India as well as the International Conventions on Human Rights provide for a reasonable and fair trial.

d) The common rule of *locus standi* is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, the deprived, the illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right.

e) When the Court is *prima facie* satisfied about the variation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the State or the Government to raise the question as to the maintainability of the petition.

f) Although procedural laws apply to PIL cases, the question as to whether the principles of *res judicata* or principles analogous thereto would apply depends on the nature of the petition and the facts and circumstances of the case.

g) The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as a PIL.

h) However, in an appropriate case, although the Petitioner might have moved a Court in his private interest and for redressal of personal grievances, the Court in furtherance of the public interest may treat it as necessary to enquire into the state of affairs of the subject of litigation in the interest of justice.

i) The Court in special situations may appoint a Commission, or other bodies for the purpose of investigating into the allegations and finding out facts. It may also direct the management of a public institution taken over by such Committee.

j) The Court would ordinarily not step out of the known areas of judicial review. The High Courts, although they may pass an order for doing complete justice to the parties, do not have a power akin to Article 142 of the Constitution of India.

k) Ordinarily, the High Court should not entertain a Writ Petition by way of PIL questioning the constitutionality or validity of a statute or a statutory rule.

(k) Landmark PILs

52. The wide reach of PILs is best demonstrated by reference to some areas in which Courts have made particularly significant pronouncements.

a) In a case arising out of the 'Bhopal Gas Tragedy', the Government of India filed a civil suit against Union Carbide before the District Court in Bhopal in its role as '*parens patriae*'. This was necessitated by the fact that, as some commentators put it, 'procedural rules would make such class action litigation impossible to conclude and unwieldy to carry out'. The case was finally settled before the Supreme Court of India.

b) In *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81, *Citizens for Democracy v. State of Assam*, (1995) 3 SCC 743 and *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488 PILs, were entertained in relation to rights of prisoners and undertrials.

c) In *Bandhua Mukti Morcha v. Union of India (supra)*, the Supreme Court ordered for the release of bonded labourers.

d) In *Murli S. Deora v. Union of India & Ors.*, AIR 2002 SC 40, the Supreme Court issued directions for a ban on smoking in public places.

e) In *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011, the Supreme Court laid down guidelines for preventing sexual harassment of women in the work place.

f) PILs have also significantly contributed in a large number of issues concerning environmental and ecological degradation. (*M.C. Mehta v. Union of India*, (1996) 4 SCC 750.)

g) In recent times, the use of PILs has also become popular to challenge State actions involving questions of financial impropriety in public contracts.

53. In its nascent form, the tool of PIL was used by Courts to secure various facets of the right to life and liberty as enshrined in Article 21 of the Constitution of India. However, with the passage of time, Courts have moulded reliefs in PILs to direct affirmative action in diverse areas including governance, environment, provision of civic amenities and other such fields.

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Chapter 12

Israel


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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The Class Actions Law 2006 (the "**Law**") governs the filing and adjudication of class actions. The Law defines a class action as "an action managed in the name of a class of people, who have not empowered the class plaintiff for this purpose, and which raises material questions of fact or law that are shared by all members of the class". The filing of a class action is subject to the court's approval and discretion, and requires that several conditions be met: (i) the action must raise material questions of fact or law that are shared by all members of the class; (ii) there must be a reasonable possibility that those legal or factual questions will be decided in favour of the class; (iii) a class action must be the efficient and fair way of resolving the dispute under the circumstances of the case; and (iv) there must be a reasonable basis to assume that the interest of all members of the class will be represented and managed properly and in good faith. These requirements are examined by the court in the scope of a preliminary stage adjudicating the motion to approve the action as a class action (a "**Motion for Class Certification**").

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The Law provides that "no class action will be filed other than in a claim set forth in the Second Addition or in a matter set forth in an explicit provision of law permitting to file a class action". The Second Addition to the Law sets forth a closed list of issues and subjects with respect to which a class action may be filed. These include, *inter alia*: (i) a claim against a "dealer" (as defined in the Consumer Protection Law 1982: a person selling products or providing services by way of occupation, including a manufacturer) in regard to a matter between it and a client; (ii) a claim against an insurer, an insurance agent or a provident fund management company, regarding a matter between them and a client; (iii) a claim against a banking corporation, regarding a matter between it and a client; (iv) a claim based on a cause of action pursuant to the Antitrust Law 1988; (v) a claim based on a cause of action deriving from the ownership, possession, purchase or sale of share capital or investment units; (vi) a claim regarding an environmental hazard (as defined in the Prevention of Environmental Hazards Law 1992); (vii) a claim based on a cause of action under the Prohibition of Discrimination in Products, Services and Entrance to Entertainment and Public Places Law 2000; (viii) a claim with respect to various labour law issues; (ix) a claim against a public authority for restitution of payments unlawfully collected as a tax, toll or other mandatory payment; and (x) a claim against an "advertiser", as defined in section 30a of the Communications Law (Telecommunications and Broadcast) 1982, which is the Israeli Anti-Spam Act.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The Law provides for the management of claims by means of class action. A judgment in a class action constitutes *res judicata* binding all members of the class (unless explicitly provided otherwise in the Law).

1.4 Is the procedure 'opt-in' or 'opt-out'?

As a default, the Law provides for an "opt-out" mechanism, pursuant to which putative class members must take affirmative action to remove themselves from the class. However, the court is allowed, under special circumstances, to apply an "opt-in" mechanism.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

The Law does not require a minimum threshold/number of class members. However, case law provides that the court may exercise its discretion to refuse to certify a class in the event that the number of class members is too small.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

According to the Law, one of the requirements for class certification is that "the action raises material questions of fact or law that are shared by all members of the class, and there is a reasonable possibility that they will be decided in favour of the class". The claims do not have to be identical and certain differences between claims and class members are permitted, as long as the essential questions of fact or law are predominant.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

The following may bring a class action in the name of the class: (1) a person possessing a personal cause of action that raises material questions of fact or law that are shared by all members of the class; (2) a public authority with respect to a claim in the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class; and (3) an organisation (typically a non-governmental organisation) with respect to a claim in the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class, and in the case of an organisation other than the Israeli Consumer Council, provided that under the circumstances there would be a difficulty in filing the action by a person possessing a cause of action as per point (1).

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

The Law provides that a notice be provided to the members of the class with respect to the decision of the court to approve a class action, which includes the following information: the definition of the class in whose name the class action will be managed; the identity of the class plaintiff and the class attorney; the cause of action and the questions of fact or law that are shared by the class; and the relief sought. Notice is to be provided to the class members in a manner and timing determined by the court. There is no set manner of publication; rather the court may determine different ways of publication for different types of class members, taking into account, *inter alia*, the following considerations: (1) the expenses involved with the publication and its efficiency; (2) the scope of the monetary compensation or other relief that any of the class members may receive, and the scope of the harm that might be caused to each member of the class if the class action is denied; (3) the estimated number of the class members, and the ability to identify and locate them with reasonable effort and cost; (4) the ability to provide a personal notice to the class members in a reasonable manner and cost, including in the scope of a continuous relationship between a litigant and the class members; and (5) the special characteristics of the class members, including with respect to language. A copy of the notice is also provided to the Administrator of the Courts, in order to be registered in the Class Actions Registry.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

The number of class actions filed each year has increased dramatically since the enactment of the Law in 2006. According to unofficial statistics, approximately 8,900 class actions were filed between 2006 and 2016. While approximately 150 class actions were filed in 2007, approximately 1,500 were filed in 2016. The vast majority of class action are in the fields of product liability and consumer rights; a substantial number are in the fields of securities, banking and insurance; and the remainder are the fields outlined in question 1.2 above.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

In general, in a class action, the court may award any appropriate remedy applicable pursuant to the law governing the cause of action on which the class action is based, including monetary compensation (individual or class compensation), injunctive relief and declaratory relief, with the exception of punitive or statutory damages that may only be awarded in class actions concerning the Equal Rights to the Disabled Act 1998 and the Television Broadcast (Subtitles and Sign-Language) Law 2005.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

See question 1.7 above. The Law permits the filing of a class action by: (1) a public authority with respect to a claim in the scope of one of its public goals; (2) an organisation (typically a non-governmental organisation) with respect to a claim in the scope of one of its public goals, provided that under the circumstances of the matter there is a difficulty in filing the action by a person possessing a personal cause of action; and (3) the Israeli Consumer Council with respect to a claim in the scope of one of its public goals.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

See questions 1.7 and 2.1 above. An organisation that may file a class action with respect to a claim within the scope of one of its public goals (when, under the circumstances of the matter, there is a difficulty in filing the action by a person possessing a personal cause of action) is not required to be approved by the state.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

The procedure is available in any area of law with respect to which a class action may be filed pursuant to the provisions of Law (see question 1.2 above).

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The remedies available in any class actions are likewise available in actions brought by representative bodies. Monetary compensation is available when the representative body shows that there is a reasonable likelihood that the class has suffered damage.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Juries are not used in the Israeli legal system. All questions of fact and law, including with respect to class actions, are determined by professional judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Class actions are adjudicated by civil courts according to the subject matter jurisdiction and aggregate claim amount sought for the entire class (and not in accordance with the form of proceedings), with the exception of: (1) class actions against public authorities requesting compensation or restitution, including with respect to amounts collected as taxes or other mandatory payments, which are filed with the Administrative Courts; and (2) class actions with respect to various labour law issues, which are filed with the Labour Court Courts. The actions are managed and heard by professional judges.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

In its decision certifying the class, the court is required to define the class in whose name the class action will be managed, including sub-classes. The Law provides for an "opt-out" mechanism, namely any person or entity that falls under that definition becomes a member of the class, unless it provides a withdrawal notice within the time frame provided for by the court. The court is allowed, under special circumstances, to apply an "opt-in" mechanism, in which case it may specify a date by which persons must opt into the class. The Law further provides that the class shall not include any person whose cause of action was created after the certification of the class.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

As part of adjudicating the Motion for Class Certification, the court examines whether the action raises material questions of fact or law which are shared by all members of the class, and whether there is *a reasonable possibility that they will be decided in favour of the class*. Consequently, in this preliminary stage, the court examines the alleged cause of action on its merits with respect to both legal and factual aspects. Since the stage of class certification is preliminary in nature, the general rule is that it will not be split into sub-stages, unless a simple question exists that does not require complicated adjudication which may render all other issues moot.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

A motion to dismiss *in limine* is applicable in class actions as well. The court may entertain a motion to dismiss *in limine* a Motion for Class Certification where the grounds for dismissal are simple and do not require complicated adjudication. For example, such a motion to dismiss would be appropriate where, pursuant to the Law, a class action may not be filed with respect to the subject matter, where the statute of limitations has lapsed, and in other similar circumstances.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The Israeli legal system as a whole is an adversarial one. Consequently, in the event that the Motion for Class Certification raises issues requiring special expertise, the plaintiff is required to bring *prima facia* evidence with respect to such issues in the form of expert opinions, otherwise the plaintiff will fail to carry the burden to show that there is *a reasonable possibility that the common questions will be decided in favour of the class*. The defendant may file expert opinions with its response to the Motion for Class Certification even where the plaintiff has not filed an expert opinion with its motion. Although the court is generally allowed to appoint experts on its own behalf, it does not commonly do so in the scope of adjudicating the Motion for Class Certification.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

The Israeli legal system does not provide for pre-trial depositions at all, including with respect to class actions. Witness statements and expert reports are filed in written form prior to trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

There are no document discovery or disclosure obligations prior to the commencement of legal proceedings (with the exception of freedom of information obligations imposed on public authorities). In the scope of adjudicating the Motion for Class Certification, the court is allowed to permit document discovery in the event that: (i) the documents requested to be disclosed are relevant to the requirements for class certification; and (ii) the plaintiff provided *prima facia* evidence with respect to such requirements. In the event that the Motion for Class Certification is granted, pre-trial procedures are conducted in adjudicating the class action in a manner similar to any civil action, including document discovery.

3.9 How long does it normally take to get to trial?

Trial (or at least a hearing) takes place both in the scope of adjudicating the Motion for Class Certification and in the scope of adjudicating the class action itself (in the event that it has been certified). Within the scope of adjudicating the Motion for Class Certification, the trial usually takes place a few months after the completion of the filing of pleadings (the Motion for Class Certification, the defendant's response and the plaintiff's reply brief). In some cases this may take approximately a year from the filing of the Motion for Class Certification. Within the scope of adjudicating the class action itself, the trial usually takes place a few months after conclusion of pre-trial proceedings and after the parties have filed their evidence in chief – in most cases in written

form. In the majority of cases, this may take longer than a year from certifying the class (not including the time during which the proceedings in the class action have been stayed pending appeal on the decision certifying the class).

3.10 What appeal options are available?

An appeal is available both with respect to the decision in the Motion for Class Certification and the judgment in the class action itself (in the event that it has been certified). In the event that the Motion for Class Certification is denied/dismissed (in whole or in part), the plaintiff may, by right, appeal the decision to the appellate court. In the event that the Motion for Class Certification was granted (in whole or in part), the defendant must first obtain leave of the court in order to appeal the decision. The judgment in the class action itself is subject to right of appeal to the appellate court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

In general, the time limits in a class action are identical to the general statute of limitations applicable to the cause of action or subject matter pursuant to the Statute of Limitations Act 1958. The usual statute of limitations period in civil cases in Israel is seven years (with some exceptions; see for example question 4.3 below). In a class action against a public authority for restitution of payments unlawfully collected as a tax, toll or other mandatory payment, the court shall not impose restitution for a period beyond two years prior to the date of the filing of the Motion for Class Certification. The Law includes some provisions concerning limitation of the personal cause of action of the class members as a result of the decision in the Motion for Class Certification. For example, in the event that a Motion for Class Certification was denied/dismissed, the statute of limitations of the personal cause of action of each of the class members would be extended to a year following the time when that decision was no longer appealable (provided that it was not already barred when the Motion for Class Certification was filed).

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The plaintiff is required to possess a personal cause of action against the defendant which is not barred by statute of limitation as outlined above. The statute of limitations is a statutory limit and is not subject to court discretion. The Statute of Limitations Act 1958 provides that the statute of limitations period does not run as long as the plaintiff is aged 18 or less.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

The Statute of Limitations Act 1958 provides that, in the event of fraud, the limitation period begins on the date the plaintiff discovers the fraud. It further provides that, in the event the plaintiff was unaware of the facts constituting the cause of action due to reasons out of his or her control, and which he or she could not have uncovered with reasonable care, the limitation period begins on the date the plaintiff discovers these facts.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

In general, any type of damage which is recoverable under the applicable cause of action is recoverable in class actions as well, including bodily injury, mental damage, damage to property and economic loss, with the exception of punitive or statutory damages that may only be awarded in class actions concerning the Equal Rights to the Disabled Act 1998 and the Television Broadcast (Subtitles and Sign-Language) Law 2005. However, usually cases involving bodily injury or mental damage would not meet the requirement of common material questions of fact or law.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

To the best of our knowledge, this question has not yet been adjudicated by Israeli courts.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive or statutory damages may only be awarded in class actions concerning the Equal Rights to the Disabled Act 1998 and the Television Broadcast (Subtitles and Sign-Language) Law 2005.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

No, there is not.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The Law provides that in certifying the class, the court is authorised to order, *inter alia*, any of the following: (1) the payment of monetary compensation, at a rate and in a manner it determines, to each member of the class whose entitlement has been proven; (2) that each class member proves his or her entitlement to monetary compensation; and (3) the total sum of the monetary compensation and the manner in which the share of each class member is calculated.

If the court finds that monetary compensation to the class members is not practical under the circumstances of the case (whether because they cannot be identified, or because the payment cannot be made with reasonable cost, or for any other reason), it has broad discretion to provide any other relief to the class or any part thereof, or to the public, as it deems fit under the circumstances of the case.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Any class settlement (as well as individual settlement with the class plaintiff) is subject to court approval. A motion for approval of a class settlement is made public and provided to various entities

including the Attorney General; any class member, various entities and the Attorney General may file an objection to that motion. The Law provides that the court will not approve a settlement unless it finds that it is proper, fair and reasonable taking into account the interests of the class members. In the event that the settlement is made prior to class certification, the court will not approve the settlement unless it finds that, *prima facie*, the requirements for class certification are met, and that concluding the case with a settlement is the efficient and fair way of deciding the dispute under the circumstances of the case.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The 'loser pays' rule applies. The amount of the costs awarded are subject to the court's discretion and there is a distinction between a case where the plaintiff loses (i.e. the Motion for Class Certification is denied/dismissed) and a case where the defendant loses (i.e. the Motion for Class Certification is granted). In the former case (the plaintiff losing), the costs awarded to the defendant are almost always substantially lower than the actual costs incurred in defending the case (and in some cases the court may not award such costs at all). In the latter case (the defendant losing), the class attorney and class plaintiff are entitled by law to attorney fees and to special remuneration (respectively) in the amounts determined by the court that are incurred by the defendant.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

There is no distinction under Israeli procedure between common costs and individual costs. All costs of litigation are borne by the class plaintiff and the class attorney, who are entitled to special remuneration (for the class plaintiff) and attorney fees (for the class attorney) in the event that the action is successful, in the amounts determined by the court that are incurred by the defendant.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

There are none.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

No. Costs are awarded at the end of the proceedings (including within the decision in the Motion for Class Certification). They are subject to the court's discretion, do not necessarily reflect the actual costs incurred and are not managed by the court.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes. The Law established a statutory fund for funding class actions aimed at assisting plaintiffs in bringing class actions of public or social interest. A plaintiff filing a class action based on a cause of action deriving from the ownership, possession, purchase or sale of share capital or investment units of public companies or the state may request public funding from the Israel Securities Authority. In addition, consumer organisations assist in bringing class actions relating to consumer rights.

7.2 If so, are there any restrictions on the availability of public funding?

The budget of the Class Actions Fund is regulated by law. In 2016, the budget was NIS 1,231,000 (approximately $350,000); 124 requests for funding were submitted to the fund, and 48 of them were approved (approximately 40%).

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Yes. In the event that the class action is successful, the class attorney is entitled to attorney fees that are determined by the court and are paid by the defendant. Consequently, conditional or contingency fees are typical and acceptable.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

There is no statutory prohibition on third party funding. In general, third party funding should be disclosed to the court.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

There is no such mechanism under Israeli law. As outlined above, the Israeli Consumer Council, as well as other organisations, may file a class action in the name of the class but this procedure is not based on assignment of claims.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Section 22 of the Tort Ordinance (New Version) provides that the right to remedy for tort, as well as the liability thereto, may be transferred by law only. As a result, plaintiffs may not sell their claim in tort to another party. There is no prohibition on sale of claims in contract; however, there is no case law on the question of whether such sale can be recognised in a class action.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Section 4 of the Uniform Contracts Act 1982 sets forth a list of provisions in a uniform contract which are presumed to be depriving. Since December 2014, such provisions include, *inter alia*, a provision that negates or limits the customer's right to raise certain claims in legal proceedings, or provides that *any dispute between the supplier and customer shall be resolved in arbitration*; as well as an arbitration clause when the supplier has greater influence than the customer with respect to the terms of arbitration, including selecting the arbitrator, the place of arbitration, the terms of the arbitration, the manner of conducting the arbitration and its procedure (as long as the supplier proves that the arbitration clause in and of itself is not depriving). Consequently, class arbitration is a complex question under Israeli law, and some believe that a class arbitration is available only to the extent in which it is mutually and explicitly agreed. Mediation between the class plaintiff and defendant (in an attempt to reach a class settlement) is available and subject to the consent of the parties.

8.5 Are statutory compensation schemes available e.g. for small claims?

No, they are not.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

This is not applicable – see above.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Yes. Any person or entity possessing a personal cause of action against the defendant may bring a class action (provided that it falls under Israeli international jurisdiction). In the event that the action raises issues concerning international jurisdiction, the court may exercise its discretion in refusing to adjudicate the case based on any doctrine available by law, such as *forum non conveniens*, *lis alibi pendens*, etc.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

A bill to amend the Law to include a statutory requirement for providing the defendant with a notice and opportunity to cure prior to filing the class action is currently pending. The bill proposes that:

- a plaintiff shall not be permitted to file a class action unless a prior notice has been provided to the defendant setting forth the cause of action, the class and requested relief;
- the defendant shall be provided with 45 days to provide an undertaking to provide the class with the requested relief or any part thereof;
- the complainant shall be entitled to approach the court and seek instructions with respect to granting the class with such relief and/or appointing a court-appointed officer for supervising this process; and
- payment of statutory remuneration to the complainant and his or her attorney, and their entitlement to seek additional remuneration from the court.

An additional bill is pending for payment of court fees in class actions. Under Israeli procedure, filing civil actions is subject to payment of court fees equal to 2.5% of the claim amount, while class actions are exempt from court fees. The new bill proposed payment of court fees for class actions in the amount of NIS 12,000 in the Magistrates Court and NIS 24,000 in the District Court (approximately US$ 3,500 and US$ 7,000, respectively).

These bills are intended to properly address the potential negative impacts of unfounded class actions that are filed for opportunistic motivations of the plaintiff or class attorney, and aim to create a judicial balance between supporting and encouraging justified class actions, while deterring the filing of baseless ones.

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Barak has extensive experience in virtually the full range of civil & commercial litigation, including antitrust law commercial law, insurance law, communications law, banking law and restrictive trade practices. Barak also specialises in class action suits and has represented parties in some of Israel's leading class action litigation.

Additionally, Barak has defended clients in some of Israel's highest-profile white-collar crime trials. Barak has appeared repeatedly before Israel's Supreme Court.

Barak served as a member of the Disciplinary Panel of the Israel Bar Association (2002–2008). He served as a judge in the National (Appellate) Disciplinary Court of the Israeli Bar Association (2009–2011).

Barak is a member of the board of trustees of the law faculty of the Tel Aviv University. He lectures to LL.M. students in the law faculty of Tel Aviv University, and often lectures in continuing education programmes for attorneys.

In addition, Barak is a member of the board of the Israeli Chamber of Commerce (ICC).

Barak joined the firm in 1992 and became a partner in 1995.

He has received consistent recognition for his highly valued litigation skills:

- ***Chambers Global*** (2008–2017 editions) ranks Barak Tal in Band 1. "*Department co-head Barak Tal is 'sharp, experienced and knowledgeable' and 'client-oriented', according to clients.*"
- ***The Legal 500*** (2010–2016 editions) ranks Barak as a leading individual under Dispute Resolution and recommends him under Insurance and Telecoms & Media. Barak Tal is "*Excellent and efficient*" (2015).
- ***Who's Who Legal*** (2017 edition) ranks Barak as one of the world's leading litigation lawyers.
- ***International Lawyer Office Awards*** (ILO) (2012 edition) lists Barak Tal as the Best Litigator in Israel.
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Ruth is a partner at the firm's litigation department, specialising in civil and commercial litigation and class action suits. Ruth also holds expertise in international intellectual property disputes, product liability, internet law, mass torts and crisis management.

Over the years, Ruth has gained vast experience in defending her clients with difficult and complex legal disputes. She has represented large-scale Israeli as well as international companies in numerous high-profile class action suits and mass torts, including lawsuits against tobacco corporations, product liability and antitrust cases, lawsuits dealing with cellular radiation and other environmental matters, and many other issues which have received significant attention within the public debate.

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Naturally oriented to the practice of litigation, Ruth enjoys the challenge of a difficult case, and she manages herself professionally and intelligently before the court.

Ruth joined the firm in 2001 and became a partner in 2008.

- ***The Legal 500*** (2015 edition) ranks Ruth Loven as a recommended lawyer in Dispute Resolution and mentions that "*Ruth Loven is very well respected*".
- ***Chambers & Partners*** (2017 edition) ranks Ruth as a rising star and notes that: "Peers laud Ruth Loven as '*a rising star*', adding: '*If you have a problem and need a solution that others will not find, she is good*.' Clients say that '*she is very nice to work with, very responsive and has good litigation skills*'. Her practice includes class actions as well as international and local litigation matters."

YIGAL ARNON & CO.
LAW FIRM

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Yigal Arnon & Co. provides a full range of corporate legal services. Our experienced lawyers guide companies from corporate formation, through negotiation of angel investments, private placements, private equity, venture capital and debt financing transactions and on to strategic alliances, joint ventures and other corporate partnering arrangements, including exits via public offerings and mergers and acquisitions.

Our ability to provide comprehensive and integrated solutions, drawing upon the expertise of our specialty teams in tax, executive compensation, employee benefits, antitrust, real estate and other related areas, allows us to handle highly complex transactions which are completed in an efficient, timely and highly successful manner.

Throughout its history, a full spectrum of clients has turned to Yigal Arnon & Co. when seeking professionalism, service and integrity in helping them to resolve complex and challenging legal problems. The firm continues to represent some of the world's leading companies, such as Unilever, eBay, Oracle, Essilor International, IBM, Texas Instruments, BASF, Medtronic, Deere & Co. and Intel, and to make deals opposite others (e.g. Micron Technologies, Yahoo and Boston Scientific).

Italy

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The Italian legal system provides for different procedures which vary according to the kind of relationships (the so-called "Connection" – "*Connessione*") that exist between the claims. In particular, claims can be subjectively or objectively connected depending upon whether they have, respectively, the same parties or objects.

Nevertheless, the above-mentioned identity relationships between the claims are not sufficient in themselves to give rise to what is normally understood by "group action". Reference has to be made to **Cumulative Actions**, through which multiple victims seek protection for their individual interests by combining their claims in a single claim. However, every plaintiff remains the only person who has the right of initiative and who must provide an individual Power of Attorney.

On the other hand, the legal instrument for the protection of collective interests is **Group Actions**. These are representative proceedings brought by a representative organisation on behalf of its members. A typical example is laid down under Article 140 of the Consumer Code. According to the aforesaid Article, consumers associations are allowed to bring claims on behalf of their members asking for the cessation of unlawful conduct and the removal of the relevant effects. Therefore, the injunctive relief is the only collective judicial protection available. Other examples of Group Actions are: Article 2601 of the Italian Civil Code, which relates to the suppression of unfair practices; Article 18 of the Workers Statute, which regulates the protection of employee rights; and Article 18 of the Law No 349/1986, which deals with protection from environmental damages.

Finally, **Class Action** is the action aimed at protecting "*homogeneous individual interests*" and has been introduced by Article 140*bis* of the Consumer Code by Law No. 244 of 24th December 2007, and subsequently amended by Law No. 99 of 23rd July 2009, and Law No. 27 of 24th March 2012. The Class Action mechanism allows class members and/or consumers to join the proceedings already brought by the principal plaintiff in order to obtain either compensation for damage or restitution for undue payments.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Cumulative Actions have very broad applicability, covering all areas of law.

Representative Actions, rather, are available only in certain sectors, where they are specifically provided by applicable laws, including *inter alia*: competition law; labour law; and consumer law.

On the other hand, Class Actions protect the following rights, which are moreover laid down under Article 140*bis* of the Consumer Code as follows:

"*a)* *The contractual rights of a number of consumers and users who find themselves in the same situation vis-à-vis the same company, including the rights related to contracts underwritten through standard form and conditions;*

b) *Identical rights of final consumers of a given product in relation to its manufacturer, even in the absence of a direct contractual relationship (i.e. product liability);*

c) *Identical rights of consumers and users to the payment of damages deriving from unfair trade practices or anti-competitive behaviour.*"

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The determination of one claim leads to the determination of the class only in the case of Class Actions. Indeed, all the plaintiffs who have joined the proceedings are bound by the final outcome.

1.4 Is the procedure 'opt-in' or 'opt-out'?

Italian Class Actions are based upon an "opt-in" mechanism and there is no right to opt-out. The legislature's main purpose was, indeed, to minimise legal costs which represent the major threat to the exercise of the right of defence in all cases where consumers find themselves *vis-à-vis* companies.

From a procedural point of view, the admissibility order establishes the deadline by which consumers and users – belonging to the class – are requested to opt-in.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Article 140*bis* of the Consumer Code does not mention any minimum threshold relating to consumer claims. However, the volume of individual claims/plaintiffs does constitute an element which the Court takes into account when assessing a claim's admissibility.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

In Article 140*bis*, the legislature refers to similarity between claims by using, interchangeably, the expression "*homogeneous individual rights*" and "*identical rights owed to consumers*".

The generic requirement of "*homogeneity*" is based upon the factual assimilation of the various claims in respect of the rights injured by conduct that has mass-effect. Therefore, it shall arise both in the cases of a single act or repetitive similar acts and in cases where their judicial determination requires the solution of similar or identical factual or legal issues.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Those entitled to bring Class Actions are: i) individual consumers or users belonging to the same class; and ii) associations and committees, but only if specifically empowered to do so by their members.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Article 140*bis* Paragraph 9 of the Consumer Code states that: "*the Court sets the terms and methods of the most appropriate form of public notice in the order with which it admits the action, so that those belonging to the class can join promptly*". Furthermore, compliance with such public notification is a precondition for the prosecution of the claim.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Since 1st January 2010, the date on which Law No. 99 of 23rd July 2009 came into force, an average of 10 Class Actions per year has been brought and admitted by Italian courts. These procedures have been mostly used in the fields of Consumer Fraud and Securities/Financial Services.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The remedy available in Representative Actions is injunctive relief; typically, a court decision ordering a party or parties to cease the unlawful behaviour complained of or to prohibit the application of and/or to modify contractual terms.

Class Actions, in contrast, allow multiple parties to obtain monetary compensation from a common defendant.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

As set out under Article 140 of the Consumer Code, consumer and users' associations can petition the Court to: "*i) stop or prevent unlawful acts or behaviour damaging the collective interests of members; ii) correct or remove the harmful effects of the above conduct; iii) order the publication of the decision*".

On the other hand, Class Actions are usually started by physical persons. However, each consumer is allowed to give mandate to consumers' associations to start the claim, irrespective of whether the particular consumer is a member or not thereof.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

In order to bring Representative Claims, consumers' associations have to be registered at the Ministry of the Economic Development. The registration is subject to compliance with the conditions laid down under Paragraph 2 of Article 137 of the Consumer Code.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Pursuant to Article 140 Paragraph 1 of the Consumer Code, Representative Actions may be brought to:

"*a) stop or prevent unlawful acts or behaviour damaging the collective interests of members;*

b) implement measures aimed at correcting or removing the harmful effects of the above conduct;

c) seek the publication of the decision in a national or local newspaper."

Furthermore, the plaintiff may ask the Court to remove from standard contracts those unfair terms and conditions which result in a significant imbalance in the parties' rights and obligations.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The only remedy available in Representative Actions is injunctive relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Representative Claims are tried and decided by a single judge.

Class Actions are, in contrast, tried and decided by a panel composed of three judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

With regard to Representative Claims, there is no provision relating to the appointment of specialist judges.

The same applies to Class Actions, in respect of which Article 140*bis* of the Consumer Code establishes the jurisdiction of the Court as being that of the regional capital where the defendant has its registered offices.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

As far as Representative Claims are concerned, associations define the group-class by specifying the collective interests that have been harmed.

With regard to Class Actions, the class and, therefore, all the potential members that might opt-in, they are defined by the Court's admissibility order. Furthermore, the order sets out a peremptory time limit – not exceeding 120 days from the deadline for public notification – by which the adhesion contracts shall be lodged at the registry. A copy of the order is then sent by the registry to the Ministry of Economic Development which is in charge of further publication thereof, including on its website.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Since previous Court decisions rendered in different trials are not binding under Italian law, Italian Courts do not make use of test cases, nor of model cases.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There are no specific management procedures in the context of class actions.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Both in the case of Representative Actions and Class Actions, the Court can appoint an expert and question the latter about specific technical issues. In such a case, the parties are also allowed to appoint an expert who assists the Court-appointed one in performing his tasks.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Under the Italian Civil Procedural law, testimony *stricto sensu* is a source of evidence consisting of a statement exclusively relating to facts. As a consequence, expert testimony on technical issues is not admissible. Moreover, there is neither pre-trial exchange of depositions or of witness statements.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

No documentary pre-trial discovery is provided by the Italian Civil Procedural Code.

3.9 How long does it normally take to get to trial?

In order to ensure that the right to a defence is respected absolutely, provision is made for a time period of 90 days – or 150 days in the case of cross-border disputes – between the time when the defendant has been served and the date of the first hearing.

In the case of Representative Claims only, a 15-day term has to be given to the potential defendant who can avoid trial by ceasing the complained of conduct.

3.10 What appeal options are available?

The admissibility order is subject to a challenge before the Court of Appeal within the peremptory time limit of 30 days from either its disclosure or notification, whichever occurs first. The Court of Appeal shall decide on the claim by order in a closed session within 40 days from when the appeal is lodged.

According to general rules, in both Representative Actions and Class Actions, final decisions shall be challenged before the Court of Appeal within six months from their publication and/or within 30 days from their service. The Court of Appeal's judgment can be challenged before the Court of Cassation.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Under the Italian Civil Code, any right lapses in accordance with a statute of limitation, which may be suspended by giving notice of the complaint.

Once the claim is initiated, the period for the action can be prolonged without limitation.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The period under the statute of limitation for bringing a claim is:

- 10 years in the case of breach of contract, unless the law prescribes otherwise; or

- five years from the commission of the unlawful act, in the case of tortious claims.

In any event, if the unlawful conduct is also considered to be a criminal offence and a longer statute of limitation period is provided, the latter must also be applied to the civil claim.

In no case does the Court have any discretion to disregard time limits. Neither age, nor the personal circumstances of the claimant normally affect the calculation of the time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Concealment or fraud has the effect of preventing the above-mentioned time limits from beginning to run. Indeed, if the plaintiff's knowledge is affected by concealment or fraud, the latter cannot be said to be aware of the facts constituting the cause of action for the purposes of Article 2935 of the Italian Civil Code.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The following are types of recoverable damage or loss:

- economic loss, including both pecuniary loss and loss of profit which are direct consequences of the damage;
- physical damage, which affects the psychological and physical integrity;
- moral damage, including pain and suffering damages; and
- the so-called "existential damage" which negatively impacts on the existence of person, in a consistent or permanent manner.

The last two kinds of damage can be recovered only in those circumstances provided by the law.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Since the recoverable damage must be actual and effective, the mere cost of medical monitoring cannot be regarded as recoverable damage.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

The Italian legal system is based upon the "mere compensation principle".

Therefore, plaintiffs are compensated only within the limits of the damage they actually suffered. No punitive damages are recoverable under the Italian law.

However please note that, following the issue of a remarkable ruling of the Italian Court of Cassation, foreign judgments awarding punitive damages shall be recognised in Italy (*cf.* Court of Cassation, Joint Divisions, Judgment No. 16601, 5th July 2017). Previously, the Italian Supreme Court did not recognise punitive damages in the Italian legal system; nevertheless foreign rulings awarding punitive damages can be enforced in Italy if such punitive damages have been awarded based on specific law or regulations complying with the Italian principles of law referring to civil liability.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

In general terms, there is no limit on the damages recoverable from one defendant.

However, with regard to liability in contract, only the foreseeable damage is recoverable.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The Court can alternatively: i) quantify the damages directly; or ii) establish the criteria for calculating the amounts. The amounts are liquidated per each class member.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

The settlement agreement is binding only upon those class members who expressly adhere to it. The Court's approval is only required if the criteria for the calculation of the damages is established by the parties' agreement.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

According to Article 140*bis* of the Consumer Code, should the judge find the class action non-admissible, the plaintiff can be sentenced to pay court fees and other incidental expenses (also according to Article 96 of the Civil Procedural Code) as well as further damages. Moreover, the judge can order that the decision is made public at the losing party's expenses.

Nevertheless, should the judge find the lawsuit admissible and successful, the judge issues a ruling ordering the payment of damages in a given sum or specifying the criteria for determining the *quantum* according to Article 1226 of the Italian Civil Code and the court fees and legal costs relating to the activities carried out throughout the proceeding.

Please note that the Consumer Code does not provide specific rules relating to the recovery of court fees and legal costs, which are subject to the evaluation of the judge and the enforcement of general rules of civil procedure, unless the circumstances provided by Article 92 of the Civil Procedural Code apply. The recovery only includes the costs and fees relating to activities before the Court, quantified on the basis of the Ministerial Decree No. 140 of 22nd July 2012.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

Both in the Class Action and in the Representative Action, the leading plaintiff bears all the litigation costs relating to them.

However, the promoting entity can ask for "joining fees" from all the intervening parties.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

According to Articles 306 and 310 of the Civil Procedural Code, the discontinuation of the action by a party normally requires the consent of the other party. The party who discontinues the claim must pay the litigation costs to the other party unless otherwise agreed between the parties.

There are no costs consequences for the intervening parties in the class action.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The Courts define the amount of litigation costs in the final judgment. Article 92 of the Civil Procedure Code allows the Court to limit, in whole or in part, the recoverable costs.

In particular, this rule applies: i) in cases where all parties lose; ii) if the subject matter of the proceedings is completely new; and iii) if the juridical opinion has changed in relation to the claim's matter.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

The provision set out by Article 74 of the DPR No. 115 of 30th May 2002 regulates the legal aid in the criminal, civil, administrative and tax proceedings.

7.2 If so, are there any restrictions on the availability of public funding?

As far as the civil proceedings are concerned, public funding is available – when there are good reasons – to those citizens with a low taxable income. According to Article 78 of the DPR No. 115 of 30th May 2002, the party may submit a claim for legal aid, at any stage of the proceedings.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Under Italian law, there are no specific provisions on conditional or contingency fees. However, it seems reasonable to expect that to a certain extent the principle of parties' autonomy applies, allowing parties to provide for them.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

The arrangement between a third party (usually specialist funding company) and the main plaintiff whereby the former agrees to finance a client's legal fees in exchange for a share of the 'case proceeds' (usually the recovered damages) is possible but not frequent.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Usually, consumers start proceedings individually, and consumer associations intervene in support of them. Each consumer is, indeed, allowed to give mandate to consumer associations to start the claim. In such a case, consumer associations are regarded as "promoters".

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Within the Italian legal framework, professional claimants are allowed to purchase rights to individual claims in order to obtain a share of the recovered damages.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Although damaged parties are entitled to join civil action individually to ongoing criminal proceedings in order to recover individual damages, neither Class Actions nor Representative Actions for injunctive relief can be brought in criminal proceedings.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Conciliation is the only ADR method available to parties in this type of dispute. Pursuant to Article 140 of the Consumer Code, consumer and user associations are entitled to promote a conciliation procedure prior to commencing a Representative Action.

As far as Class Actions are concerned, there is no expressed provision relating to conciliation procedures. However, in accordance with procedural general principles, parties can petition the judge in order to attempt conciliation at any stage of the proceedings. Article 15 of Decree No. 28/2010 provides that conciliation shall be binding only for those consumers who expressly adhered to it ("opt-in mechanism").

8.5 Are statutory compensation schemes available e.g. for small claims?

The Italian legal system does not provide for collective compensation schemes and there are no specific provisions regulating Class Actions for small claims.

However, under the European law, Regulation No. 861/2007 introduced a European Small Claims Procedure with a view to simplifying and speeding up the small claims relating to civil and commercial matters. The regulation shall apply to all European members (except for Denmark) for claims whose value does not exceed Euro 2,000.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

The available remedies are monetary compensation or a voluntary discontinuance of the particular conduct complained of. Injunctive relief is excluded.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

No provision of the Consumer Code has been specifically dedicated to cross-border claims. The jurisdiction of Italian Courts is established according to the common criteria laid down under both national and European private international law rules. Therefore, the risk of forum shopping has not been specifically avoided in this field.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

As for the Class Action *per se*, the Italian legal system does not provide for *ad hoc* laws and regulations and, nowadays, there is no proposed change in this respect.

However, a law proposal, released on 3rd June 2015, notwithstanding the approval of the Italian Chamber of Deputies, is still pending and waiting for the definitive approval of the Italian Senate. Should this law proposal enter into force, the Consumer Code and the Civil Procedural Code will be amended accordingly with Class Action specificities. This proposed new law may introduce important changes, such as:

- first of all, the Class Action regulation should be introduced in the Civil Procedural Code (it is actually governed only by the Consumer Code);
- secondly, each injured person – whether consumer or not – should be entitled to promote a Class Action; and
- thirdly, monetary incentives should be provided for the purpose of the Class Action's promotion.

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MUNARI CAVANI

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Chapter 14

Japan

Daisuke Oda

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

In Japan, collective actions can be brought before the courts when rights or obligations that are the subject matter of the actions are (Article 38, Code of Civil Procedure 1996 (CCP)):

- common to two or more persons, or based on the same factual or legal cause; or
- of the same kind and based on the same kind of factual or legal cause.

Collective actions can also be formed after the courts transfer and/or consolidate separate but related actions following the request of defendants or the exercise of the court's discretionary power (Articles 17 and 19, CCP).

A collective action mechanism should be distinguished from a so-called class action mechanism, which we describe in more detail below, by the fact that those who wish to benefit from the result or proceeds of a collective action must file an action on their own behalf.

Until recently, there has not been any mechanism for class actions in Japan, where certain claimants seek to represent class members (that is, those whose claims are similar to their own), to bring actions on behalf of themselves and class members. However, the Japanese Government has taken the initiative to introduce a series of legislation with the aim of enhancing consumer protection, and introduced a limited opt-in class action mechanism in relation to consumer contract claims.

The Consumer Contract Act 2000 introduced substantive laws for consumer protection, such as the right to rescind consumer contracts where consumers are misled in entering into such contracts. In 2007, the Consumer Contract Act was amended to allow "Specified Qualified Consumer Organisations" (SQCOs) to seek injunctive relief for the benefit of relevant consumers against business operators.

Furthermore, the Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage of Consumers 2013 (ASP) introduced a special procedure, which is sometimes referred to as the "two-stage action" system or Japanese Class Action System. Under this special procedure, the existence of liability will be determined at the first stage based upon claims brought by SQCOs (first stage). If affirmed, the action will move forward to the second stage, where the quantum of damages will be determined based upon individual claims filed by consumers who have elected to opt in to the procedure upon circulation of proper notice following the first stage (second stage).

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Collective action:

The collective action mechanism under the CCP applies to all areas of law and is commonly used for actions involving personal injury, competition law issues, product liability, labour disputes, financial services, and consumer protection. There are no restrictions to the grounds for claims or the type of remedy or damages that a claimant could recover under the collective action mechanism under the CCP.

Class action:

In contrast to the scope of the CCP, the class action mechanism under the ASP only applies to claims arising from consumer contracts and certain categories of property damages. Consumer contract is defined as any contract (excluding employment contracts) entered into between an individual and a business operator (Articles 2(3) and 3(1), ASP).

The ASP limits the type of claims that SQCOs can bring under the class action mechanism to claims for monetary compensation arising from any dispute of consumer contracts. The ASP does not cover any claim other than those that are stipulated in Article 3(1) of the ASP (for example, consequently, damages for personal injury are not recoverable under the ASP). So, for example, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947 (Anti-Monopoly Law or AML) provides for no-fault liability where the Japan Fair Trade Commission (JFTC) has made a determination that there has been an Article 3 (Unreasonable Restraint of Trade) or Article 19 (Unfair Trade Practices) violation and such determination has become final (Article 25(2), AML). SQCOs can only bring class actions in competition law claims based on tort theory or unjust enrichment theory provided under Articles 703, 704 or 709 of the Civil Code, and not on no-fault liability claims under Article 25(2) of the AML. In addition, SQCOs can only bring claims on behalf of consumers, which excludes the possibility of bringing competition law claims on behalf of business entities which may have been harmed by competition law violations.

Similarly, the ASP does not cover any claims for damages based on statutes (other than the Civil Code), such as the Product Liability Act 1994 and the Financial Instruments and Exchange Act 1948, which provide for no-fault liability under certain circumstances.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Collective action:

Under the CCP, related claims are consolidated and managed together, but the decision for one claim does not automatically create a binding precedent for the others in the group.

Class action:

In contrast, under the ASP, the existence of liability will be determined in the first stage based upon claims brought by SQCOs where the determination of one claim leads to the determination of the class. The quantum of damages will be determined individually in the second stage based upon claims filed by consumers who have elected to opt into the procedure upon circulation of proper notice following the first stage.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The class action under the ASP is an 'opt-in' procedure.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Collective action:

There is no minimum or maximum number of claimants of collective actions.

Class action:

In order to bring a class action pursuant to the ASP, the number of claimants must be a "considerably large number" (Article 2(iv), ASP), which the government later interprets this as "tens of people". Therefore, we could conclude that the minimum number of claimants is at least 10 (ten), without any maximum number thereof.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

Collective action:

Collective actions can be brought before the courts when rights or obligations that are the subject matter of the actions are either (Article 38, CCP):

- common to two or more persons, or based on the same factual or legal cause; or
- of the same kind and based on the same kind of factual or legal cause.

This can be divided into three categories:

- where rights or obligations are common to two or more persons;
- where rights or obligations are based on the same factual or legal cause; or
- where rights or obligations are of the same kind and based on the same kind of factual or legal cause.

Class action:

Claims must satisfy the following three requirements to be brought under the class action mechanism:

- **Numerousness**: claims must relate to damages owed to a "considerably large number" of persons (Article 2(iv), ASP), which the government interprets this as "tens of people".
- **Commonality**: claims must be of "common obligations". Common obligations mean obligations that business operators owe to the individuals to make monetary compensation for damages to property arising from the "same factual and legal cause" (Article 2(iv), ASP). The government interprets the "same factual and legal cause" as the facts supporting the said claim are common in principal, and the basic legal theory is common among the consumers. In this regard, the scale of damages, and whether or not there is a link between conduct and damages, may be considered as issues specific to each individual consumer, and therefore, is not necessarily to have "same factual and legal cause".
- **Predominance**: individual issues such as damages, and the link between conduct and damages, must not predominate over common issues such that "appropriate and swift determination of individual claims" cannot be achieved at the second stage (Article 3(4), ASP).

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Collective action:

Any business operator(s) (regardless of its level in the distribution chain) or individual(s) can bring a collective action.

Class action:

Only SQCOs (which establishment approved by the government) have legal standing to bring a class action on behalf of consumers against business operators under the ASP. The government decides whether or not to approve an organisation as an SQCO, taking into consideration (among other factors) the organisation's track record of activity, organisational structure, decision-making process, financial foundation, and the level of compensation it receives from consumers, among others (Article 65(4), ASP)

It should be noted that SQCOs do not need the appointment from the relevant consumers to bring the said action. Also, SQCOs can only bring claims on behalf of consumers and not someone at a different level in the distribution chain (i.e., wholesale).

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Class action:

When the court's decision is made as to whether the case can proceed as a class action, the SQCO will:

- notify all "known consumers", by post or email, with potential claims subject to the class action as determined by the court in the first stage (Article 25(1), ASP); and
- provide public announcement through the internet, newspapers, and so on (Article 26(1), ASP).

"Known consumers" is interpreted as persons whose names, as well as addresses or email addresses and so on, are known to the SQCO at the time of notification. Upon the SQCO's request, the defendant

business operator in question may also be required by the court to provide a public announcement through the internet, newspapers and so on (Article 27, ASP).

Consumers must elect to opt in, that is, delegate the authority to recover their claims to the SQCO so that the SQCO can then file the claims with the court within a prescribed period set by the court (Articles 30 and 31, ASP).

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

The number of collective/class actions brought each year is not publicly disclosed.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

Collective action:

There are no restrictions to the type of remedies available under the collective action mechanism, such as monetary compensation and/or injunctive/declaratory relief.

Class action:

Under the revised Consumer Contract Act, SQCOs may seek injunctive relief for the benefit of the relevant consumers against business operators. In addition, SQCOs may seek monetary compensation based on claims arising from consumer contracts, limited only to property damages (damages for personal injury, for example, would not be recoverable using the class action mechanism).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Consumer organisations that have been approved by the government as SQCO can bring a class action on behalf of consumers against business operators under the ASP. The government decides whether or not to approve an organisation as an SQCO, taking into consideration (among other factors) the organisation's track record of activity, its organisational structure, decision-making processes, financial foundation, and the level of compensation it receives from consumers (Article 65(4), ASP).

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please see question 1.7.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Please see question 1.2.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Please see question 1.10.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

The trial is by a judge. Jury trial system is not available for collective/class action.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The court proceedings are led by judge(s) including the procedural aspects of the case, and the same judge(s) would render the decision at the conclusion of the proceedings. There are judges who specialise in certain areas of law such as labour, intellectual property and medical issues, and cases involving certain issues tend to be assigned to those judges with relevant expertise at the discretion of the court. However, there is no specialist judge appointed to manage the procedural aspects of the case.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

Collective action:

Collective actions can be brought by the claimants. The court may consolidate separate but related proceedings and try multiple claims following the request of defendants or the exercise of the court's discretionary power (Articles 17 and 19, CCP) if they satisfy the requirements under Article 38 of the CCP, which are explained in the answer to question 1.6 above.

Class action:

The court can certify claims as eligible for class action proceedings at the end of the first stage (of the "two-stage action system"). For the requirements of this determination of eligibility (such as numerousness, commonality and predominance), please see question 1.6.

When the court decides that the said case is qualified as a class action, the SQCO will: (i) notify all "known consumers", by post or email, with potential claims subject to the class action as determined by the court in the first stage (Article 25(1), ASP); and (ii) provide public announcement through the internet, newspapers, and so on (Article 26(1), ASP).

Consumers must elect to opt in, that is, delegate the authority to recover their claims to the SQCO so that the SQCO can then file the claims with the court within a prescribed period set by the court (Articles 30 and 31, ASP).

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Collective action:

Especially in cases involving many claims/claimants, the courts sometimes exercise their case management powers to either: (i) select 'test' or 'model' cases to try all issues of law and fact so that they can apply the same methodology or logic to the remainder of cases; and/or (ii) determine preliminary issues of law and/or fact so that they can focus on those issues first, before moving on to the remaining issues having resolved preliminary issues in the form of interlocutory judgment.

Class action:

It is not clear from the statute whether or not the court will allow test cases in class actions.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

In the context of collective actions, the courts may separate the cases/claims into different groups depending on a few categories (for example, the date of filing) and allow the groups whose claims were brought earlier to move forward. This is a common approach, especially when there are a large number of claimants and when such numbers are increasing over time. From that point on, claims belonging to different groups will be completely separated and the legal procedure will proceed independently in each groups. In theory, the court will issue a judgment with respect to each group of claims and the judgment will have no binding effect on the other groups. However, claims belonging to different groups may be based on the same factual or legal cause, and therefore, the judgment in earlier cases may have a *de facto* effect on later judgments.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court can appoint experts to assist in considering technical issues and the relevant parties can also present expert witnesses. There is no strict regulation concerning the admissibility of opinions by a court-appointed expert or a privately appointed expert witnesses. The value of evidence will be determined by the judge taking into consideration all the circumstances. Often, expert witnesses are requested to prepare a written statement/report providing the overview of his or her testimony in advance. Experts will then be cross-examined at the testimony.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

There is no pre-trial deposition procedure in Japan. Witness statements/expert reports are often submitted in advance of his or her testimony.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Before court proceedings

A party may request disclosure of documents by itself or have its attorneys make such a request through the Bar Association. However, there is no sanction against failure to comply with either of those requests.

During court proceedings

There are principally two procedures for disclosure of documents during litigation under the CCP:

- Commission to Send Documents.
- Document Production Order.

"Commission to Send Documents" (*bunsho-sofu-shokutaku*) is a request made by a party to a civil action (including collective actions), addressed to anyone in possession of documents, to produce these documents to the requesting party (Article 226, CCP). There is no sanction against the requested party for any failure to comply with such request.

Alternatively, a party to a civil action can request the court to issue a Document Production Order. In making such a request, the requesting party must specify the document and its general content, possessor, and the issue the requesting party seeks to prove by the document at issue, as well as the grounds for such request (Article 221(1), CCP). This specification requirement will effectively limit the scope of document production to a certain extent.

The court will grant the request for the Document Production Order unless the document falls under the following categories specified in the statute:

- Documents stating the matters the possessor can refuse to testify on due to kinship (Article 220(i), CCP).
- Documents concerning a secret in relation to a public officer's duties which public disclosure would likely harm the public interest or the performance of the public duties (Article 220(ii), CCP).
- Documents concerning a business secret or matters certain professionals can refuse to testify about due to confidentiality (Article 220(iii), CCP).
- Documents created exclusively for use by the possessor (excluding documents held by the state or a local public entity, which are used by a public officer for an organisational purpose) (Article 220(iv), CCP).
- Records or seized documents concerning a criminal case or juvenile protection case (Article 220(v), CCP).

If the addressee of such order does not produce the specified documents, the court can deem the issue which the requesting party sought to prove through those documents to be true (Article 224(1), CCP). In case of third party addressees, the court can impose an administrative fine of up to JPY200,000 (Article 225(1), CCP).

Please note that there is a special disclosure obligation for business operators in the case of class actions. SQCOs can request business operators to disclose any document by stating the name and address or contact information of the relevant consumer (Article 28(1), ASP). This is for the ease of notifying consumers upon the determination by the court that the case can proceed as a class action.

3.9 How long does it normally take to get to trial?

According to the latest report published by the Supreme Court of Japan in July 2017, the average period of civil litigations in 2016 (at

the court of first instance) was 8.6 months. The percentage of cases that took more than two years but less than three years was 4.2%, while 1.4% took more than three years but less than five years. Cases which took more than five years represented 0.2% of the total.

There are no statistics for the average length of proceedings for collective actions or class actions. However, considering collective actions tend to involve many claimants, it would usually take more time than normal litigations (often up to two to three years, and in rare cases, even more than five years, for the court of first instance to reach a verdict).

3.10 What appeal options are available?

Collective action:

The decision/verdict by the court can be appealed to the high court. The decision on such appeal by the high court may be further appealed to the Supreme Court of Japan.

Class action:

The decision to certify a claim can be appealed to the high court. The second stage cannot take place while such appeal is pending. When the decision becomes final, it will be legally binding upon not only the SQCO that brought the action, but also on SQCO(s) which did not bring such action, or consumers who file claims in the second stage (Article 9, ASP). Therefore, if the case is not certified as a class action, other SQCOs cannot bring the same action over the same case. However, consumers are not bound by this court's decision and are free to bring individual actions for these cases that were not certified as a class action. If the case is certified as a class action, those consumers who are not fully satisfied with the court's decision can elect not to file a claim in the second stage and to initiate separate individual actions instead. Note that in this scenario SQCOs cannot initiate separate class actions on behalf of such consumers, as they will be bound by the previous court decision at that point in time.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

The Civil Code 1896 (CC) sets the general rule for the limitation period. Periods vary depending on the nature of the action.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The limitation period for tort claims under the Civil Code is whichever comes first from the following (Article 724, CC):

- three years from the time when the claimant came to realise both the damage and the identity of the perpetrator; or
- 20 years from the time of the tortious act.

The limitation period for contractual claims under the Civil Code is 10 years from the time when the claims become exercisable (Articles 166(1) and 167(1), CC).

The running of the limitation period may be interrupted or tolled by a certain prescribed act, event or status (including age) on the part of claimant or respondent (Articles 147, 158, 159, 160 and 161, CC).

The court basically does not have the discretion to disapply time limits; however, in exceptional circumstances, the court may do so should the application of time limits be considered abusive.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Concealment or fraud basically does not affect the time limits, however in exceptional circumstances, it may be considered as one of the factors when the court decides whether the application of time limits should be considered as abusive.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Collective action:

For both contractual claims and tortious claims, monetary compensation is the standard remedy for damages (Articles 417 and 722(1), CC). For defamation claims, the court can order an appropriate disposition to restore reputation (Article 723, CC).

Such monetary compensation may cover both bodily/mental damage as well as damage to tangible/intangible property/assets. Such compensation extends to not just "ordinary" damages but also "special" damages, provided that, in the case of the latter, "special" damages was generally foreseeable at the time of the breach/infringement (Article 416, CC). Lost profit is generally considered as special damages. Interest is awarded from the date of the breach/infringement, based upon an agreed rate or, in the absence of that, the statutory rate (of 6% in the case of commercial transactions and 5% in other cases).

Class action:

The class action mechanism under the ASP applies to claims arising from consumer contracts and to certain categories of property damage (for example, damages for personal injury are not recoverable through class action under the ASP).

The ASP limits the type of claims SQCOs can bring under the class action mechanism to claim for monetary payment arising from a consumer contract. The ASP further limits the type of remedy one can seek under the class action mechanism to (Article 3(1), ASP):

- Claims for specific performance.
- Claims for the return of unjust enrichment.
- Claims for compensation for losses arising from breach of contract.
- Claims for compensation for losses arising from defect liability.
- Claims for compensation for tortious losses.

With respect to the bottom three items above, the ASP further limits the type of damages SQCOs can seek to recover. Specifically, the following are not recoverable under the class action mechanism (Article 3(2), ASP):

- Lost profit.
- Secondary loss against the property or service not covered by the contract with the consumer.
- Loss arising from personal injury and death.
- Loss arising from pain and suffering.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

The cost of medical monitoring may be recoverable. Damages that arise in the future may be recoverable if there is a need to demand compensation at present (Article 135, CCP).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not recoverable.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no limit on the damages recoverable from one defendant.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

For both contractual claims and tortious claims, the standard measure of damages is the difference between what actually happened and what would have happened if the breach or infringement had not occurred. Quantification is at the sole discretion of the judge. The judge would quantify the amount of damages taking into consideration the totality of the circumstances.

5.6 Do special rules apply to the settlement of claims/ proceedings e.g. is court approval required?

Collective action:

Settlement can be made in and out of the court. In the latter case, the settlement will be entered in the court record and such record will have the same legal effect as that of a final judgment; in other words, it will be legally enforceable against the opposing party (Article 267, CCP).

Class action:

Class actions can be settled between SQCOs and business operators before the case goes to court. The settlement can be related to whether or not there were "common obligations", and the court record will be legally binding for other SQCOs and consumers who filed claims over the same case.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The court has discretion to award a party its costs based on the "loser pays" principle (Article 61, CCP). The court may award a losing party all or part of its costs if such costs resulted from unnecessary action or delay on the part of the winning party (Article 62, CCP). Recoverable costs include: (a) court fees or other incidental expenses, and only in exceptional circumstances; and (b) legal costs of bringing the proceedings. The latter is recoverable only in certain types of claims where the court deems the assistance of outside counsel to be categorically necessary due to the complexity of the case and expertise required.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

There are no set rules regarding the allocation of the costs of litigation amongst the members of the group/class.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

There are no set rules to address such situation.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Courts normally do not manage the costs incurred by the parties. Costs are assessed at the end of the proceedings.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

The Japan Legal Support Center, which was established by the Japanese Government pursuant to the Comprehensive Legal Support Act 2004, provides legal aid for those who cannot afford to pay the costs and lawyers' fees associated with bringing a civil litigation claim by themselves.

7.2 If so, are there any restrictions on the availability of public funding?

There are no specific restrictions as to the type of cases or claims one can bring using legal aid, provided that certain general conditions are met. These general conditions include:

- That the claimant falls under a specified income threshold.
- That the claim is not frivolous.
- That the case does not require extremely atypical and specialised expertise.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Funding is conditional and, in principle, the recipient must pay the Japan Legal Support Center back in monthly instalments. Depending on the status/income of the recipient, certain payback obligations may be waived.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Article 72 of the Attorney Act prohibits anyone other than an

attorney or a legal professional corporation from engaging in the business of providing legal advice or representation in exchange for compensation, unless otherwise permitted by specific statutes. A violation of this article can result in up to two years of imprisonment or a fine up to JPY3 million (Article 77(iii), Attorney Act).

There is a concern that third party funding may be found to be in violation of the Attorney Act even though, technically speaking, it would not be providing representation *per se*, so long as claims were assigned by the claimants to the third party for collection, and such party acted as a principal.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Please see question 7.4.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Please see question 7.4.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

The Act on Issuance of Remission Payments Using Stolen and Misappropriated Property of 2006 allows recovery of damages inflicted by organised crime through the use of criminal proceedings.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Claims can be dealt with through an alternative dispute resolution mechanism such as mediation or arbitration. However, the use of such alternative dispute resolution mechanisms may be limited, as most collective claims involve significant numbers of claimants.

There are exceptions:

- Mediation and/or arbitration before the Labour Relations Committee (a special administrative body specialising in resolving labour disputes), is quite common in labour law-related claims.
- Environmental law-related claims, where mediation and/or arbitration before the Environmental Dispute Co-ordination Commission (another specialist administrative body) may be an option.

In addition, the Dispute Settlement Centre for Nuclear Disaster Compensation was established in 2011, to resolve claims against Tokyo Electric Power Co. in response to the nuclear accidents at the Fukushima nuclear power plants in March 2011.

8.5 Are statutory compensation schemes available e.g. for small claims?

There are no statutory compensation schemes available.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Monetary compensation is common, but injunctive/declaratory relief may be sought using the court system (for example, based upon the arbitrary award).

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Residents from other jurisdictions may bring claims before the courts in Japan. The court would determine if it has personal jurisdiction over the case and the issue of 'forum shopping' would also be dealt with in that context. There is no set of prescribed rules governing this issue, but there are certain court-made precedents in determining the personal jurisdiction, as it concerns residents from other jurisdictions.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

Currently, there are no changes in the law proposed to promote class/collective actions in Japan.

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Mori Hamada & Matsumoto is one of the largest full-service law firms in Japan, with its principal office in Tokyo, with branch offices in Osaka, Nagoya and Fukuoka, and overseas offices in Beijing, Shanghai, Singapore, Yangon and Bangkok. The firm provides comprehensive assistance on cross-border transactions and disputes. Over half of the firm's work is international in nature and its clients include multinational corporations from a wide range of sectors, including banking, insurance, finance, telecoms, information technology, real estate and manufacturing.

The firm regularly advises on large and complex cross-border transactions, particularly in M&A and finance. The firm has a strong international capital markets (including JREITS) and asset management practice and was instrumental in the development of the Japanese syndicated loan and securitisation markets. The firm has also been a leader in the growing private equity market in Japan. The firm is widely regarded for its expertise in Japanese insolvency and restructuring proceedings and complex litigation, arbitration and regulatory proceedings, particularly in banking and securities, intellectual property, information technology and antitrust. The firm's intellectual property practice is known for its work in rapidly developing technologies, such as telecommunications and information services. Other core practice areas include antitrust, tax and labour law.

New Zealand

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

New Zealand does not have a specific procedural regime for class actions. While draft class action rules have been developed, the authors understand they are no longer under active consideration.

However, representative proceedings can be taken pursuant to rule 4.24 of the general rules of civil procedure (the High Court Rules), which provides that one or more persons may sue or be sued on behalf of persons with the same interest in the subject matter of a proceeding.

The threshold concerning the "same interest" requirement is relatively low. All that is required is that the representative group is capable of clear definition, there are issues of fact or law common to all members and the nominated representatives can fairly and adequately represent that group.

A person may sue as a representative either with the consent of all persons in the class or upon obtaining a direction from the Court. The Courts have stated the approach to rule 4.24 should be liberal and in accordance with the overarching purpose of the rules, which is to secure the just, speedy and inexpensive determination of proceedings. Additionally:

- the representative order cannot confer a right of action on the member of the class who would not have such a right in separate proceedings, or bar a defence which might have been available to the defendant in a separate proceeding;
- there must be a substantial common issue of fact or law for each member of the class represented; and
- it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.

The Courts have also stated that, as long as defendants are not compromised and the aims underlying representative proceedings are enhanced, there is scope for continual development in the area.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Representative proceedings are available in any civil matter where the same interest requirement is fulfilled.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Representative proceedings may determine all issues for all members of the represented group or be structured so as to create a binding precedent on the common issues only.

In the former case, both common and individual issues can be determined within the representative proceeding, although such claims may need to be heard in stages. Accordingly, in a recent representative proceeding, the representative plaintiff's claim was heard in its entirety at the first stage, with the individual aspects of remaining group members' claims to be considered in a second stage if the representative plaintiff succeeded on the common issues.

In the latter case, the represented persons would rely on the *res judicata* established on common issues by the representative proceeding. Whether their separate claims would need to be brought in separate proceedings to establish the remaining ingredients of their claim (i.e. the individual issues) is uncertain. The Courts may be willing to resolve those matters within the original proceeding.

The authors are not aware of any representative proceedings having been structured that way in New Zealand.

1.4 Is the procedure 'opt-in' or 'opt-out'?

There is an *obiter* statement from the High Court that, in the absence of a specific regime for class actions, the 'opt-out' mechanism is too great a departure from the High Court Rules, which only contemplate 'opt-in' representative proceedings. Whether that position would be upheld if fully argued is uncertain.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, there is not.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The required standard is relatively low:

- the representative group must be capable of clear definition;
- there must be some substantial question of fact or law common to all members (that must be explicitly identified by the claimant group); and
- the nominated representatives must fairly and adequately represent that group.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Any plaintiff who satisfies the common interest requirement can bring a representative action.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Given the lack of specific class action rules, notification of potential claimants is supervised by the Court on a case-by-case basis. Generally, advertising will be permitted if necessary. The level of Court supervision concerning communications with potential represented persons will vary in accordance with the circumstances of the case.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Large-scale representative proceedings are a relatively recent phenomenon in New Zealand. Such actions commenced to date have included shareholder claims for prospectus misrepresentation, financial services claims by bank customers in relation to fees, negligence claims by horticultural producers following the introduction of a bacterial disease, claims against insurers following an earthquake and claims in respect of allegedly deficient building materials. However, there is no reason why representative proceedings cannot be brought in respect of any of the above areas of law and the trend appears to be that representative proceedings are increasingly utilised in New Zealand.

Representative proceedings (or any proceedings) seeking damages for personal injury are barred by accident compensation legislation in New Zealand.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

All civil remedies are available in representative proceedings.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

A regulatory body, such as the Commerce Commission (New Zealand's competition and fair trading regulator), can bring proceedings on behalf of others under some legislation, such as the Fair Trading Act 1986, provided that the claim relates to specific persons who have suffered specific losses, as opposed to an indeterminate group. The Financial Markets Authority also has the power to "stand in the shoes" of claimants in proceedings relating to financial markets.

Two specific statutes allow proceedings to be brought on behalf of a class of persons. The Human Rights Act allows class actions to be brought by the Human Rights Commission on behalf of a class of persons subject to a discriminatory practice and the Health and Disability Commissioner Act allows the Director of Proceedings to bring proceedings on behalf of a class of persons before the Human Rights Review Tribunal for breaches of the Code of Health and Disability Services Consumers' Rights.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please refer to question 2.1 above.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Please refer to question 2.1 above.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

All applicable civil remedies are available to a Court, including injunctive, declaratory, equitable and monetary relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Civil proceedings in New Zealand are usually heard before a judge alone. Although there is a right to trial by a judge with a jury for some civil proceedings, the Court has an overriding power to order trial by judge alone in most complex cases. In practice, trial by jury rarely occurs in the civil context, except in defamation proceedings.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Given the absence of specific rules governing management of class actions in New Zealand, representative proceedings are managed in the same way as ordinary cases. Most complex proceedings brought in the High Court will be assigned to a High Court judge for case management, and, where possible, that judge will manage the proceeding through to determination.

Representative proceedings are generally subject to ongoing case management, and the Court retains the ability to vary or rescind the representative order where continuation of the litigation in a representative form is no longer appropriate.

Judicial specialisation has not historically been a feature of the New Zealand legal system. However, a panel of judges has recently been created to deal with proceedings exhibiting a significant commercial element. Either a plaintiff or a defendant may nominate that the proceeding be dealt with by a panel judge at the time the statement of claim or statement of defence is filed.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The group or class of claims will be defined by the representative order by reference to the "same interest" test (see question 1.1 above).

As an aspect of case management, the Court can set a final date by which individual claimants are required to opt in to the proceeding. That date can be set at the same time as the representation order is made, but in some cases has been much later.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both approaches are available. Although there is a presumption that all matters will be determined in one trial, the separate hearing of preliminary questions may be ordered where doing so will create efficiency in terms of hearing time, or where there are issues that may be determinative of the case generally (potentially obviating the need to hear and determine the balance of the issues).

In a recent representative proceeding that went to trial, the representative plaintiff's claim was tried in its entirety (both individual and common issues). This had the effect of using the representative plaintiff's facts as a 'test case', though all members of the represented group were bound by the Court's decisions on the common issues.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Representative proceedings will generally be subject to close case management. In New Zealand, issues such as the composition of the represented group, funding arrangements, discovery and security for costs have all received close attention.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The Court may appoint independent experts to inquire and report on any question or fact or opinion arising in the proceeding. A Court expert can either be a person agreed upon by the parties or, in the absence of agreement, a person appointed from experts named by the parties.

The parties will generally be able to adduce expert evidence at trial, subject to the normal rules of admissibility. Expert witnesses are required to comply with a code of conduct which, among other things, imposes upon them an overriding duty to assist the Court impartially on relevant matters within that expert's area of expertise.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Factual or expert witnesses are not generally required to present themselves for pre-trial deposition. However, parties to a proceeding in the High Court will usually be required to exchange written briefs of proposed evidence and/or expert reports in advance of trial according to a timetable set by the Court. Objections concerning the admissibility of evidence are then exchanged and heard in advance of or in the course of trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

The process for disclosure of documents in representative proceedings will generally be similar to that in ordinary civil proceedings, with disclosure taking place at a number of stages throughout the litigation process. The most significant obligation on the parties to disclose documentary evidence is the requirement to conduct "discovery" of relevant documents in accordance with any discovery order made by the Court. A party subject to a discovery order must identify, list in an affidavit of documents, and provide to the other parties for inspection, relevant documents. The Court can order "standard" discovery (which requires disclosure of all documents that may advance or damage a party's case), tailor the discovery order to the particular circumstances of the case, or dispense with discovery altogether. In large proceedings, including representative proceedings, it is common for discovery to be closely managed by the Court, with a focus on reasonable and pragmatic discovery solutions.

As a general rule, a party will be required to make a reasonable search for documents covered by the discovery order, and disclose to other parties all such documents ("document" is defined broadly to include any material bearing symbols and information electronically recorded or stored) within that party's control. A document will be in a party's control if it is in that party's possession, or if that party has a right to possess, inspect or copy the document. The discovery order may include specific directions as to the manner of discovery, including listing and exchange requirements. Each party subject to a discovery order has a continuing obligation to ensure that relevant documents are disclosed to the other parties.

In addition to discovery orders against parties to the proceeding, the Court may order non-parties to give discovery. In representative proceedings, members of the represented group who are not representative plaintiffs may be required to give discovery if the Court so orders. For example, group members appearing as fact witnesses in the first stage of a representative proceeding have been required to give discovery.

3.9 How long does it normally take to get to trial?

The time it takes for a representative proceeding to progress to trial will vary from case to case. However, given the lack of a prescriptive regime of rules, large-scale representative proceedings often involve complex procedural issues and attendant interlocutory applications (that may generate multiple interlocutory appeals), and may take several years to reach trial.

3.10 What appeal options are available?

For most decisions of the High Court, there is a right of appeal to

the Court of Appeal. Leave to appeal may be required in some circumstances. Appeals to the Court of Appeal will be heard by way of "rehearing", which in practice means that it will be conducted on the record of the evidence given in the High Court (subject to the Court's power to admit further evidence in limited circumstances). An appeal to the Court of Appeal may typically deal with both questions of fact and of law, and, except where appeals from a discretion are concerned, appellants are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment.

Court of Appeal decisions can be appealed to the Supreme Court (New Zealand's highest Court) only with leave of the Supreme Court. The scope of the appeal will be confined to grounds approved in the order granting leave to appeal. Leave is only granted if the appeal involves a matter of general public importance or general commercial significance or if a substantial miscarriage of justice may occur if the appeal is not heard.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

A representative proceeding must be brought prior to the expiry of the relevant limitation periods applicable to the named plaintiff(s). However, once a proceeding is filed and a representative order is made, time will cease to run for potential members of the identified represented class. That applies both to common issues and to individual issues. How the individual issues are managed will be determined by the Court in the circumstances of the case.

If, by the cut-off date set by the Court, a person has opted out (in the case of an opt-out procedure) or failed to opt in (in the case of an opt-in procedure), that person may be subject to limitation periods in relation to any separate cause of action.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

New Zealand has recently transitioned between limitation regimes.

Pursuant to the current limitation regime (which applies to causes of action arising from 1 January 2011), a claim for damages can be brought within six years of the act or omission on which the claim is based. A claim also may be brought after six years if it is brought within three years of the point at which the claimant gained (or ought reasonably to have gained) knowledge of the relevant facts. A 15-year longstop provision also applies. Time is extended for claimants who are under 18 and can be extended by the Court where the claimant is incapacitated.

Claims under certain enactments have specific limitation regimes (for instance, claims for damages pursuant to the Fair Trading Act must be brought within three years from the date on which the relevant loss or damage was discovered or ought reasonably to have been discovered).

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Under the old limitation regime, if the right of action is based on fraud or concealed by fraud, time will not run until the relevant fraud is discovered or reasonably ought to have been discovered.

Under the new limitation regime, fraud may prevent the operation of the longstop period (so that a claim concealed by fraud can be brought at any time within three years of the date at which the claimant gained knowledge of or ought reasonably to have gained knowledge of the relevant facts).

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Damages are commonly recoverable in New Zealand as a remedy for a range of causes of action, including for negligence causing damage to property or economic loss. An important exception is that New Zealand's accident compensation legislation bars the majority of claims for compensatory damages as a result of personal injury. Claims for exemplary damages and mental damage can be pursued in certain (very limited) circumstances.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

No. As is set out in question 1.9, claims seeking compensatory damages for personal injury are barred by accident compensation legislation in New Zealand.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Exemplary (punitive) damages may be awarded in tort where a defendant has acted outrageously and intentionally or with subjective recklessness. While exemplary damages are available in a personal injury claim, they are not available in contract claims. Exemplary damages in New Zealand are exceptional and have tended to be modest in amount.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

As a general rule, there is no cap on the level of damages recoverable from one defendant. However, where statutory damages are awarded (for example, under the Credit Contracts and Consumer Finance Act 2003), a maximum entitlement may apply. The accident compensation legislation bars most proceedings seeking compensatory damages for personal injury but provides for a compensation scheme, effectively capping the amount recoverable for personal injury.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The quantification of damages will depend on the particular cause of action according to common law principles or the relevant statutory regime.

The Courts are yet to comprehensively address how awards of damages will be made in representative proceedings. In cases

where the extent to which damages can be recovered is an individual issue, the level of damages will need to be separately identified for each group member (or possibly category of group members). In other cases, it may be possible for the Court to award damages to be divided amongst the group members according to the harm suffered or loss incurred.

5.6 Do special rules apply to the settlement of claims/ proceedings e.g. is court approval required?

Court approval is not necessarily required to approve settlements in representative proceedings. However, the prospects of settlement may be constrained in practice where third party funding agreements limit the representative party's ability to settle without the consent of other group members.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

An unsuccessful party will usually be required to pay costs to the successful party, although awarding costs is ultimately a matter of judicial discretion. Costs are set by reference to a prescribed scale, which applies notional daily recovery rates and time allocations for particular steps in the proceeding, depending on its complexity and the skill and experience required of counsel. An award of scale costs is not intended to fully compensate the successful party for all costs incurred in pursuing the claim. In complex representative proceedings, costs awarded may cover a relatively small portion of the actual costs of the proceeding.

The Court may increase costs from the scale amount where the nature of the proceeding or the conduct of a party justifies it. That may be appropriate in large representative proceedings involving significant time and expense, particularly where funding arrangements are involved. Indemnity costs (which compensate the successful party for costs actually incurred) may also be awarded, but only in limited circumstances.

In addition to costs, an unsuccessful party will generally be required to pay the successful party's reasonable disbursements, including Court fees, expert witness expenses, and travel expenses.

Costs can also be (and have been) awarded against non-parties. In particular, it has been recognised by the Courts that it would be wrong for a litigation funder to potentially benefit from a proceeding without bearing the corresponding risk of adverse costs. Costs have been awarded against a litigation funder on a joint and several basis, subject to the limit of an indemnity contained in the relevant funding arrangement.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The representative plaintiff will be liable for any adverse costs award. Other represented persons are not parties and will not, as a general rule, be liable for costs. In funded representative proceedings, the lead plaintiff may be indemnified by the funder for any costs awarded against them.

Given that the costs awards in large-scale representative proceedings can be significant, security for costs is often sought by defendants (particularly in cases where the representative plaintiff is a natural person or has limited assets) and awarded by the Court.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

A representative plaintiff who discontinues a claim must pay costs to the defendant unless the Court otherwise orders, or the parties otherwise agree. There is no automatic costs consequence for a represented group member discontinuing (as they are not formally a party to the proceeding).

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

See question 6.1 above. The Court has a wide discretion to determine costs as it sees fit. A party will usually only recover costs set by reference to the appropriate scale. The assessment of costs will usually occur at the end of the proceeding, although costs in respect of interlocutory applications may be fixed when the application is determined.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, legal aid is available in some circumstances.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid is means and merits tested and usually limited to modest amounts. Except for in certain limited circumstances, legal aid is only available to natural persons.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Conditional fee arrangements are permitted subject to the relevant rules of professional conduct for lawyers. A key requirement of the rules concerning conditional fee arrangements is that the total fee charged at the conclusion of the matter must be fair and reasonable.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes, in recent times the common law prohibitions on champerty and maintenance have been relaxed, and the Courts have recognised that third party funding can play an important role in facilitating access to justice, particularly in the context of representative proceedings (although, as is set out above in question 6.1, litigation funders may be required to pay adverse costs where the funded claim is unsuccessful).

In representative proceedings, the Courts have held that active supervision of the funding arrangements is required to protect the

interest of the represented persons and defendants. Parties may also be required to disclose their litigation funding arrangements (subject to redactions for confidential, litigation-sensitive or privileged material) where necessary to determine an application.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Please refer to question 2.1 above.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

While a third party can fund the proceeding, it cannot "stand in the shoes" of the plaintiff in bringing the action.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

In the absence of specific rules governing class actions, the usual range of alternative dispute resolution mechanisms, including mediation and arbitration, is open to the parties. Lawyers are required by the relevant professional rules to keep clients advised of alternatives to litigation that are reasonably available. However, in situations where class actions involving numerous represented parties are promoted by a litigation funder for financial gain, the utility of arbitration or mediation as a dispute resolution tool may be diminished.

In addition to general dispute resolution, some regulators, such as the Financial Markets Authority and the Commerce Commission, have a range of investigation and enforcement powers. Complaints about banking may be made to a Banking Ombudsman, an industry-funded dispute resolution scheme for banking customers, with the power to deal with a range of banking disputes and make awards that are binding on a bank.

Claims of up to 15,000 NZD (or 20,000 NZD by agreement) may be taken to the Disputes Tribunal, an alternative forum for the resolution of small claims.

8.5 Are statutory compensation schemes available e.g. for small claims?

Yes. New Zealand has a significant accident compensation scheme, covering most personal injuries. Please refer to question 5.1.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

The terms of a mediated agreement (including any relief) will be agreed between the parties. Where a dispute goes to arbitration, the arbitral tribunal can award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court. The awards available when other dispute resolution mechanisms are used will depend on the individual mandate of the relevant body.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Yes. Proceedings may be brought in New Zealand by claimants from other jurisdictions subject to the rule of *forum conveniens*. To date, the major representative proceedings brought in New Zealand have not required the Courts to consider conflicts of law issues.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

A draft Class Actions Bill was provided by New Zealand's Rules Committee to the Ministry of Justice in 2009 but appears not to have progressed.

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Pakistan

Aemen Zufikar Maluka

Josh and Mak International

Pir Abdul Wahid

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Class Actions in Pakistan will often come about as a result of a criminal activity giving rise to a civil claim, often in cases where the plaintiffs have been similarly defrauded, or deprived of a right. This may be a service matter where employees of a government department are protesting being discriminated against for promotions, or a case where a number of defendants have been similarly defrauded by an individual or government entity. The main provision that deals with Class Actions is Order 1 Rule (1) of the CPC 1908 reading: "All persons may be joined together in one suit as plaintiffs, in whom any right to relief in respect of arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly severally or in the alternative, where if such person brought separate suits, any question of law or fact would arise."

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

They apply uniformly to all civil actions. In order to enable several persons to join in one suit as plaintiffs, the right to relief must arise out of the same act or transaction or series of acts or transactions, and the matter must be such that if the plaintiffs brought separate suits, any common question of law or fact would arise. It is not necessary that every person should have an interest in the subject matter. The court is not entitled to order a person to be added as a plaintiff without the consent of the plaintiff who is already on the records and who has taken the trouble of incurring the cost of preparing the brief, engaging a counsel and instituting the claim in court (PLD (1994) 46 DLR 426).

The rule enables different plaintiffs to join in one suit where the right to relief alleged to exist in each of them arises out of the same transaction and there is a common question of fact or law to be decided. However, it is not essential that all the questions arising in a case should be common to all suits if separate suits were instituted.

Even if there were only one common question of law or fact, the requirement of this rule would be satisfied. Moreover, many persons may be joined subsequently to the institution of the suit.

Basically any order made by the court as to whether a class action should be maintained can be conditional and can be amended at any time before a decision on merits is reached. Once the court decides that the action is to be maintained, it will serve notice to all members identifiable with reasonable effort. The notice will point out that they will exclude any member who makes such request by a specified date. The judgment will include everyone of the class who did not ask for such exclusion. Any member who does not request such exclusion can appear in the court via their lawyer.

Once a group is specified, the court can determine the course of proceedings and can require that notice should be given at any stage of the action where the court deems such notice is necessary. The court will also ensure a fair conduct of action and will impose any necessary conditions.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

This is a factual matter for the court to decide; the courts will be careful to state in the final orders, as to who the benefit of the judgment does not apply to. This is also a frequent occurrence in promotion matters of civil servants bringing in a class action.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The procedure is opt-in.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

There are generally no maximum thresholds, but power comes from a majority.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

Please see question 1.2 above.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Please see question 1.2 above.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Please see question 1.2 above.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Please see question 1.2 above.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

Please see question 1.2 above.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

This is another economical and convenient forum for disposing of similar lawsuits. Unlike Class Action, there is no requirement for a full list of persons having a common interest in the suit. In matters pertaining to environmental law and public nuisance, this becomes an extra advantage because it is not possible to make a complete list of all victims or affectees. One example may be the sufferers of a drug or another may be victims of radiation or pollution exposure. In such a matter, a representative of such a class can move a court petition. The representative should have permission from the court to move the petition as representative suit and notice should be served to other members. Any suit under Section 92 of the C.P.C mentioned below alleging breach of public trust should be bought as a representative suit. Some environmental legislation includes special provisions on citizen suit where any member of the public can sue the public body if any provision of the Act is not fulfilled.

In Pakistan, Order 1 (8) of the CPC 1908 states that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such a suit on behalf of or for the benefit of all persons so interested. But the court shall, in such a case, give notice of the institution of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonable practicable by public advertisement.

In order to start a representative suit, a number of people have to be so interested in the matter, bearing the same interest and the permission of court under Order 1, rule 8 must be obtained and a notice must be given to all persons who it is sought to represent or sue (1984 PSC 560).

It is also important to note that under the substantive law certain persons are entitled by virtue of their position to sue on behalf of themselves and others; they can also bring a representative suit independently of the rule.

The rule presupposes that every individual by himself or herself has a right of suit. A person who does not have a right of suit himself cannot be allowed to sue in a representative capacity. It is also important that the body of persons represented by the plaintiffs must be sufficiently definite for the court to recognise them as participants in the suit. A suit will be maintainable by a fluctuating body for e.g. inhabitants of a town or village, or the members of an unregistered association belonging to a particular class, or members of a particular religious group. In case of an unincorporated association, such as a club, the secretary or other officer of the club cannot sue or be sued except by obtaining permission under this rule, even though he may have been authorised by a resolution of the association to sue or to defend a suit. It should always be made clear to the defendant whether the suit is brought in a personal capacity or in a representative capacity. Where numerous persons who are not the general public suffer a special injury in respect of a public right, any one of such persons may, under this rule, bring a representative suit on behalf of them all. The rule is designed to allow one or more persons to represent a class having a special interest to sue on behalf of the general public. Therefore, an interest merely as a member of the public is not sufficient interest to sue in a representative capacity; a representative suit can be bought for declaration, injunction, and possession or for damages.

Very few matters succeed in public interest matters, plagued often by delays, backlogs and substantial *ad valorem* fees.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organization be approved by the state?

The court is the one to decide *locus standi*; these are often private NGOs though.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Environmental law, mass employment fraud and Ponzi schemes all come within this ambit.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

All four remedies are available.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

The trial is by judge.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

This is usually not the case, unless a judge with special knowledge is required.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

This is possible in theory, but generally courts are generous in allowing claimants to join litigation.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Matters of law are determined first, but this may be a concurrent exercise.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

No, there are not.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court has this discretion, yes.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

This is not a procedural requirement.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

There are none that exist here.

3.9 How long does it normally take to get to trial?

This can be a delayed adversarial process at times.

3.10 What appeal options are available?

Matters can be taken up to the Supreme Court level.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

The ordinary time limits should apply in this matter as per the limitation Act 1980, under which actions must be commenced within the following periods:

60 Years.

Any suit by or on behalf of the central government; suits by a mortgagee for foreclosure and sale; and suits against a mortgagee for redemption or to recover possession of immoveable property.

30 Years.

Against a depositary or pawnee to recover deposited moveable property; and by a mortgagee to recover possession of immoveable property from the mortgagor.

12 Years.

Inter alia, to recover a legacy or share in an intestacy; to establish a periodically recurring right; to enforce a charge upon immoveable property; to recover immoveable property mortgaged or bequeathed in trust which has been transferred for a valuable consideration, by a landlord to recover possession from a tenant; by a remainder man or reversionary for possession of immoveable property; and generally for the possession of immoveable property or any rights therein not specially provided for.

Six Years.

For compensation for breach of a contract in writing registered upon a foreign judgment; to obtain a declaration that an alleged adoption is invalid or valid; and any suit for which no limitation is provided elsewhere in the Act.

Three Years.

Most actions arising in contract are within a three-year limitation period, including any breach of contract not specially provided for.

Two Years.

Suits against executors or administrators, for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not specially provided for in the documentation agreed upon.

One Year.

For wages; for price of food or drink supplied; for price of lodgings; to enforce a right of prescription; to set aside, *inter alia*, sale in execution of a decree against the government to recover land acquired, money paid and challenged orders; for compensation for false imprisonment by executors and administrators; for compensation for injuries under the Fatal Accidents Act, other injury; and for compensation for malicious prosecution, libel and slander.

Six Months.

Where the Specific Relief Act applies.

90 Days.

For compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force for the time being.

30 Days.

To contest an award of the Board of Revenue. Limitation need not be specifically pleaded, as the courts must take cognizance of this.

Exclusion of Limitation will only apply where, at time of commencement of the period of limitation, the person in whom the right of action lies has a disability, e.g., where he is insane, a minor, or an idiot, time will not commence to run against him until the disability ceases. Where a second disability commences before the first disability is over, time will run after the second disability is over. Once time begins to run, however, any subsequent disability will have no effect. Where the person dies still under a disability, his right of action passes to his legal representatives and time will commence to run from that date. Public holidays and court holidays are excluded from the periods of limitation. In an appeal, the time for obtaining a copy of the decree and judgment will also be excluded. Where a *bona fide* plaintiff prosecutes his claim in the wrong court, the time of such prosecution will be excluded.

Extension of Time.

Where a defendant acknowledges a debt in writing during the period of limitation or makes a part payment of rent, a fresh period of limitation will be computed from that date (Limitation Act 1908, § 19). Please also note that there have been a plethora of interesting constitutional decisions where limitations have been set aside, due to the nature of the damage suffered by the Class Action plaintiffs.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Please see question 4.1 above.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Please see question 4.1 above. Concealment and Fraud are a basic cause of setting aside limitation rules, and a good example is section 18 of the Limitation Act 1980. A similar matter was taken up by our team's Senior Partner, Mr. Zulfikar Khalid Maluka, in a highly-contested Supreme Court case in 2009. This case can be accessed via this URL https://joshandmakinternational.com/our-reported-judgements/2009-scmr-731-noor-muhammad-versus-muhammad-miskeen-supreme-court/.

This case is a prime example of when Fraud can overcome limitation and when the court will deem it as a step too far!

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

All four types of damage are recoverable.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Yes, it can.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Yes, in theory these can be recoverable based on the conduct of the defendant.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

This all depends upon court discretion in capping the final award.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

This differs from person-to-person and what has been agreed and approved by the court in the original petition.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Yes, they do.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Yes, they can.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The sharing mechanism is often set out in the court order.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

This is a fairly frequent occurrence due to the painstakingly slow system of litigation in Pakistan.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Does the court assess costs during and/or at the end of the proceedings?

This is mainly up to the court's discretion and the ordinary rules under Civil Procedure Code 1908 will apply, just as they apply to normal civil suits where class actions are not a subject.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

There is always private charitable funding available.

7.2 If so, are there any restrictions on the availability of public funding?

There are no restrictions that we know of.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Yes indeed, some firms provide the same.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes, unless there are clear ulterior or political motives.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, NGOs regularly do this.

8.2 Can consumers' claims be brought by a professional commercial claimant, which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

This is not possible in Pakistan.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

They often run concurrently with the Civil Matter. A key example is the "Double Shah" Ponzi scheme.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes, courts also make *ad hoc* committees in this regard.

8.5 Are statutory compensation schemes available e.g. for small claims?

This depends; one key example is the compensation scheme of One Constitution Avenue.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Damages are available.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Clients suspected of forum shopping are carefully vetted out by the class action process as liberally discussed elsewhere.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

There have been no recent changes or proposed changes.

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The firm, which is listed in *The Legal 500*, prides itself in the provision of efficient and innovative solutions to its clients' commercial, legal, regulatory and structural challenges. The firm's extremely enterprising team gives quick responses to online queries reinforcing its zeal for excellence. The lawyers at Josh & Mak have the ability to provide effective responses to client queries, and this is what distinguishes them from other local consultancy firms. The firm's approach is not only novel and innovative but also attuned to the demands of the international corporate sector. The associates and partners at Josh and Mak International want clients to rely on them for realistic and incisive advice about their legal matters. The firm's specialisations include legal advisory in matters such as energy and petroleum, telecommunications, internet and media, intellectual property, dispute resolution and taxation, to name a few.

Russia

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Class action procedures are new to the Russian legal system, being regulated by Chapter 28.2 of the Arbitrazh Procedural Code of the Russian Federation ("APC"), which only became effective on 21 October 2009.

The APC governs proceedings in Russian arbitrazh (i.e. state commercial) courts that consider disputes between legal entities or registered entrepreneurs. In certain cases these courts can also try cases involving other individuals (e.g. in corporate disputes).

Russian procedural law also allows cases to be merged and parties to be joined. This enables courts to resolve related claims in a single trial, although such claims are not considered to be class actions.

In the answers to questions 1.2 to 1.10 below, we concentrate only on the class action procedure in Russian arbitrazh courts, as provided for by the APC.

It should be noted that there are extensive discussions in the legal and business community of a proposed law on class actions. Please see the answer to question 9.2 below.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

There are no limitations in this regard, although the APC confirms that corporate and securities disputes in particular may be tried through the class action procedure.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Russian courts manage all the claims in a class action collectively but have to adjudicate on each claim within the group separately. The lead claimant is entitled to support and represent the claims of the entire group of claimants.

Any facts which have been established by a court in a class action shall be binding on a subsequent case involving a claimant from the same group of claimants and the same defendant.

Under Russian class action provisions, a party is not entitled to initiate separate proceedings against the same defendant asking for the same relief, if it failed to opt into a previous class action which has been concluded by a judgment that has entered into legal force. If a class action is still in process, a court cannot consider the separate claims of any parties which have the right to opt into the existing class action proceedings, although the court must explain to such parties their right to opt-in.

1.4 Is the procedure 'opt-in' or 'opt-out'?

In order to take part in a class action, a group member has to deliver an accession document (an application from a member or a decision of a group of members) to the lead claimant within the deadline set forth by the court in the pre-trial order.

Please see also the answer to question 1.3 above.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

At least five group members must have opted into the action of the lead claimant, by the time the action is filed with the court, for a case to be handled as a class action.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

All the claimants in a class action should have the same substantive legal relationship with the defendant.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Class actions can be initiated and led by any person or legal entity (the lead claimant) that is a party to the same substantive legal relationship with the defendant as the other claimants. Other persons, including representative bodies, may be allowed to initiate a class action if this is envisaged by Russian law.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Russian law provides that an offer to join a class action can be made in a public form by publication in the mass media or sending an offer by mail with confirmation of receipt.

In the pre-trial order the court should: (i) set a time limit within which the lead claimant has to invite the other group members to opt into the class action; and (ii) determine the form of such invitation.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

We are not aware of the exact statistical data. However, in general, class actions are still not widely used in Russia.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The full range of remedies provided in Russian legislation for parties in a substantive legal relationship are generally available, including monetary compensation, injunctive relief (e.g. to prohibit actions that violate a claimant's rights) and a declaratory judgment (e.g. a confirmation of the existence of a right or a declaration of a transaction as void).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Russian law authorises certain legal persons to defend and represent other persons' interests or the collective (public) interests. Such actions may be initiated only under the conditions specified by Russian law.

For instance, the Russian antitrust authorities may bring actions to prohibit illegal advertising, or to refute false advertising.

Public prosecutors may bring claims to contest regulatory legal acts or to protect the interests of specific individuals (e.g. to file claims on behalf of minors).

Governmental consumer rights authorities, municipal authorities and consumer associations may file actions with the court on behalf of consumers as a whole seeking to deem a respondent's actions unlawful and to halt them (a judgment upon such a claim would be binding on a subsequent case involving a claim by a specific individual against the same respondent).

Collective management copyright organisations are entitled to protect and represent the collective rights of authors and holders of related rights in copyright disputes.

The business ombudsman is entitled to file claims on behalf of a group of individuals or organisations which are members of the business community and have complained to him of the violation of their rights.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please see the answer to question 2.1 above.

With several exceptions, no special approval from the state is required for a representative body to bring a claim. However, collective management copyright organisations have to obtain a certain state accreditation in order to be able to file actions on behalf of an indefinite number of copyright holders.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Please see the answer to question 2.1 above.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Generally, only injunctive and declaratory relief can be sought. However, there are several exceptions. For example, there are no restrictions as to remedies in copyright cases or in cases where a representative body seeks to protect a specific individual.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In Russia, all civil cases are tried in the first instance by one or several professional judges appointed by the state. The number of judges which hear the case typically depends on the type of dispute. There are no jury trials for civil actions.

In the state arbitrazh courts, cases may also be considered by a judge and two commercial court assessors if a party can prove a statutory reason for joining assessors to the court panel (e.g. the special complexity of the case). Commercial court assessors are selected at random from special court lists by an automated information system.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Class actions are tried in the state arbitrazh courts, which also handle other matters. There are no specialist judges appointed to hear class actions or to manage any certain procedural aspects. However, Russian courts usually try to allocate cases with regard to the specialisation and the case-load of the judge.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

A class is initially defined by the lead claimant in the class action by naming those (at least five) claimants who have joined him in the case and identifying the legal relationship from which the class action has arisen. However, it is the court that ultimately decides which group members are accepted into the class action.

The court sets a deadline for accession to the class action in a pre-trial order (please see the answer to question 1.8 above).

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Class actions are new to the Russian legal system and it is not yet clear what approaches will be developed by the courts to handle them.

In general, Russian higher courts may adopt clarifications on the interpretation of certain legal provisions (such clarifications from the Plenum of the Supreme Arbitrazh Court of the Russian Federation ("SAC RF"), which was the highest state commercial court in Russia before its recent merger into the Supreme Court of the Russian Federation, are mandatory for the lower arbitrazh courts in Russia). Moreover, an interpretation of the law by the Plenum or the Presidium of the SAC RF may be the grounds for the revision of lower court judgments upon newly discovered circumstances.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There are no such procedures. Please also see the answer to question 3.1 above.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

In order to clarify certain issues relevant to the case which require specific knowledge, the court has the right to order an expert examination. The experts then produce a written expert report and may afterwards be invited to a court hearing for questioning.

The expert report's purpose is to provide answers to the questionnaire which has been approved by the court for the relevant expert with regard to the scope of his/her specialisation.

In addition, the court may engage a specialist to provide consultation on certain issues in a court hearing. The court and the parties may then question the specialist.

The parties can also file reports from professionals whom they have chosen themselves; however, such documents will not be treated by the court as "expert evidence".

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

There is no pre-trial deposition procedure for witnesses and experts under Russian procedural law. Witnesses are to appear and give their testimony during the court hearing. In general, the exchange of expert reports before the trial is not contemplated by Russian law.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Russian law does not provide for broad document disclosure procedures. A Russian court may order that only specific relevant documents are produced if a party is not able to obtain them itself.

Also, under Russian law, the parties to a dispute have the right to know about each other's arguments and are obliged to disclose their evidence to the other party prior to the trial.

3.9 How long does it normally take to get to trial?

Class actions must be heard and resolved by a court of the first instance within five months from the date of the court ruling to initiate the proceedings, including any pre-trial proceedings. In general, the timeframe for non-class actions is three months from receipt of a claim by the court.

These time periods may be longer in practice depending upon the complexity of the case, any counterclaims on the part of the defendant, and other issues.

3.10 What appeal options are available?

Class action judgments may be appealed in accordance with standard court procedure provided by the APC.

A first-instance judgment, which has not entered into legal force, may be appealed within one month of the judgment. Decisions of the appeal courts and first-instance judgments which the appeal court refused to consider due to the expiry of the time period for appeal and the absence of grounds for its restoration may be further appealed to the court of cassation.

In addition, decisions may be reviewed by the Supreme Court of the Russian Federation or upon new or newly discovered circumstances (such as where a transaction, on which the judgment in the case was based, was then declared void in other proceedings).

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Russian law uses limitation periods, but their expiry does not prohibit a claimant from bringing a claim to a court. A respondent must request the court to dismiss the claim on the basis of the expiry of the limitation period.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

A limitation period under Russian law in general runs for three years from the moment the claimant becomes aware (or should have become aware) of the violation of its rights.

Limitation periods vary depending on the type of claim. For example, the limitation period for challenging voidable transactions is one year. Shorter limitation periods apply to claims arising from certain legal relations (such as employment), contracts (including carriage or insurance contracts) or activities (including the issue of securities). In some cases, limitation periods are longer (e.g. environmental damage compensation claims), or do not exist at all (such as in cases for the protection of personal non-proprietary rights or for the recovery of bank deposits).

The court may consider certain factors (including a serious illness or the helpless state of the claimant) as reasonable grounds for the restoration of a limitation period. Russian law also provides for the extension of a limitation period in certain circumstances (such as *force majeure*, in a military situation or where there is a governmental moratorium to discharge an obligation).

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Russian law does not deal specifically with these issues. However, fraud or concealment may still be relevant. For instance, they may affect the calculation of the limitation period, since it starts from the moment when the injured party became (or should have become) aware of the violation of its rights.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Both proprietary and non-proprietary damages are recoverable under Russian law, including damages for lost profit, but this always depends on the type of claim and the parties to the dispute. It is notable that, in consumer cases, the recovery of moral damage is very common.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Russian law does not deal specifically with these issues. In general, Russian law does provide for the recovery of damages if a particular product is defective. If the product is not, then the availability of damages (including the costs of a medical examination) will require fact-specific analysis (e.g. it will not be excluded if a producer was obliged to recall the product, but failed to do so).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not available under Russian law, although some Russian law remedies may be regarded as punitive (such as penal fines in consumer cases and liquidated compensation in copyright cases).

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no such limit under Russian law, although there is a general principle that the amount of damages recoverable should be equal to the damage suffered.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

There are no specific rules under Russian law, but generally the court is to specify the amount of damages recoverable by each claimant in the group.

5.6 Do special rules apply to the settlement of claims/ proceedings e.g. is court approval required?

Claims are settled through a specific settlement procedure, and it is the court's duty to promote an amicable settlement of dispute. A settlement agreement should be approved by the court, which should refuse to approve the settlement if it violates either the law or the rights of third parties.

Also, the parties may reach an out-of-court settlement with the claimant withdrawing its claims from court. This withdrawal should also be approved by the court (and, again, should be rejected if it violates either the law or the rights of third parties).

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Under Russian law, legal costs, including court fees, attorneys' fees, and expenses (e.g. on expert examinations, witnesses and interpreters) are recoverable. However, the amount of attorneys' fees awarded in practice is generally insignificant.

The "loser pays" rule applies. In the case of only a partial satisfaction of claims, legal costs are divided in proportion to the satisfied claims. If a party has abused its procedural rights (for example, if it has delayed the proceedings), then the court may rule that such party shall pay all legal costs in full (in proceedings before Russian arbitrazh courts) or that such party should pay compensation "for the loss of time" to the other party (in proceedings before Russian courts of general jurisdiction).

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

Russian law does not directly set out a procedure for the allocation of legal costs among the claimants in class actions.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

No specific costs consequences under Russian law are set out for the discontinuation of a claim by a member of a class action group.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Legal costs are assessed by the court at the end of the proceedings in a final judicial act or in a separate ruling on the recovery of legal costs.

There is no "cap" established on costs. At the same time the court may reduce the amount of recoverable legal costs (such as attorneys' fees) to an amount the court finds reasonable, which may be significantly less than the actual expenses.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

In civil proceedings, legal aid may be granted free of charge subject to certain conditions. Due to a lack of regulation, the legal aid system for civil proceedings in Russia is less developed than the relevant system for criminal proceedings.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid is provided to Russian citizens whose income is lower than the living wage established for the respective part of the Russian Federation in which that citizen lives. Legal aid is also provided to certain categories of handicapped persons, veterans of World War II and non-working pensioners.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Russian law does not allow conditional or contingency fee arrangements and their enforcement is highly questionable.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Russian law does not deal specifically with third party funding, but does not prohibit it as such.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Please see the answer to question 2.1 above.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Russian law does not directly deal with this situation. However, while the possibility of purchasing such rights is fact-specific, the enforcement of contingency fees is highly questionable.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Under Russian law, victims of a crime may file civil claims in the course of criminal proceedings, but these claims will not be considered as class actions.

At the same time, the outcome of criminal proceedings may have a *res judicata* effect in civil proceedings, including in class actions.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

A number of alternative dispute resolution ("ADR") procedures are available, including in civil, labour and administrative relations. In particular, arbitrations are frequently used in commercial disputes. Mediation is not widespread but may be becoming more popular after new mediation law entered into force on 1 January 2011.

8.5 Are statutory compensation schemes available e.g. for small claims?

Russian law provides for a number of public and commercial insurance-based statutory compensation schemes under which a person becomes entitled to compensation in the occurrence of a specific event (such as on the default of a bank, in which case the recovery of deposits is available).

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Monetary relief is most common. Other remedies may also be available depending on the specific substantive legal relationship and alternative dispute resolution procedure involved.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims may be brought by residents of other jurisdictions if the claim is within the jurisdiction of Russian courts (such as where damage is suffered or unjust enrichment occurred in Russia or where the defendant resides or has any property in Russia). In a number of types of dispute, Russian courts have exclusive jurisdiction (such as in disputes whose subject matter is real estate or rights thereto located in Russia, and disputes related to the establishment, liquidation or registration of legal entities in Russia).

In general, claims are brought to the court at the place of residence or location of the defendant. However, Russian law lists certain types of cases which can be heard only by courts at a specific location. For example, claims regarding rights to real estate must be filed to a court at the location of such real estate and claims in corporate disputes must be filed with a court at the place of the registered office of the relevant legal entity.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

On 8 December 2014, the State Duma Committee for Civil, Criminal, Arbitral and Procedural Law approved a concept for the unified civil procedure code ("Concept") which was supposed to embrace civil, arbitrazh and administrative proceedings. The Concept stressed that the class action mechanism had very limited application in practice and needs to be significantly revised.

According to it, the main reason for the low use of the class action mechanism was the difficulties of the Russian courts to distinguish a class action lawsuit from a mass joinder lawsuit. To overcome their procedural similarity, the Concept introduced new conditions for the application of the class action mechanism, in particular:

- the large number of group members (not less than 40) and inability to identify all of them that does not allow to involve all the members by the joinder procedure;
- the joint cause and matter of the claims of group members;
- the same remedy for protection of the rights;
- the same defendant for all claimants; and
- the separate consideration of the claims can infringe rights and interests of other members of the group.

It was originally planned for the Concept to be outlined in a respective draft bill by 1 October 2015.

However, on 15 September 2015, the Code of Administrative Court Proceedings ("the CACP") came into effect in the Russian Federation.

In connection with the adoption of the CACP, the work on the draft bill was brought down to a minimum and the new time for the introduction of the draft bill is not yet known.

The CACP in turn introduced the possibility to file administrative class action lawsuits.

According to Article 42 of the CACP, administrative class action proceedings may be initiated in the following cases:

- the minimum number of claimants is over 20 persons;
- similarity of subject matters of the disputes and grounds for raising claims by the claimants;
- one defendant (or several co-defendants) is the same for all claimants; or
- all claimants of the group apply for the same remedy.

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Baker Botts has been providing domestic and international service to clients with interests in Russia/CIS since the mid-1970s. The firm provides a complete range of legal services to many industries, including corporate, banking, oil and gas, finance, technology, consumer products and real estate. Our Dispute Resolution work in Russia is diverse, and our DR team is equally active in investor-state and commercial disputes, representing claimants and respondents in both arenas. Our practice covers both arbitration and litigation, with international arbitrations, cross-border disputes and the representation of various clients in disputes arising out of transactions in Russia. We have acted for public and private companies, state companies, government divisions and noted individuals.

South Africa

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

South Africa has not yet promulgated class action legislation, as it is commonly known in the USA. The procedure for handling group or class-related claims is dealt with by the South African High Court Rules and the Constitution of the Republic of South Africa of 1996. There is no statutory definition of a class action that defines the requirements of a class action or what constitutes a class action. The procedure for the handling of class or group actions in South Africa is in a developing stage and judgments by the Supreme Court of Appeal and the Constitutional Court provide much needed guidance for the development of class actions in South Africa. Class actions were not recognised in terms of South African common law and prior to 1994, class actions were foreign in terms of South African law. However, the Supreme Court of Appeal in the matter of *Children's Resources Centre Trust vs Pioneer Foods (Pty) Ltd. and Others* ("*Children's Resources Centre Trust*") commenced the process of laying down procedures for the certification of class actions. The requirements stipulated in the *Children's Resources Centre Trust* matter for the certification of a class action are as follows:

- The existence of a class identifiable by objective criteria.
- The existence of a cause of action raising a triable issue.
- There are issues of fact or law, or fact and law, common to the members of the class.
- The relief sought or damages claimed flow from a cause of action and are ascertainable and capable of determination.
- There is an appropriate procedure to allocate damages to class members.
- A representative has been proposed suitable to conduct the action and to represent the class.
- The class action has appropriate means to determine class members' claims in light of composition of the class and nature of the proposed action.

The Constitutional Court in *Mukaddan vs Pioneer Foods (Pty) Ltd. and Others* did not accept that the factors identified by the Supreme Court of Appeal in the *Children's Resources Centre Trust* case were requirements that have to be satisfied before a class action may be certified. The Constitutional Court held that the aforesaid requirements must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The aforesaid requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. During 2014, an application for the certification of a class in *J I Bartosch vs Standard Bank of South Africa Ltd and others* 2014 JDR 1687 (ECP) was unsuccessful, among other reasons, because the applicants' papers were found to be based on conjecture and assertions. The applicant endeavoured to obtain a declaratory order that thousands of credit agreements concluded between consumers and credit providers were reckless as envisaged by section 80 of the National Credit Act. The High Court held that no cause of action was established in the papers. In the ground-breaking judgment of *Nkala & Others vs Harmony Gold Mining Co Ltd & Others* handed down during May 2016 ("the *Silicosis* case"), the certification of the class action was granted by the High Court and the judgment paved the way for between 17,000 and 500,000 mineworkers and former mineworkers suffering from silicosis and tuberculosis to sue the mining companies for damages. The judgment developed the common law to allow for the dependents of miners, who have passed away, to claim damages. It was found to be in the interest of justice to certify two classes, being the silicosis class and the tuberculosis class. The court found that the evidence of the miners would be similar and that such evidence would have to be repeated in each individual case in the event of separate cases. The court found that it would be neither economical nor affordable for the miners to bring actions in their individual capacities. All the evidence will be dealt with during one trial when the class action proceeds. This is the largest class action to ever be certified in South Africa. Although the defendant mining companies have applied for leave to appeal in respect of various aspects of the judgment, their application for leave to appeal was dismissed by the court *a quo*. The mining companies applied for special leave to appeal to the Supreme Court of Appeal and the appeal will be heard during the first six months of 2018. One of the main grounds of the appeal is that the group of potential claimants certified as a class was too broad – the mining companies argued that the broad classes would make the litigation unmanageable and that the liability of each mining company will be very difficult to determine considering that the miners worked in different gold mines over a period of 50 years.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The above rules and procedures developed by the courts will apply for all areas of the law and claims instituted. All claims in terms of which a cause of action can be pleaded will be governed by the same rules or procedures. Competition law claims, for example, will also have to be instituted in the High Court.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Apart from factors to be taken into account to determine whether a class action may be certified, no formal procedures have been prescribed in South Africa for the handling of class or group actions. In the *Silicosis* case, South Africa adopted international procedures and also accepted the basic principle that the outcome of one case does not automatically determine liability for the others in the group.

1.4 Is the procedure 'opt-in' or 'opt-out'?

In the *Silicosis* case, the court granted the relief sought by the miners, allowing them to pursue the class action in two stages:

- firstly, to seek declaratory relief in respect of the mining companies' liability on behalf of the classes as "opt-out" classes. The members of the first class will be bound by the judgment in the class action that applies to all members of the class unless they give notice that they wish to be excluded as a member of the class; and
- secondly, if successful at the first stage, to claim damages on an individual basis on behalf of the classes as "opt-in" classes.

The *Silicosis* case has now provided for procedures regarding "opt-in" or "opt-out" elections, and each matter will be dealt with on its own merits. As there is no legislation giving guidance, the "opt-in" or "opt-out" principle will have to be developed over time, creating principles going forward.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, there is not.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The issues of fact or law or both should be sufficiently common to all the members of the class so that they can be appropriately determined in one action. The 2014 case of *JPH Pretorius* (representing 60,000 pensioners) *vs Transnet and Others* is a good example of a class action being certified and the 60,000 pensioners' claims being similar. The application for certification was brought in terms of section 38(c) of the Constitution by representatives of members of the Transnet Benefit Fund and Pension Fund. The representatives sought to compel Transnet to pay a legacy debt of R80 billion dating back to the establishment of Transnet, to the pension funds. These funds were to provide benefits to pensioners and beneficiaries and the failure to redeem the debt had adversely affected the rights of the members of the class. The applicants were drawn from the poorest within society, old-age pensioners and those in need of statutory social assistance and who had the least chance of vindicating their rights through the ordinary legal process. As individuals, they were unable to finance the legal action given their meagre income in the form of pension monies. The common factor between the claimants was that they were "*victims of official excess, bureaucratic misdirection and what they perceive as unlawful administrative methods*". The certification was granted in the interest of justice.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

In terms of section 38 of the Constitution, "anyone acting as a member of, or in the interest of, a group or class of persons" or "anyone acting in the public interest" may approach a court. Individual groups and/or representative bodies will therefore be entitled to bring the class actions. However, the court will have to approve of the class representative.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Yes, a court will make an order that the members of each class are to be notified of the action. Depending on the circumstances, this can be via mail, a publication in daily newspapers and dissemination by radio. Where appropriate, notices may be placed in prominent places and/or call centres can be maintained to answer questions and accept all "opt-out" members, for a period of time.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Class/group actions are a new phenomenon in South Africa, and since 2012, only a handful of applications for certification have been brought. At present, the most important group/class actions relate to occupational health and safety damages claims, for instance, the *Silicosis* matter. The *Silicosis* case will provide guidance in the absence of legislation to regulate class actions. There are also two cases regarding the distribution of bread in the Western Cape, where the Competition Commission found the bread industry guilty of engaging in anti-competitive conduct. Applicants approached the courts for the certification of a class and were successful in the Constitutional Court. Most of the claims are delictual/tort damages claims.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The remedies available are any remedy available to any individual litigant in terms of South African law. These remedies will include monetary compensation and/or injunctive/declaratory relief.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

See question 1.7 above.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

See question 1.7 above.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

See question 1.7 above.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Injunctive/declaratory relief and/or monetary compensation are available. Ordinarily, injunctive relief will be granted on an interim basis pending a monetary claim to be instituted and finalised.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

South Africa does not have a jury system. In all matters, the trial will be heard by a judge or a panel of judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The class action will be managed by a judge, who will be in control of the proceedings. Judges in the High Courts in South Africa conduct cases of all sorts. Some judges may handle more criminal cases than commercial cases, but that does not entail that judges in South Africa specialise in handling cases of a specific nature only.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

It will be within the discretion of the judge hearing the application for the certification of a class to impose a "cut-off" date by which claimants must join the litigation. There are no specific rules in this regard.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Only time will tell – the handling of class/group actions and the procedures relating thereto are in a developmental phase.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

No, this has not yet been developed in South Africa.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court has the power to appoint technical specialists to assist the judge and assess the evidence presented by the parties. The parties may also present expert evidence but must give notice and a summary of the expert evidence in terms of the High Court Rules to the opposite party prior to the date of the trial. Failure to present such summary of the expert evidence will result in the expert not being allowed to testify.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Depositions do not form part of the South African system, and the High Court Rules do not make provisions for depositions. Witness statements are not required in terms of the High Court Rules except where expert testimony, as referred to in question 3.6 above, is concerned.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In terms of our discovery procedure, a party is obliged to make full disclosure of all documents, recordings and correspondence relevant to the case and make copies of same available to the other side. The discovery procedure is usually completed by the time the first pre-trial meeting is held. Discovery in South Africa does not include the taking of oral evidence as is the case in the USA and only relevant documents are discovered.

3.9 How long does it normally take to get to trial?

It depends in which legal jurisdiction the action was brought. On average, it takes approximately one to one-and-a-half years for a matter to be brought to trial (excluding the certification application).

3.10 What appeal options are available?

A party can appeal the judgment of a single judge in the High Court to a full bench (an appeal tribunal of three judges) in the High Court. However, leave to appeal is required from the single judge who handed down the judgment. If leave to appeal is not granted, special leave to appeal can be obtained from the Supreme Court of Appeal. A further appeal from the three judges in the High Court is available to the Supreme Court of Appeal, with a final appeal option to the Constitutional Court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, certain time limits do exist.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

In terms of the Prescription Act 68 of 1969, claims for damages must be instituted within three years from the date when the cause of action arose. There are exceptions, and the commencement of the running of prescription may be interrupted, i.e. when a claimant is a minor, insane, a person under curatorship or is prevented by a superior force including any law or any order of court from interrupting the running of prescription. The court does not have any discretion to interfere with the stipulations of the Prescription Act. The law of equity does not apply in South Africa.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Prescription will not commence to run in the event of the concealment of facts or a fraudulent act, preventing a claimant from having full knowledge of the facts on which his/her claim is based.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Generally, damages can be recovered if caused by: the death of, or injury to, any persons; an illness of any person; any loss of, or physical damage to any property irrespective of whether it is movable or immovable; and any economic loss that results from the harm.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

No, they cannot.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

No. South African law does not recognise punitive damages.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

No. There is no maximum limit on the amount of damages recoverable, provided that the damages claimed from the respective parties are proven by the claimant. The damages may comprise special damages and general damages.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages will be quantified on an individual basis. It is doubtful that in South Africa a procedure will be adopted in terms of which a global amount of damages is awarded to claimants, as punitive damages are not known in South Africa and individuals are required to prove their claims. Each claim may be different and the defences to each claim may also vary. In some instances, prescription may apply.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Court approval is not a prerequisite for a settlement to be entered into. However, to ensure that the settlement agreement is enforceable, it should be made an order of court and in the process the court is not entitled to interfere with the terms of the settlement, unless the court is of the view that the terms of the settlement are not in the public interest. Regarding claims on behalf of children, such claims must be instituted by the guardian of the child. The High Court, being the upper-guardian of all minors, will have to sanction the settlement agreement to ensure that the child's interests are protected.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

In South Africa, and in ordinary cases, costs should follow the event, i.e. the successful party is usually entitled to claim its costs from the unsuccessful party. Legal fees (legal costs reasonably incurred to prepare for the filing of pleadings and the trial, including all the fees and reasonable costs incurred by the attorney and counsel) and sheriff costs are recoverable and the successful party is generally entitled to recover the court and legal fees on a party-and-party scale, as provided for in the High Court Rules. A party's bill of costs may be taxed (i.e. be determined by the taxing master) or agreed between the parties. In the event that an order to pay costs on a punitive scale (attorney-and-client costs) is granted by the court, the successful party will be entitled to recover more legal costs than the usual party-to-party scale provides for, subject to the discretion of the taxing master. There are no court fees in South Africa.

In constitutional cases where the public interest is at stake, it does not always follow that the successful party is awarded legal costs. In the past, the Constitutional Court has held that each party should pay his/her own costs in these kind of cases.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

There is no judgment yet as to how costs of litigation may be shared amongst the members of the group/class. In South Africa, a cost order will be made against the loser on a joint and several basis. Only time will tell whether the same approach will be followed in class/group actions.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Depending on the agreement between the members of the group/class, if a member discontinues a claim before the conclusion of the matter, such conduct may result in legal costs to be paid by such member to the representative acting on behalf of the group.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

At present, the courts do not accept the responsibility of managing costs incurred by parties and limiting same with a cap. To make provision for a procedure to manage costs, the High Court Rules will have to be amended to cater for class/group actions specifically. As per question 6.1 above, the taxing master will assess the costs claimed from the unsuccessful party.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, public funding is available via institutions such as the Legal Aid Board, the Legal Resources Centre and certain Legal Aid Clinics.

7.2 If so, are there any restrictions on the availability of public funding?

Yes, a means test exists for the purpose of determining the indigence of an applicant for aid. In civil matters, the income and assets of the applicant and/or his/her spouse are both taken into account to qualify for aid. However, certain restrictions exist regarding the types of claims, and financial assistance is often not provided for monetary claims for damages based on contract and delict.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fees are allowed in South Africa. However, the "success fee" may not exceed the normal fee by more than 100%, provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceeding concerned. Such amount may not, for the purposes of calculating excess, include any costs.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

An agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not considered to be contrary to public policy or void. Third party funding is therefore permitted. Funding may be provided by way of any legitimate means. In the *Silicosis* case, the funder for the class action was not a cited party to the application for certification as a class. One of the gold mine defendants brought an application to seek an order that the funder be joined as a party so as to allow the gold mines to ask for an order for legal costs against the funder in the event of the class action not being successful. The court found that the funder was not in control of the litigation and the financial benefit was insufficient to justify a joinder of the funder as a party to the action.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

As stated above, the Constitution makes provision for actions to be instituted by representative bodies.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

See question 7.4 above. Champerty is allowed in South Africa.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Class/group actions are not determined in terms of alternative dispute resolution mechanisms.

8.5 Are statutory compensation schemes available e.g. for small claims?

Small claims can be instituted in the Small Claims Court, but such court has a very limited monetary jurisdiction, making it unsuitable for class/group actions.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

See question 8.4 above.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims can be brought by residents from other jurisdictions, but the claimant/s will have to satisfy the court that the court has jurisdiction to hear the matter.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

As yet, there are no changes proposed.

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Switzerland

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Peter Haas

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

A specific procedure equal to the US "*class action*" does not exist in Switzerland. The Federal Council Dispatch to the Swiss Parliament regarding the new Civil Procedure Code ("**CPC**"), which entered into force on 1 January 2011, expressly refused to implement a "*class action*" into the Swiss civil procedure. One argument against the implementation was the "*principle of party disposition*", which is a central pillar of the Swiss civil procedure. Under this principle, the parties exercise sole control over the object of the dispute.

The current CPC provides an alternative instrument for collective redress, such as the simple joinder ("*einfache Streitgenossenschaft*", "*consorité simple*", Article 71 CPC), which may be subsumed under the term "*group action*". The simple joinder may exist either through a joint plaintiff consisting of several parties or where several parties are sued as joint defendants.

Nevertheless, there is a noteworthy exception under Swiss law which reflects closely a "*class action*". Article 105 of the Swiss Merger Act ("**SMA**") provides compensation for damages for any company member/shareholder who has been disadvantaged during a transaction (merger, split or change of corporate form). The decision of such a claim has legal effect for all company members/shareholders who have the same legal status as the plaintiff regardless of whether they were subject to the claim or not.

Furthermore, according to the Collective Investment Schemes Act (Article 85), a representative individual may represent a group of investors and claim in the name of the group. Such a judgment has a binding effect on all affected investors.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

In general, according to the CPC, the provisions apply to all areas of civil law.

Article 105 SMA is applicable to all company members/shareholders who are affected by a merger, split or change of corporate form of their company. It therefore has a very limited scope of application.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The simple joinder is a classic group action and does not automatically create a binding precedent for the others in the group. Article 71 para. 3 CPC specifically states that each of the joint parties may proceed independently from the others in the group.

With regard to the determination of the claim, Article 105 SMA is a typical class action, insofar as all parties, who have the same legal status towards the company as the individual plaintiff, are affected by the decision.

1.4 Is the procedure 'opt-in' or 'opt-out'?

Pursuant to the "principle of party disposition", the procedures in the CPC are quasi "opt-in".

According to Article 105 SMA, the individuals with the same legal status as the plaintiff have no choice to "opt-in" or "opt-out"; they are automatically bound by the decision *ex lege*.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, there is no such minimum threshold or number of cases.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

To proceed jointly as plaintiffs or be sued as joint defendants, rights and duties must result from similar circumstances or legal grounds. This is, for example, the case in the following situations:

- Claim of joint and several debtors or creditors based on a contract (Articles 143 and 150 Swiss Code of Obligation "CO").
- Claim for rent reduction of several tenants (Article 270 *et seq*. CO).
- Claim of several employees against mass redundancies (Article 335d *et seq*. CO).

- Claim of several co-sureties against the debtor (Article 497 para. 1 CO).
- Several consumers may claim together.

Furthermore, a simple joinder is excluded if the individual cases are subject to different types of procedure: e.g., simplified proceedings apply in general in financial disputes with a value in dispute not exceeding 30,000 Swiss Francs ordinary proceedings are applicable if the value exceeds 30,000 Swiss Francs.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Court proceedings are filed together. To simplify the administration, the simple joinder may appoint a joint representative (Article 72 CPC).

Within the scope of the application of Article 105 SMA, only company members/shareholders can file the proceedings if they are affected by the merger, split or change of formation of the company.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Pursuant to the CPC, there is no provision which states that potential claimants must be informed of a group action such as a simple joinder. There are procedural rules if a similar claim is pending before another court (see question 3.5).

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

There are no statistics available concerning this matter.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

In the case of a simple joinder, all legal remedies are available, e.g. monetary compensation ("*Leistungsklage*", "*action condamnatoire*", Article 84 CPC) and action for a declaratory judgment ("*Feststellungsklage*", "*action en constatation de droit*", Article 88 CPC).

According to Article 105 SMA, only the claim for compensation (money or shares) is available.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

The Swiss legal system allows for collective actions by representative bodies under certain conditions.

Moreover, it is often the case that interest groups incorporate a "*Verein*" to represent its interests or establish a contractual relationship to support a model case.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Article 89 para. 1 CPC provides that associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality rights of the members of such group. A so-called "approval" takes place through the tribunal, which is mandated to decide if an association does have a "national or regional importance".

Additionally, special legal provisions exist which permit associations to file claims to defend their members under the Swiss Workers' Participation, Unfair Competition Act and the Trademark Protection Act, as well as organisations pursuant to the Gender Equality Act.

Furthermore, under certain conditions, a right to appeal is also given to organisations by the Federal Act on the Protection of the Environment, the Federal Act on the Protection of Nature and Cultural Heritage and the Federal Act on Non-Human Gene Technology.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Since the new CPC entered into force, there are no limits in respect of certain areas of law (e.g. Unfair Competition Act, Trademark Protection Act, etc.). However, outside of the special legal provisions, the claims are limited to violations of the personality rights of the members of the group.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

With regard to associations that may file a claim, the remedies are limited to injunctive and declaratory claims. Claims for monetary compensation are not admissible.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Cases are determined by a judge or judges. The civil jury does not exist in the Swiss legal system.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

In general, civil cases are not handled by specialist courts or judges. However, the CPC provides the Cantons some autonomy regarding their own court systems. Therefore, in several Cantons there exist specialised courts including Commercial Courts, Labour Courts and/or Tenant Courts.

Additionally, since January 2012, a new first instance patent court with nationwide jurisdiction over virtually all civil patent matters was established and came into operation.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

There is neither a definition of group action nor can the court impose a "cut-off" date by which claimants must join the litigation.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The CPC does not regulate "test" or "model" cases that may be selected by the courts.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

A court may consolidate proceedings through an order by joining claims of separately filed actions ("*Klagevereinigung*", "*la jonction de causes*", Article 125 *lit*. c CPC), or if factually connected cases are pending before different courts, the subsequently seized court may transfer the case to the court first seized if the first court agrees to take over ("*Überweisung bei zusammenhängenden Verfahren*", "*Renvoi pour cause de connexité*", Article 127 para. 1 CPC).

The consolidated or transferred proceedings will then fall under the regulations of the simple joinder (Article 71 CPC).

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court may, at the request of a party or *ex officio*, obtain an opinion from one or more experts (Article 183 CPC). If the court lacks the necessary capabilities to assess the facts, it is obliged to appoint an expert. However, the court must hear the parties first.

However, allegations of a party which are based on a private expert opinion are considered to be particularly substantiated or "qualified". Accordingly, a non-qualified submission from the opposing party will not be sufficient to disprove the aforementioned private expert opinion.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Pre-trial depositions similar to the discovery-phase in US procedure do not exist under Swiss law.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Before court proceedings are commenced, a so-called "precautionary taking of evidence" may be possible under Article 158 CPC. The court is permitted to take evidence at any time (before and during the proceedings) if the law grants the right to do so or if the applicant shows credibly that the evidence is at risk or that it has a legitimate interest.

The condition of a "legitimate interest" is to ensure the plaintiff assesses its chances of success of future proceedings and/or the possibility of obtaining evidence. It is intended to avoid cases where a plaintiff has little or no reasonable chances of success. If the applicant applies for a "precautionary taking of evidence" he/she has to name the evidence as precisely as possible. So-called "fishing expeditions" are not allowed under Swiss law.

Furthermore, for cases involving e.g. financial institutions, clients of such institutions may also exercise their right obtaining access to information under the Data Protection Act.

3.9 How long does it normally take to get to trial?

Depending on the complexity of the case and the workload of the particular court, it normally takes between two and six months to get to trial.

3.10 What appeal options are available?

There are no specific rules or restrictions regarding appeal options within simple joinder proceedings. Depending on the circumstances of the case, a revision (Article 311 *et seq*. CPC), an objection (Article 319 *et seq*. CPC) or a review (Article 328 *et seq*. CPC) must be lodged.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, time limits are provided under substantive civil law. When the limitation period has passed and the defendant pleads this fact in its defence, the chances of success for a plaintiff are essentially non-existent.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The law on time limits is currently under review and the Federal Council has quite recently dispatched a legislative proposal to the Swiss Parliament. At the time of writing, it was unclear when the new law will enter into force. Therefore, the following answers are based on the law in force in June 2017 (in this section, possible amendments according to the legislative proposal are mentioned in square brackets).

Time limits are not ruled consistently. The general provision says that all claims based on a contractual relationship become time-barred after 10 years unless otherwise provided by federal civil law (Article 127 CO) [legislative proposal: the time limit shall be extended to 20 or 30 years in the case of damages and compensation for homicide and personal injury based on a breach of contract]. There are several specific provisions that qualify the general rule. For example, for claims on periodic payments and in employment contracts, a limitation period of five years is applicable (Article 128 CO) [legislative proposal: these specific provisions shall be

omitted]. Claims under chattel sale law on breach of warranty of quality and fitness are generally time-barred two years after delivery of the goods to the buyer (Article 210 CO).

For non-contractual claims, there are two time limits – a relative and an absolute time limit. The relative time limit passes one year after the injured party has knowledge of the damages [legislative proposal: the relative one-year time limit shall be extended to three years]; the absolute time limit ends 10 years after the damage has occurred [legislative proposal in cases of homicide and bodily injury the absolute time limit shall be extended to 20 or 30 years].

The age or condition of the claimant is not relevant to the proceedings; the court has no discretion to deviate from the law on time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

If there is a criminal offence, the time limits applicable in criminal law apply. These are generally longer than time limits under civil law [legislative proposal: for non-contractual claims in such cases the right to claim damages for homicide and bodily injury after the time limit starts running shall be extended to 20 or 30 years].

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Swiss law considers as recoverable those damages that have financial consequences. These include property damages, economic loss (under certain conditions) and bodily injury (physical and/or psychological injury), as well as different kinds of infringements on privacy (e.g. prejudice to a person's reputation). Moreover, in certain situations and under strict conditions, environmental damage is also recognised and recoverable. Secondly, mental damage is a non-pecuniary damage that is also compensable under Swiss law, if it is determined to be serious, the extent of which is determined in each case.

Further, when associations are entitled to claim, claims for monetary compensation are not allowed (see question 2.4 and section 8).

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Damages are recoverable if all legal conditions of liability are met. Under Swiss law, generally, costs regarding preventive measures, such as costs of medical monitoring, put in place before any damage has occurred are not compensable. In the example given above, the cause of liability (malfunction) is not fulfilled and the costs of medical monitoring are not yet recoverable. The Swiss legal system has adopted a Product Security Act ("PSA") to ensure consumers' safety under administrative law. Under the PSA, manufacturers are required to respect the safety obligations before and after a product has been introduced into the market. If a product presents a risk to the health of consumers, authorities may impose different measures against the manufacturer (e.g. selling or exportation prohibition, product recall, product destruction, etc.).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not recoverable under Swiss law. They are contrary to the Swiss legal principles according to which the maximum limit of compensation is the total amount of the damage suffered.

As a common legal remedy for the protection of the creditor's interests, the parties may agree on a contractual penalty as a fixed sum that is triggered in case the debtor is in breach of its contractual obligations. A contract clause penalising one party for non-performance or breach of contract is enforceable under Swiss law. According to Article 161(1) of the Code of Obligations, the enforcement of such a penalty clause requires no proof of any real damage.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

A plaintiff has the right to obtain full compensation in respect of the damages suffered but is not entitled to receive any overcompensation. Under Article 43 CO, the court determines the maximum compensation. This entitles the court to reduce the compensation according to the circumstances and the plaintiff's contributory negligence, if any.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Swiss law requires every plaintiff to justify and prove the amount of any alleged damage. There is no allocation of damages to classes/groups since the damage has to be determined for each person individually.

An exception to this principle is foreseen in the "class action" of the Swiss Merger Act. Article 105 SMA provides compensation for damages for any company member/shareholder who has been disadvantaged during a transaction (merger, split or change of corporate form). As the decision of such a claim has legal effect for all company members/shareholders who have the same legal status as the plaintiff, the damage does not have to be determined individually.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

There are no specific rules with regard to the settlement of claims which can be reached in court or out of court. Most claims are resolved by an out of court agreement. Courts tend to motivate the parties to enter into a settlement agreement in the course of the proceedings, which is ratified by the court and has the same effect as a judgment.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The costs of the proceedings comprise the court costs and party costs. Each Canton issues its own tariff. According to Article 104

et seq. CPC, the court determines and allocates the court costs *ex officio* to the party that succumbed. Where neither party has won completely, the costs are charged according to the outcome of the proceedings. The court awards the party costs pursuant to rules of court costs in accordance to the cantonal tariffs, provided the reimbursement has been requested by the winning party.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

As class actions are not admissible under Swiss law, general rules are to be applied. Where more than one party proceeds as an ancillary or main party, the court must determine under Article 106 CPC the proportion of costs of each plaintiff. Even though the court retains discretion to determine the costs, it must take into consideration the role of the parties and the amount of their claims, as well as the conduct of the parties throughout the proceedings in order to determine the allocation of costs. Joint and several liabilities may also be ordered by the court.

In the case of a merger, a demerger, or a conversion pursuant to Article 105 SMA (see questions 1.1 and 5.5), the cost of the proceeding shall be borne by the surviving subject.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Article 106 CPC provides that the party that withdraws its action will be charged for the costs. In the case of a simple joinder, the court applies Article 106 CPC to the discontinuing plaintiff in order to charge the costs incurred until that time; the plaintiffs are jointly and severally liable for the costs.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Each Canton issues its own tariff for the court and the party costs. The amount of recoverable costs depends on this tariff. In practice, the prevailing party is prevented from obtaining reimbursement for its entire costs. The court's determination on recoverable costs is generally determined in the final judgment.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Legal assistance is available only under certain conditions. It includes the appointment of a counsel (if necessary) and various waivers of costs.

7.2 If so, are there any restrictions on the availability of public funding?

A party that requires legal assistance must make an application before or, at least, during the proceedings. To be eligible for legal aid, the applicant should firstly be unable to support the necessary costs for the proceedings. Secondly, the applicant's case should appear to have a chance of success. The court determines whether these conditions are met, and if so, can award full or a partial legal assistance.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Under Article 12 *lit*. e of the Federal Lawyers Act, it is recognised that Swiss law prohibits funding through contingency fees (*pactum de quota litis*). Despite the prohibition, it is possible to fix attorney fees partially (i.e. on a reasonable basis) according to the result of the proceedings (*pactum de palmario*).

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding is permitted in Switzerland. Legal expenses are often covered by a legal expenses insurance policy; there is commonly a maximum limit to the cover provided. If costs for a plaintiff's proceedings are paid by an insurance company, the plaintiff is not entitled to receive legal assistance.

Furthermore, there is the possibility of process financing in Switzerland. The litigation funders will finance the process and take the risk of litigation in return for a participation in the positive process result.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes. Regarding the procedure, see questions 2.1–2.4.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

An assignment of a claim is possible under conditions provided by Article 164 *et seq*. CO. Not all claims are assignable; pecuniary claims are, however, generally assignable (e.g. claims for damage caused to property or infringement of privacy). Payment can be by way of a fixed price or a share of the damages awarded. The assignment of a claim must comply with general provisions of contract law.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Under Swiss criminal procedure, a claim for the compensation of damages can be claimed within criminal proceedings. However, only a victim of a criminal act can be a party of such proceedings and therefore claim compensation. In other terms, this is not possible for a group or an organisation.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The CPC encourages extrajudicial and alternative dispute resolution

mechanisms, including arbitration, conciliation and mediation. An Ombudsman is available for specific areas (e.g. banking, telecommunications, insurance, tourism).

8.5 Are statutory compensation schemes available e.g. for small claims?

Statutory compensation schemes are not available.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Generally, remedies are similar to those available in litigation matters before state courts (including injunctive and declaratory relief). Monetary compensation is more commonly claimed and awarded.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims can be brought by residents from other jurisdictions. There are no restrictions in this regard.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

An increasing number of legal scholars have published support for permitting class actions in Switzerland, mainly in the fields of banking and finance law and consumer protection, data protection and gender equality. The Swiss Government had an open ear for these concerns and published a report in July 2013 that analysed the situation in different countries, e.g. the US, and in the European Union, and stated that the collective redress is currently insufficient. Even the Swiss Parliament has come to the conclusion that in specific areas of law, class actions should be introduced, and has now mandated the Swiss Government to issue a draft-proposal for class actions in specific areas of law. The aim is to introduce neither a unilateral plaintiff-friendly nor a non-economic-friendly instrument. Among others, one possible system might be that the courts may select 'test' or 'model' cases which will be binding for similar proceedings.

In June 2014, the Federal Council launched a consultation on the draft of the Federal Financial Services Act. This legislative proposal did not include any class action mechanism as expected beforehand, but only a group settlement proceeding for the amicable settlement of disputes in the event of a large number of claimants (*Verbandsklage* and *Gruppenvergleichsvereinbarung*). Since the group settlement proceeding of the abovementioned draft was met with harsh criticism from various sides during the consultation, the Federal Council decided in March 2015 not to pursue this instrument within the Federal Financial Services Act, but to implement it in the legislative work concerning the revision of the CPC.

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Taiwan

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Yes, Taiwan's Civil Code provides two methods: (1) plaintiffs bring suit together as co-plaintiffs at their own initiative, with the selection of representative(s) for the underlying suit; and (2) plaintiffs incorporate themselves into an entity, which will bring the suit.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The rules apply to all civil proceedings.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

By means of class action, where the determination of one claim leads to the determination of the class.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The procedure is opt-in.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

There is no minimum threshold.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The plaintiffs must have a "common interest", and the case must be based on common facts and application of law. In addition, there must be a common relation between the plaintiffs and the defendant(s) as a matter of law.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

As set out in question 1.1 above, there are two methods, and there is no restriction on who can bring the class/group proceedings. It is a matter for the class member to decide. Generally, the plaintiffs choose their representative(s) to bring the action on behalf of the class.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Where the plaintiffs gather together to bring the action jointly, and the class action is approved by the court, the class action shall be announced publicly by the court at the court's expense through government gazette and the media to notify the potential claimants, if: (1) the court inquires with the class representative and obtains his/her/its consent; (2) the class representative petitions to the court for a public announcement; and (3) other interested claimants petition to the court for a public announcement. Such public announcement is deemed a 20-day notice to the potential claimants.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Generally, class actions are rare in Taiwan. The number of class actions each year has remained below 10 since the relevant law was enacted. Most of the class actions are in the area of securities/shareholders' claims, environmental protection and consumer protection.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

All remedies in civil proceedings are available in class actions.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Yes, an interested group (such as environmental, consumer protection groups, shareholder protection association) may bring collective actions for the purpose of preserving the public interest.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Any group that is validly established may bring such claims, as long as the claims are in the public interest.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Any group that is validly established may bring such claims, as long as the claims are in the public interest. The law does not classify in which areas the procedure is available. The rationale of the legislation is to preserve and advance the public interest.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

All remedies in civil proceedings are available.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

By judge(s). There is no jury trial in Taiwan.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The proceedings are managed and dealt with by judges in the ordinary course of court assignment.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The plaintiffs must be certified by court as a class. In line with the public announcement set out in question 1.8 above, the cut-off date is 20 days from the date of the public announcement.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Both approaches are available. The proceedings will be treated, in effect, as ordinary civil proceedings.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

No, the proceedings will be treated, in effect, as ordinary civil proceedings.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Generally speaking, parties have the option to present expert evidence. The court, however, does have the power and authority to seek expert evidence in support of the case. There is no restriction on the nature or extent of the expert evidence.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Witnesses must give testimony in the court hearing in person.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Under Taiwan law, there is no discovery of evidence between the parties. The plaintiffs have the burden of proof, for which the defendant has no duty to disclose or provide.

3.9 How long does it normally take to get to trial?

In general, it takes approximately four to eight months to get to trial.

3.10 What appeal options are available?

Under Taiwan law, there are three instances. The parties may appeal to the High Court after the District Court enters into the judgment. After the High Court gives its decision on appeal, the parties may appeal to the Supreme Court for final judgment.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, the time limit for civil claims applies.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Statutory limitations apply to the institution of court proceedings. The age or condition of claimants is generally not a ground for altering the time limit, but the court has the discretion to disapply time limits in case of fraud or abuse of process. Please see the answer to question 4.3 below.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Under Taiwan law, where either party is found to have been involved in abuse of process or fraudulent actions, it has the authority to disapply the statutory limitation.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

All damages in civil proceedings are recoverable; however, where the damages arise from damages to personal property, the plaintiff is not entitled to claim for mental distress and pain & suffering. In principle, under Taiwan law, damages to personal property do not give rise to a cause of action for pain & suffering of the property owner.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

The burden of proof is on the plaintiffs, and so are the costs arising from the proof. However, if the court takes the initiative to seek evidence, all costs incurred shall be borne by the losing party.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are generally recoverable if the parties have agreed on such punitive damages in the agreement. The court has the discretion to decide whether such punitive damages as agreed by the parties are reasonable, and may reduce the punitive damages if the court regards the agreed amount as too high. In the absence of the agreement by the parties, the court can only award punitive damages where the applicable law provides the legal basis. For example, in cases involving infringement of a trade secret, the disgruntled party may recover punitive damages up to three times of the amount claimed.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no maximum limit on the damages recoverable from one defendant.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

There are two scenarios: (1) the court, in principle, still has to decide the damages of the plaintiff on each account; and (2) if the members of the class agree upon the amount to be allocated to each individual member by themselves, then the class representative may petition to the court for a "lump sum" order, and the court may order the total amount recoverable by the class, without having to assess the amount to be awarded to each individual class member.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

There is no special rule for settlement of the claims; provided, however, that in some cases where the class representative's authority to settle on behalf of the class is limited by other interested party/parties, the representative cannot settle with the defendant.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The winning party may recover court fees, costs and expenses incurred in the procurement of evidence, and witnesses' travel expenses. Attorney fees are only recoverable by the winning party in appeals before the Supreme Court.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

This would be decided by the members among themselves.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

This would be decided by the members among themselves.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

No, the courts do not manage the costs incurred in the proceedings.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, funding is available through legal aid.

7.2 If so, are there any restrictions on the availability of public funding?

Public funding is available to those who fit into the class or criteria, such as income threshold, family status, etc.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

The Legal Aid Foundation shall review each applicant's case (e.g., family income and number of family members) and determine the funding available to each applicant. In some cases, such review may be exempted where the claimants fit into a particular class, e.g., minority claimants or aboriginals without legal representation. There is no distinction between conditional and contingency fees.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

In the absence of conflict of interest, third party funding is permitted.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, it may be assigned to the consumer association or representative body and brought by that body. There is no specific procedure for such assignment. These associations or representative bodies may take the initiative to bring actions against the defendant. However, there is a threshold of 20 consumers, who must assign their claims to the consumer association or representative body first, before legal proceedings can be instituted.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Yes, as above.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Yes, they can. Generally speaking, when initiating a criminal complaint, the plaintiffs will file a civil claim for monetary damages at the same time, and the court will decide on the criminal liability of the defendant, as well as assess the damages.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes, both mediation and arbitration are available as alternative methods of dispute resolution.

8.5 Are statutory compensation schemes available e.g. for small claims?

No, there is no such scheme under Taiwan law.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Monetary damages are available as an alternative method. Injunctive and declaratory relief can only be awarded by the a court of law.

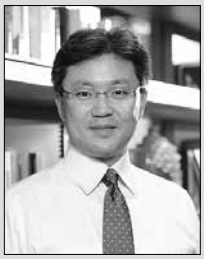
9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

No. Plaintiffs must file the suit at the place with nexus, generally in the place where the defendant is located. Forum shopping will generally be rejected.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

No, there have been no proposed changes in the law.



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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

In the United States, there are a variety of procedures for handling related claims. This chapter will focus on the federal court system – which provides the seminal collective action rules and procedures, as many states have patterned their procedures on the federal analogs. A class action is a collective lawsuit in which an individual person or persons are confirmed by the court to bring and resolve the claims of "others similarly situated" in a single proceeding. The premise of the class device is that the claims of the class members are so similar to those of the class representative that a single trial of the representative's claim will fairly and adequately dictate the outcome for all of the class members.

A class certification decision is to be made as soon as practicable in the progression of a class action. Class certification has several important and instant ramifications. First, once a class is certified, if damages are involved (or if the court otherwise determines it to be appropriate), the class members must generally be afforded notice of the certification and the opportunity to opt out of the class, in which case their claims will not be affected by a class decision or settlement. Second, once the class is certified, any settlement reached with the class representatives, must be approved by the court in what is called a "fairness" hearing at which time evidence is presented as to the nature of the claims, potential for liability, and various aspects of relief in the settlement. Any member of the class may appear and object if he or she believes the settlement is unfair, unreasonable, or inadequate. Third, the rules provide for a discretionary appeal to the Circuit Court of Appeals from the certification decision, which may also be a basis for staying class notice and further progression of the merits.

To maintain a class action, a plaintiff must satisfy the requirements of Federal Rule of Civil Procedure 23. The necessary showing under Federal Rule of Civil Procedure 23 has two components. First, the plaintiff must prove each of the elements of Rule 23(a):

- The class is so numerous that a joinder of all members is impracticable ("numerosity").
- There are questions of law or fact common to the class ("commonality").
- The claims or defences of the representative parties are typical of the claims or defences of the class ("typicality").
- The representative parties will fairly and adequately protect the interests of the class ("adequacy").

Numerosity is a fairly easy threshold – the real battles are joined on the issues of commonality, typicality and adequacy. Commonality requires a showing that the questions of fact and law will generate common answers for all class members. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 251 (2011). Typicality means that the evidence as to the class representative's claims will be the same as, or easily extrapolated to, the other class members. If the class representative is subject to particular defences that may not be asserted against the rest of the class – such as limitations, product identification/standing, or failure to mitigate damages – typicality may be destroyed. Adequacy involves consideration of both the proposed representative and the putative class counsel. As to the class representative, the court must assure itself that he or she will zealously protect the rights of the class members and does not have inherent conflicts of interest with the class members. The classic conflicts example is from the *Amchem* decision in which the U.S. Supreme Court found an inherent and irreconcilable intra-class conflict between those class members who had been actually injured (and presumably wanted immediate payout of settlement proceeds for treatment) and those who had been exposed to asbestos without present injury (who wanted to preserve the proceeds for future treatment if necessary). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,117 S. Ct. 2231, 2250-51 (1997).

In addition to the Rule 23(a) requirements, the class must also satisfy at least one of the subsections of Rule 23(b). Rule 23(b)(1) is reserved for rare cases where there is a real risk of incompatible judgments against the same defendant or a limited fund for class recovery. Rule 23(b)(2) permits class actions for equitable and declaratory relief where "the party opposing the class has acted on grounds generally applicable to the class", while Rule 23(b)(3) governs classes for damages. The idea behind a Rule 23(b)(2) class is that the relief is the same whether there are one or 100 plaintiffs – *e.g.*, stop discharging pollutants into the river – and so this provision has been perceived as easier to satisfy. In contrast, damages claims are more inherently individualised and thus more problematic in a class setting. Consequently, Rule 23(b)(3) requires additional assurances that the claims are sufficiently cohesive to warrant adjudication by representation, including the following showings:

- Common questions of fact or law will predominate over any questions affecting only individual class members ("predominance").
- Trial of this case as a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority").

Where numerous individual cases are filed, and a class action is either not possible or not advisable, there is a procedure for coordinating the pre-trial processes, including discovery, through a multi-district litigation (MDL) proceeding. Examples are product liability actions, and cases involving mass disasters, multiple infringers of a particular patent, sales practices, and securities. A panel of federal judges determines whether there are a sufficient number of questions common to the litigants, pre-trial coordination would be beneficial to the parties and judicial system, and convenience, economy, and efficiency are served by the coordination. Upon making those findings, the panel has the authority to assign all cases filed in federal court anywhere in the country to be transferred to the MDL court.

Mass actions are another form of collective action that is not specifically delineated by rule, but can be removed from state to federal court under the Class Action Fairness Act. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2005)) [hereinafter CAFA]. Some states have permissive joinder rules permitting multiple claims to be joined together in a single action, and when there are 100 or more such claims, the case can be removed to a federal court, as with any class action where any member of the class is a citizen of a state different from any defendant and the amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (11).

There is also a vehicle for addressing a group of related claims under the Fair Labor Standards Act, known as a collective action. 29 U.S.C. § 216(b). It provides more flexibility than the federal class action rule does because an action can be conditionally certified based on a showing that its members are "similarly situated". But it also requires that the class members "opt-in" – thus affirmatively stating their intent to participate – before proceeding to the merits. After discovery is completed, the opposing party may move to decertify the class, prompting an inquiry into how cohesive the class claims are, considering the different circumstances of the workers, the defences to their claims, and the overall manageability and fairness of proceeding in the aggregate.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The class action and MDL rules and statutes apply to all forms of litigation where their respective standards can be met. The collective action procedure is available in certain types of employment cases. In addition, some federal statutes and a number of states' laws provide for certain types of collective and class actions for particular areas of law, like securities, consumer protection, debt collection, and insurance practices.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

In the class action context, the claims are managed together, and the class claim turns on the presentation by the class representative. The class members' rights are tied to the result reached on their behalf. Federal Rule of Civil Procedure 23 essentially codifies the constitutional protections that have been developed to protect the absent class members and provide the trial court a framework from which to determine whether the class claims are sufficiently cohesive to warrant an "all or nothing" trial.

In an MDL, the determination of one claim does not necessarily bind others, but the MDL court's decisions have important practical and legal implications on the coordinated cases. First, discovery and other pretrial rulings are usually intended to apply to all or certain categories of pending cases. For example, in a products liability case, a decision to exclude key causation experts would likely apply to all cases in which MDL plaintiffs had similar exposures and claimed injuries. Or a decision on summary judgment that claims under a certain state's laws filed before a particular date were barred by a statute of limitations or repose would likely apply to all claims governed by that state's laws. Trial is reserved for the originating forum, and so the MDL judge does not try cases that did not originate in that court, absent an agreement by the parties. However, the MDL courts often make critical decisions about which cases to try first – known as "bellwether trials" – which can have significant practical impact on the litigation as a whole.

1.4 Is the procedure 'opt-in' or 'opt-out'?

For federal and most state-court class actions involving claims for monetary relief, the procedure is "opt-out", meaning that the class members are given notice and an opportunity to opt out before the merits are determined. However, class claims that involve purely declaratory or injunctive relief do not require notice or an opportunity to opt out – these are covered by Federal Rule of Civil Procedure 23(b)(2). Many class claims are brought as "hybrids" seeking both monetary and equitable relief. The U.S. Supreme Court has made it clear that when individual monetary relief is involved, the class members should be afforded notice and the opportunity to opt out. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011). As noted above, collective actions are opt-in procedures.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

There is no definitive minimum threshold, but numerosity – or a sufficient number of class members who could not otherwise join their claims – is one of the requirements of the federal rule and most state court rules. Classes as small as 13 have been certified, while classes with more than 400 potential members have been denied. Additionally, for the Class Action Fairness Act to apply, there must be at least 100 potential class members.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

For monetary claims, which are by far the most prevalent, the trial court must determine that "common" issues underlying each class member's claims predominate over the individual claims and that the class action is a superior method for resolving the myriad claims than any other form of resolution. A common issue is one for which the class members will have a common answer, and commonality requires all class members to have suffered the same injury. Proving predominance is even more demanding. Damages must be "capable of measurement on a class-wide basis" to prevent questions of individual damages calculations from overwhelming questions common to the class. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013). As noted above, an MDL may be maintained for a number of separate actions where there are questions common to

the litigants and pre-trial coordination would be beneficial to the parties and judicial system. In collective actions, the initial inquiry is whether the claims are "similarly situated", which some courts have held means that the class members were all subjected to an illegal policy or decision.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Individuals, associations and other private representatives, and government representatives can all bring class and group proceedings so long as they are able to show that their claims are in fact representative under Rule 23; however, the local requirements and procedures sometimes vary depending on who brings the action. In *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court held that a class plaintiff must allege a "concrete and particularized" injury to have standing and that a "bare procedural violation" of a statute is not sufficient by itself to demonstrate a "concrete" injury. *Id.* at 1548–50.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Contacting potential class members before a class is certified raises ethical concerns. *See generally* Scott J. Atlas, Chapter 2: "Ethical and Practical Issues of Communicating with Members of a Class" *A Practitioner's Guide to Class Actions* (ABA 2010).

If a class seeking individualised monetary recovery is certified, then the class members are entitled to notice, and the notice campaign must be approved by the court. If the class seeks only equitable or purely collective relief, then notice is not required, but can be provided.

Depending on the nature of the claims and type of class, notice can be provided by mail, email, publication in specified forms of media, including television and radio advertisements, internet websites, or some combination of these approaches. The only restrictions are those ordered by the trial court.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

It would be difficult to estimate the number of group and class actions brought each year in the United States, considering our dual sovereignty system and the differing ways that such actions are, or are not, tracked by the federal and individual state court systems. A conservative estimate is thousands. Class actions have been brought in every one of the categories listed above, and securities, antitrust, employment, consumer, and products litigation seem to dominate the suits brought. There has been a decrease in the number of class actions filed to challenge public company merger and acquisition transactions, as courts have become more reluctant to award attorneys' fees in cases where there is no monetary recovery for the class. By contrast, personal injury and wrongful death classes are increasingly rare, as the Supreme Court has cautioned that they typically involve highly individualised issues and so are rarely appropriate for class treatment. *See generally Amchem*, 521 U.S. 591. Those claims are typically handled by coordinated proceedings by an MDL court where feasible.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

All forms of monetary and equitable relief have been sought through class actions. Some state and a few federal statutes have placed statutory limits on the types or amounts of monetary relief that can be recovered in a class action. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k; N.Y. Civ. Prac. L.R. (CPLR) § 901(b) (New York law barring class actions seeking penalties or statutory minimum damages for certain insurance claims).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Not in all jurisdictions. Typically, the organisation must have associational standing, which means that its members have standing to bring the claim and that the association is the proper party to do so in a representative capacity. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Public interest groups often rely on associational standing, and their actions tend to be focused on declaratory and injunctive relief rather than individual damages.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Federal and state attorneys general and some agencies can be statutorily empowered to bring actions on behalf of their constituents. For example, the federal antitrust laws provide for a *parens patriae* action to be brought by federal and state regulators. *E.g.*, Hart-Scott-Rodino Antitrust Improvement Act, 90 Stat. 2484, codified at 15 U.S.C. § 15c. Statutory *parens patriae* actions have many of the attributes of a Rule 23 class action but without some of the drawbacks that Congress found to be unacceptably limiting in government enforcement actions. The regulator must be statutorily empowered to bring the action.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Typically, representative actions are brought for statutorily specified types of claims.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The remedies available are defined by the type of substantive claim brought collectively. As noted, there are some federal and state statutes that limit available remedies when brought as a collective or class action. And some courts have found constitutional constraints in awarding exemplary damages or penalties in a class action due to the sheer magnitude of the exposure.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Class actions can be tried by a judge or jury, depending on the nature of the claim. The Seventh Amendment to the U.S. Constitution guarantees the right to a jury for many types of claims, and many states have analogous provisions.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Typically, class actions, MDLs, and collective actions are managed by trial judges. However, there are situations where particular issues – such as patent claims construction, expert witness testimony, or discovery matters – are referred to the magistrate or associate judges or court-appointed special masters for recommendations or decisions.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

Every class has a class definition so that the class members can determine whether they are members of the class. Most jurisdictions require that the class be "ascertainable" from objective references rather than tied to liability questions, so that "mini-trials" on the merits are not required to ascertain who the class members are. Courts invariably impose a deadline for opting in or opting out of an aggregate action, depending on which scheme applies.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The approaches in this regard vary widely. In the class action context, there is generally only one trial of the class representative(s)' claims, and those results bind the remaining class members. In MDL and mass actions, the courts will typically identify bellwether or test cases for early trial to glean information about the claims and assist any aggregate settlement efforts. Where the trial is by jury, preliminary matters are decided by the judge, but the jury decides the ultimate facts.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Case management orders, also known as docket control or scheduling orders, are often used to manage complex litigation, including class and group actions. In the class action context, such orders typically bifurcate the proceedings, such that class discovery and the certification hearing and decision occur before merits discovery gets underway. The court may also bifurcate the proceedings or certify issue classes or subclasses to facilitate ultimate resolution of the claims.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

This occurs sometimes but court-appointed experts are rare in federal cases. The courts usually expect the parties to retain experts to assist with the technical issues. The common restriction on the nature of that evidence is that the expert be qualified in the field in question and that his or her opinions be reliable from a scientific standpoint. Most courts follow the requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), which appoint the trial judge as "gatekeeper" to guard against experts testifying before juries when their opinions are not based on valid scientific or technical data of the type and quality relied upon by other experts in their field.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

In the federal courts and the courts of most states, experts are expected and are often required to present reports and be deposed before trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

The federal and state courts have significant variances in the method and procedure for pre-trial disclosure of documentary evidence. Many jurisdictions require – or are moving towards requiring – a pre-trial conference to address discovery timing, sequence, and expectations – especially relating to electronic documents.

3.9 How long does it normally take to get to trial?

The time to trial varies widely throughout the U.S. It really depends upon the jurisdiction. Statistics on the length of time from filing to trial and similar measurements are available for each federal district court in the United States at: http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics.

3.10 What appeal options are available?

The federal courts and many state courts provide an appeal from a decision on certifying a class action. In federal court, it is a discretionary appeal, meaning that the losing party must seek permission to appeal an order on certification.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Any time limits for bringing a class action, MDL, or collective action arise under the law governing the claim. For example, if the putative class claim is a breach of contract under Indiana law, then any Indiana statutes of limitation or repose would determine whether the class action is timely. The class action rules do not superimpose additional time constraints on the claims. But please

note that the application of limitations periods or statutes of repose may affect some, but not all, class members, which can be addressed through adjustment of the class definition, which almost invariably contains temporal limits.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

Please see the response above. The age of the claimant does not usually affect the calculation of time limits, but some states have protective statutes addressing the claims of older claimants. Also, many states have special rules that suspend limitations for claimants who are minors or incompetent to handle their legal affairs.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

A number of jurisdictions have rules that suspend limitations or defer accrual of the claim if the defendant has concealed the claim or committed a fraud, but the inquiry is specific to the jurisdiction whose laws govern the matter.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The answer to this question depends upon the substantive claim brought.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring claims are recognised in a minority of states in the U.S. Even where the claim is cognizable, these claims are very difficult to certify, as observed by Judge Keenan in *In re Fosamax Prods. Liab. Litig.*: "Lower courts almost unanimously have rejected class certification in pharmaceutical product liability actions, including those seeking medical monitoring for a heightened risk of future injury, because the proposed class actions failed to satisfy many of Rule 23's requirements." 248 F.R.D. 389, 396 (S.D.N.Y. 2008).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are recoverable for certain types of claims and conduct warranting punitive measures. There are constitutional limits on the recovery of punitive damages, and a number of jurisdictions have statutorily limited their recovery both procedurally and quantitatively. It really depends upon the substantive law governing the claim. Moreover, these claims typically involve highly individualised questions that make them difficult for class treatment.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There are some constitutional limits on the amount of punitive damages or penalties that can be awarded to the class. Aggregating penalties in a class action by simply multiplying by a minimum award times the number of class members has the potential to be grossly disproportionate to the conduct at issue. And some statutes provide for statutory caps based on the type of claim made. Where a defendant has limited resources, a Rule 23(b)(1) "limited fund" class may be advisable.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The quantification of damages is tied to the substantive right. Damages are awarded to individuals based on the damages or loss they have personally sustained except where there is a common fund or "fluid recovery" on behalf of the class. There are many different ways to apportion the damages among the class members, although this is typically done in a class settlement, as very few class actions are tried to verdict. In a settlement, the agreement, as approved by the court, will define how the class members are to participate. Many cases are settled on a "claims made" basis, meaning that the class members who wish to share in the recovery have to file a proof of claim providing information and sometimes documents before they can recover. Some settlements provide for recovery according to a formula; others use a proportional method to allocate among the class members. It should also be noted that many class settlements provide for an incentive payment for the named plaintiffs who represented the class, although there is some controversy around this practice.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Once a class is certified, a class settlement almost invariably requires court approval. Many jurisdictions, including the federal courts, do not require court approval if an individual plaintiff settles with the defendant and dismisses the class claims without prejudice, but there are a few that require court approval even for uncertified classes. Generally, only when a settlement purports to affect the rights of the absent class members is court approval required. Members of the class other than the class representatives are permitted to appear and present objections. The court reviews the overall settlement agreement from the standpoint of the absentee class members to insure that it is fair, adequate, and reasonable, and it can either approve or reject the settlement as a whole, but cannot rewrite the parties' agreement.

Defendants occasionally attempt to moot class actions by reaching settlements with the individual class representative. In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the United States Supreme Court held that a defendant cannot moot a class action by making an unaccepted settlement offer to pay the full amount of the class representative's damages. *See id.* at 672. The Supreme Court left open the possibility that a defendant could moot a class action by actually tendering the full amount of the plaintiff's claim, an issue that will likely be resolved within the next few years.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Court costs are generally awarded to the prevailing party. Attorneys' fees are a matter of substantive law governing the class claims. In the federal courts and most state courts, there is no provision specific to class actions that requires the loser to pay. Absent a specific statute applicable to the claim or a particular contract provision between the parties, fees are not typically shifted from one party to the other based on who prevails. For example, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109, contains a mandatory sanctions provision for securities claims that requires the district court to make findings regarding each party's compliance with Rule 11 and award attorneys' fees for substantial violations.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In most cases, the named plaintiffs are responsible for the costs of litigation, although typically, plaintiffs' counsel will front those costs and obtain reimbursement out of any recovery. Class members who are not participating directly cannot be otherwise compelled to pay costs.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

These matters can almost always be negotiated in advance, and typically the plaintiffs' counsel will front the costs, taking a credit out of any recovery. If there is no contract, there should be no consequence to the class/group member to discontinue an individual claim before conclusion of the larger matter.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Unless agreed to by the parties, costs are almost always assessed by the court at the end of the proceeding. Usually, the prevailing party will submit an accounting of the costs to document what was incurred. The types of items recoverable as costs are often set out by statute or rule. The authors are not aware of any rules or statutes imposing a cap on costs, although there are certainly statutes and common law principles that limit the amount of attorneys' fees.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Only on a *pro bono* basis.

7.2 If so, are there any restrictions on the availability of public funding?

This is not applicable in the USA.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Conditional and contingency fees are permitted on a case-by-case basis, subject to rules of reasonableness and necessity of the fee claimed for the work actually done and documented. If the fee is being shifted to another party, there must be a statutory or contractual basis for doing so. And in those cases, the courts generally use a lodestar calculation – a reasonable amount of hours multiplied by a reasonable hourly rate. Some states have statutorily limited the recoverable attorney fee to a cap based on the lodestar calculation. *E.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 26.003. CAFA provides limits on the amount of contingent fee recovery in "coupon settlements" where the class receives non-cash benefits, providing that the fee shall be based on the value of the coupons actually redeemed. 28 U.S.C. § 1712.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Although class counsel often front certain costs of litigation to be reimbursed on recovery, ethics rules prevent attorneys from otherwise providing financial assistance to their clients. Third parties typically cannot fund litigation. However, attorneys and legal aid organisations can provide services *pro bono*.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Certain states have statutory procedures for doing so, but they are very individualised and jurisdiction-specific.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

No, they cannot.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, they cannot.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Mediation and non-binding forms of alternative dispute resolution are always available to a class. Arbitration of class claims is

available only if the parties have a contract providing for class arbitration. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685-87 (2010).

8.5 Are statutory compensation schemes available e.g. for small claims?

Yes, in some statutorily defined contexts.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Remedies and procedures are also defined by statute or local rule.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

The answer to this question depends on the jurisdiction. States like Minnesota and Pennsylvania do not have *forum non conveniens* procedures for dismissing the claims of non-residents if the actions are more properly brought elsewhere, and Delaware is the state of incorporation of many business entities for tax and governance purposes, making it an eligible jurisdiction for claims against the company even if they have little or no connection to the state. Other jurisdictions have more formidable laws to prevent non-residents from burdening their courts with entirely foreign litigation. CAFA represents a significant statutory effort to restrict forum shopping by making it easier to remove multi-state classes to federal court. The U.S. Supreme Court has held that CAFA does not contain a presumption against removal (as typically found in other removal statutes) and that a defendant need not supply proof in the removal petition of the $5 million amount-in-controversy threshold for CAFA removal. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 552 (2014) (holding that CAFA's removal provisions "should be read broadly").

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

Because of the high potential for abuse, the U.S. Congress has passed some significant laws attempting to rein in class actions, including CAFA and the PSLRA. Each year, additional limitations are proposed for both the federal and state courts. For example, on March 9, 2017, the U.S. House of Representatives passed the Fairness in Class Action Litigation Act (H.R. 985). Among other things, the act would establish class ascertainability requirements, limit attorneys' fees for class counsel, impose certain disclosure requirements on class counsel, limit issue classes, and make appeal from a class certification order an automatic right. It remains to be seen whether this act will pass the Senate (and if so, in what form) and be signed into law by the President.

The U.S. Supreme Court has also handed down a number of decisions over the past several terms that may further restrict class actions.

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