

Class Actions The Holy Grail for (European) Civil Procedure?

Fourteenth PPJ Course and Conference (2019)
Programme

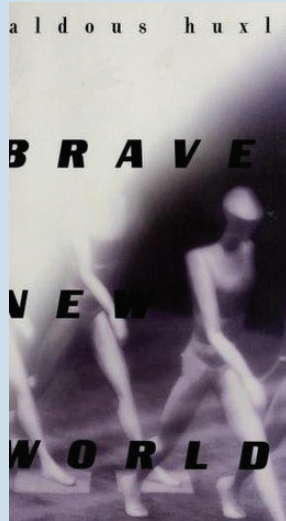
<p><u>Monday, May 27</u></p> <p>Registration (9,00 - 9,30)</p> <p>Morning Session: (9,30 – 13,00)</p> <p>[Coffee break 11,00-11,30]</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session: (15,00 – 18,00)</p>	<p>Opening speeches</p> <p>Alan Uzelac (Zagreb), Collectivization of civil procedure as a negative utopia?</p> <p>Stefaan Voet (Leuven), Setting the stage. Collective redress mechanisms: <i>status quaestionis</i></p> <p>Jasminka Kalajdzic (Windsor), Class actions in the common law world: <i>status reformationis</i></p> <p>Alexandre Biard (Rotterdam & Leuven), The future of mass litigation in France: are <i>mass disputes entrepreneurs</i> the new Knights of the Round Table?</p> <p>Maria Astrup Hjort (Oslo), Class action and group litigation - a Norwegian perspective</p> <p>Laura Ervo (Orebro), Class actions in the Nordic legal culture</p>
<p><u>Tuesday, May 28</u></p> <p>Morning Session: (9,30 – 13,00)</p> <p>[Coffee break 11,00-11,30]</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session (15,00 – 18,00)</p>	<p>Ianika Tzankova (Tilburg), Litigation funding inside out</p> <p>Xandra Kramer (Rotterdam & Utrecht), Collective redress from a Dutch and transnational perspective</p> <p>Linda Mullenix (Austin), For the defense: 28 shades of European class actions</p> <p>Elisabetta Silvestri (Pavia), Rebooting Italian class actions</p> <p>Hermes Zaneti Jr (Vitoria), The Brazilian collective redress: success or disappointment?</p> <p>Willem H. Gravett & Rashri Baboolal-Frank, A comparative study of the class action model in Europe and South Africa: proposals for reform</p> <p>Irina Izarova (Kyiv), Could judicial collective redress schemes work in Ukraine?</p>
<p><u>Wednesday, May 29</u></p> <p>Morning session (9,00 – 12,00)</p> <p>Afternoon (12,00 – 23,30) Study Trip</p>	<p>Christopher Hodges (Oxford), Evaluating collective redress: models, evidence, outcomes and policy</p> <p>Catherine Piché (Montreal), What empirical data teaches us about the challenges and future of class actions: overview of successes and challenges over 25 years in Canada</p> <p>Larissa Clare Pochmann da Silva (Rio de Janeiro), Transnational class actions in Europe and America</p> <p>Excursion to municipality of Slano and Šipan island (optional)</p>
<p><u>Thursday, May 30</u></p> <p>Morning Session (9,30 – 13,00)</p> <p>Lunch Break (13,00 – 15,00)</p>	<p>Yulin Fu (Beijing), Class actions for private interests and public interests. A perspective from China</p> <p>Rabeea Assy & Ariel Flavian (Haifa), Global perspective on collective redress</p> <p>L.H.J. Sicking (Amsterdam/Leiden), Trade, Treaties and Truces. Collective damage redress in premodern Europe</p>

Afternoon Session: (15,00–18,00)	Aleš Galič & Ana Vlahek (Ljubljana), Challenges in drafting and application of the new Slovenian collective actions act Jorg Sladič (Ljubljana), International coordination of pending collective lawsuits
<u>Friday, May 31</u> Panel on Clinical Legal Education (9,30 – 11,00) CLE in Practice: Student's Perspective (11,30 – 13,00) Lunch break (13,00 – 15,00) Afternoon Session (15,00 – 17,00)	EXPANDING THE ROLE OF LAW CLINICS Alan Russel (London), It's not just about your individual client.' Can Clinical Legal Education shape social policy? Jonny Hall (Newcastle), Designing and Implementing Law Policy Clinics. Some Thoughts on Theory and Practice PROJECT FINISHED, PROJECTS TO COME Mareike Fröhlich (Saarbrücken), Overview of current and future projects Presentation of clinical experiences: Law Clinics from England, Norway, Germany and Croatia BROWN MOSTEN INTERNATIONAL CLIENT CONSULTATION COMPETITION: WHERE CLINICAL EXPERIENCE MATTERS Introduction and interview simulation General discussion Closing remarks

This conference is co-sponsored by:

- Faculty of Law, University of Zagreb
- Ministry of Education, Science and Sport of the Republic of Croatia
- University of Maastricht.

In cooperation with the Ius Commune Research School and the East European Law Research Center (EELRC)



Collectivization of civil procedure as a **negative utopia?**

PROF. DR. ALAN UZELAC



PPJ 2019:
Class Actions -
The Holy Grail
for (European)
Civil Procedure?

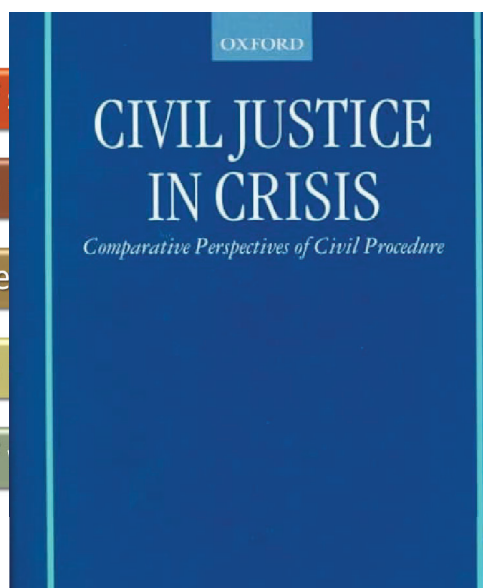
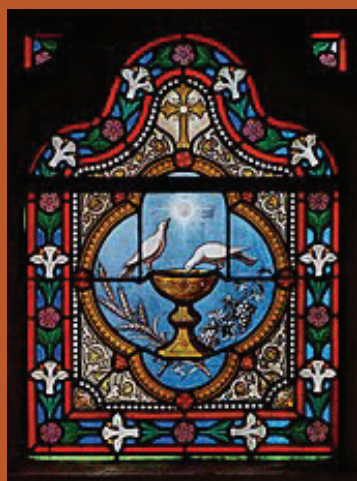
Why The Holy Grail?



3

Why is collective redress becoming so popular?

- Is this not a sign of a broader crisis of the civil justice systems?

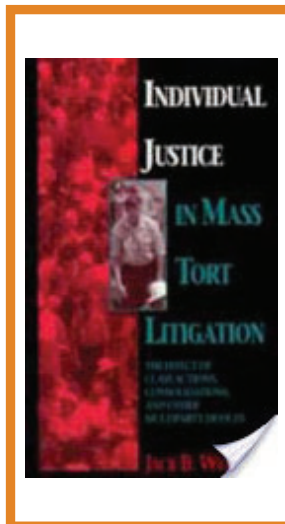
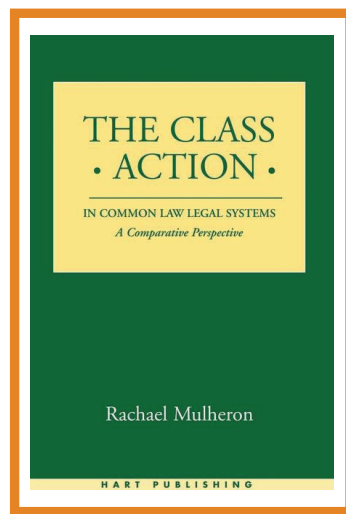




Panacea? Snake oil?



5



Are class actions pertinent to the common law legal systems only?

Are class actions a feature of American exceptionalism?

Is there an intrinsic connection between class actions and the features of common law?

Or, are class actions an American specialty?

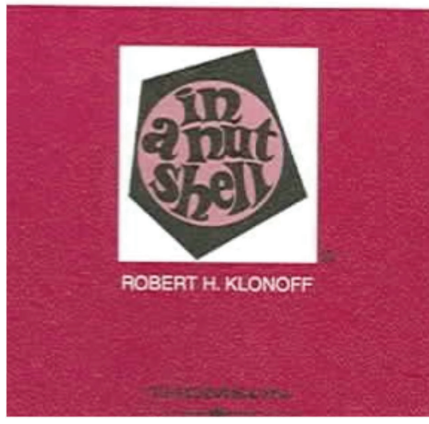
Class actions are gradually swallowing individual redress forms in the federal courts.

2017: out of 339,131 cases pending in the federal civil docket 124,202 are MDL (36%).

Vanishing civil trials and their replacement by collective claim processing?

6

Class Actions and Other Multi-Party Litigation



What are the preconditions for the success of (American-style) class actions?



Entrepreneurial
lawyers



Contingency
fees
No fee shifting
(loser pays) rule



Punitive
damages

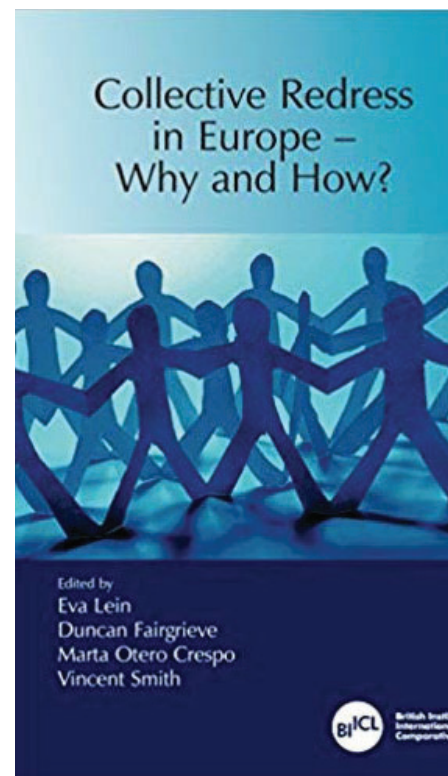


7

Is there a third (European) way?

Is there any workable non-American, EU-made special model in sight?

- Illusory prospects of 'opt-in' models?
- Adequacy of 'opt-out' models?



8



Should Europe continue to 'Americanize'?

Adopting class actions 'American way'?

- What are the risks of such development? Abusive litigation spilling over to the Old Continent?
- What are the implications to US-EU economic relations? Jurisdictional rules? Trans-continental class actions?

Cause of concerns even for the American observers. Safeguards?

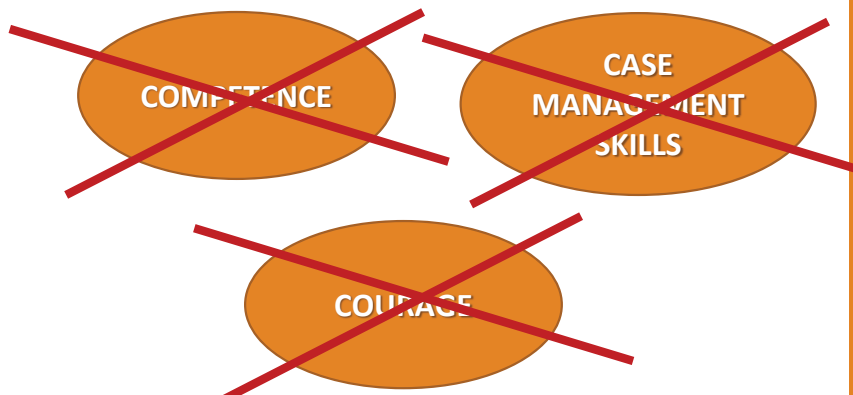
Executive Summary

Collective redress in the EU is at an important crossroads. After some years of hesitation, it is now clear that collective redress or 'class action' models are proliferating across the EU, with a significant majority of Member States now having at least one way for claimants to combine their claims and sue for damages before national courts.

9

If we find a way, do we have structures?

Procedural difficulties aside, do (South and East) European countries dispose of judiciaries that are able to implement collective schemes in a sensible way?



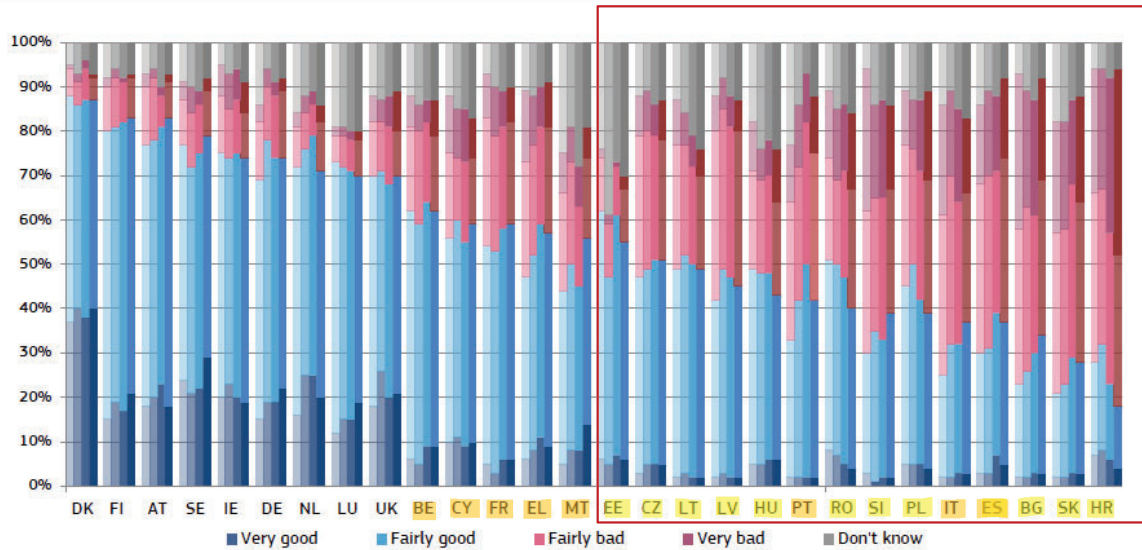
10

2019: Perception of the independence of judges and courts **among EU citizens**

Figure 47

Perceived independence of courts and judges **among the general public (*)** (light colours: 2016, 2017 and 2018, dark colours: 2019)

Source: Eurobarometer (107)



11

Even if we build the necessary structures, do we really want them?



12

Even if we build the necessary structures, do we really want them?

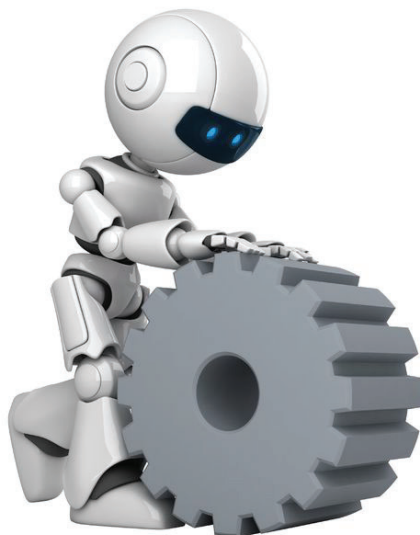
Who should we trust to make political decisions?

Is democratic legitimacy needed for decisions that implement (and create) state policies?

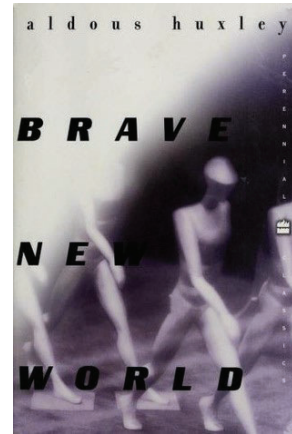


13

Is it too late?



14



The end? ...or the new beginning?

AUZELAC@PRAVO.HR



15

Class Actions in the Common Law World: *status reformationis*

Jasminka Kalajdzic, Associate Professor
IUC Dubrovnik (May 2019)



Windsor Law
University of Windsor

roadmap

1. Introduction: 1st & 2nd generation class action regimes
2. State of reform:
 - A. USA
 - B. Australia
 - C. Israel
 - D. Canada
3. Observations

1. Introduction

- **US**: birthplace of modern class action (1966)
- 2nd generation class action regimes:
 - **Canada** (Québec 1978, Ontario 1993)
 - **Australia** (1992)
 - **Israel** (1988 / 2006)
- 'legal transplants': explicit adoption/rejection of certain features of American regime

*COUNTRIES THAT HAVE ADOPTED A CLASS ACTION
FOR ONE OR MORE TYPES OF LEGAL CLAIMS*

NORTH AMERICA	CENTRAL & SOUTH AMERICA	EUROPE ⁶ & THE MIDDLE EAST	AFRICA	ASIA & AUSTRALASIA
Canada	Argentina	Belgium	South Africa	Australia
Mexico	Bolivia	Bulgaria		China
United States	Brazil	Denmark		Indonesia
	Chile	England & Wales		Japan
	Costa Rica	Finland		South Korea
	Colombia	France		Taiwan
	Ecuador	Israel		Thailand
	Panama	Italy		
	Peru	Lithuania		
	Uruguay	Netherlands		
	Venezuela	Norway		
		Poland		
		Portugal		
		Spain		
		Sweden		
		Ukraine		

Source: D. Hensler, "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally" 65 Kansas L Rev 965, 967 (2017)

3

Commonalities
between 1st + 2nd gen
common law
jurisdictions

- Opt-out
- Trans-substantive
- Damages
- Court supervision
- Role of class members/objectors
- Certification*

*Australia has decertification provision

4

Differences between 4 jurisdictions

- Evidentiary rights/requirements at certification
- Contingency fees
- Cost-shifting
- Third party funding

5

Reform efforts

- **US**
 - Statutory (failed)
 - Rules Committee (Dec. 2018)
 - Judicial (ND Cali, 2019)
- **Australia**
 - Victoria Law Reform Commission (2018)
 - Australia Law Reform Commission (2019)
- **Israel**
 - Statute (2016)
- **Canada**
 - BC statute (2018)
 - Law Commission of Ontario (2019)

6

2. State of Reform



- Reform can occur in at least 3 ways:
 - Statutory
 - Rule amendment
 - Judicial guidance
- ***Fairness in Class Action Litigation Act (FICALA)***
 - Bill introduced Feb 2017
 - Would have greatly limited availability of class actions
 - Dead (for now)

7

- **Federal Rule 23 amended in 2018**
- Five main changes:
 - i. **Notice:** recognizes additional forms of notice – namely, electronic means
 - ii. **Preliminary approval of proposed settlement:** formalizes long-standing practice
 - iii. **Specific criteria for settlement approval:** adequacy of representation, arm's length negotiation, terms of settlement, equity of treatment
 - iv. **Objectors:** more specificity required of them
 - v. **Appeals:** no appeals from preliminary approval

8

- **Court guidance** can be responsive to concerns/trends
- Northern District of California issued comprehensive guidance for class action settlements (Nov 2018)
- Much more detail required on motion for preliminary approval
 - Use original complaint as comparator
 - Proposed allocation plan
 - Estimate of number + % of class expected to submit claims
 - Details about administrator

9

2. State of Reform



- Two major law reform studies in the two active class action jurisdictions
- Inquiries launched by Attorney General with terms of reference
- Extensive consultations
- Foreign academics on advisory committees
- Tabled in Parliament
- Generally well-received

10

- VLRC, *“Access to Justice – Litigation Funding and Group Proceedings”* (June 2018)
- Stronger case management
- Certainty of powers to control costs
- Better information for class members
- Responsibilities of plaintiff lawyers
- Allow contingency fees
- Court resources

11

- “The Commission recommends that professional guidelines be produced for lawyers on their duties and responsibilities to all class members in class actions.”
- “The Supreme Court should consider amending its practice note on class actions to include guidance for the appointment of an independent representative ... to assess the terms of settlement, or the terms of the settlement distribution scheme, on behalf of class members.”
- Six-month settlement distribution status update + final report

12

- ALRC, *"Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders"* (December 2018)
- Initiated by AG in light of:
 - Increased prevalence of class actions
 - Role of litigation funders in commencing/maintaining class actions
 - Potential for conflicts of interest between counsel and funders

13

- Recommendations re: case management, settlement approval, funder regulation & fees
- **Case management:** open class, common fund, competing actions
- **Settlement approval:** referee for fees, tender settlement administration, report to court
- **Funder regulation:** power to vary terms of agreement, manage conflicts
- **Contingency fees:** allow, but not if funded

14

- **Guiding principles:** “the recommendations aim to promote fairness and efficiency; protect litigants; and assure the integrity of the civil justice system.”
- “It is important that there are appropriate protections in place for litigants involved in class actions, including passive class members who are nevertheless reliant on the representative plaintiff, and the solicitor acting for the representative plaintiff, to act in their interests.” (p 31)
- “Class actions are not simply disputes between private parties about private rights. They frequently perform a public function by being employed to vindicate broader statutory policies...” (p 32)

15

2. State of Reform



- In 2016, several reforms by way of statutory amendment
- **Pre-certification settlement/dismissal:** intended to deter plaintiffs from filing meritless cases for blackmail
- **Objectors:** expanded standing rule, limit compensation
- **Cy près:** public fund responsible for administration & distribution of awards

16

2. State of Reform



- **Statutory amendment in B.C. (2018):** two major changes
- **Opt-out for non-residents**
- **Cy près awards**
 - 50% to Law Foundation of BC
 - 50% to be applied in any manner that may reasonably be expected to benefit class members
 - Exception for \$ in cases on behalf of Indigenous persons

17

- **Law Commission of Ontario *Class Action Project* (2019):** final report expected later this year
- Precipitated by 25th anniversary and unforeseen developments in class action sphere
- Main areas under review:
 - Competing actions
 - Adverse costs
 - Settlement approval
 - Certification

18

- Wide consultation with bar and bench
- **Defendants:** raise certification bar, reduce 'unmeritorious' cases
- **Plaintiffs:** eliminate adverse costs, simply carriage
- **Judges:** delay, settlement approval, outcomes
- **Civil society groups:** costs, lack of expertise
- **Class members:** transparency, settlement outcomes
- **All:** delay (appeals, certification, carriage), empirical data
- Very few submissions re: test and process for fee and settlement approval or litigation funding

19

3. Observations

- All 1st and 2nd generation regimes are taking stock – what is working? What are unforeseen developments/practices?
- Areas of convergence:
 - Strengthen court oversight (fees, settlement, funders)
 - Recognition of inherent conflicts
 - Settlement reports
 - Cy près
 - Empirical data

20

- Widespread acceptance that class actions, on the whole, are a positive civil justice mechanism
- Role of courts is key – there are interests to protect
- Transparency of notice and outcomes + court approval = protect integrity of system
- Moving closer to US model?
 - Contingency fees
 - Opt out/ open class
 - No costs

21

- Website: uwindsor.ca/law/kalajj
- Email: kalajj@uwindsor.ca
- Twitter: @jkal



Windsor Law
University of Windsor

22

Class actions in France: 5 years and still running after the Grail?

Class actions - the Holy Grail for (European) Civil Procedure?

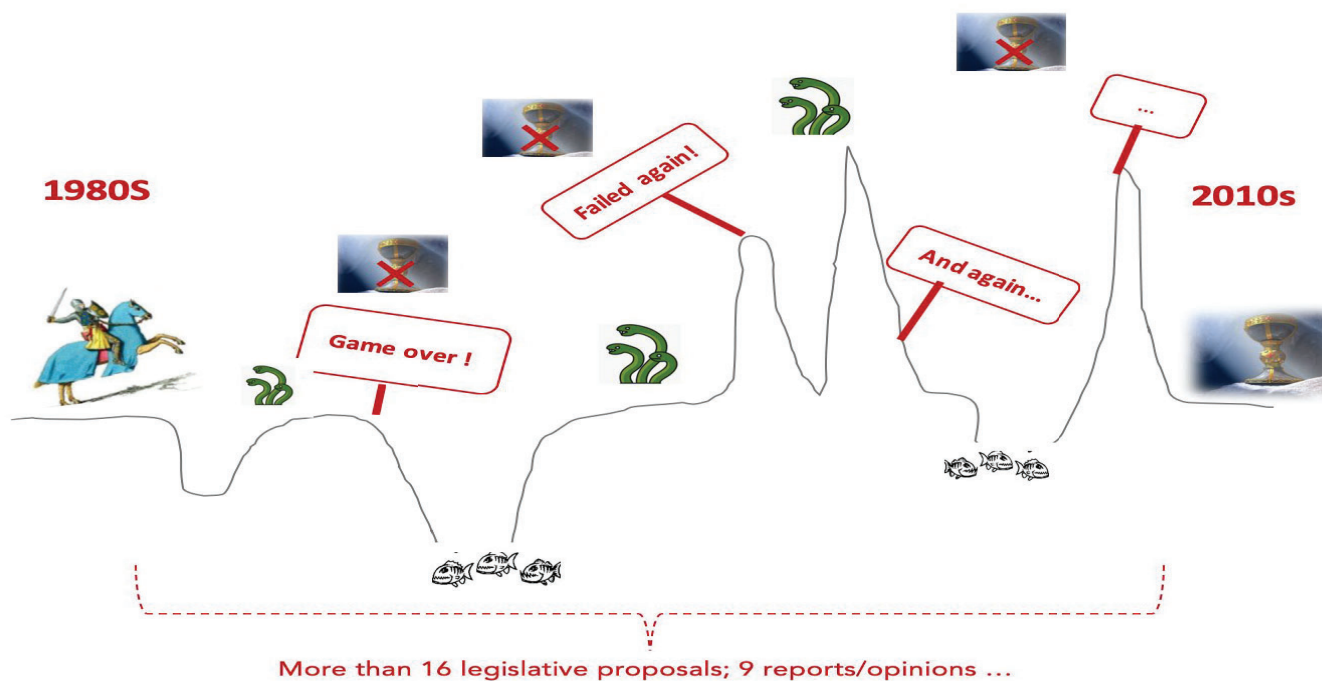
Dubrovnik, 28 May 2019

Alexandre Biard

biard@law.eur.nl, www.euciviljustice.eu

Erasmus University Rotterdam

1980s – 2010s

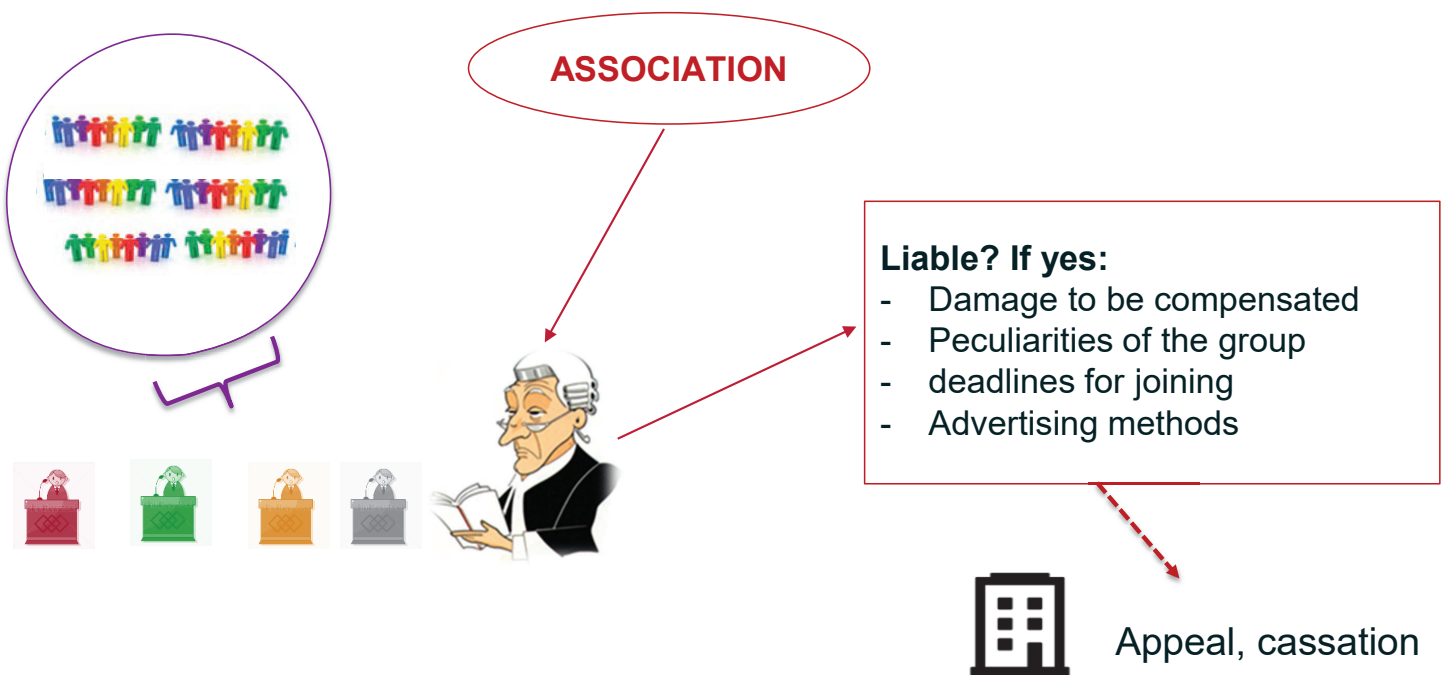


2014: Quest finally over?

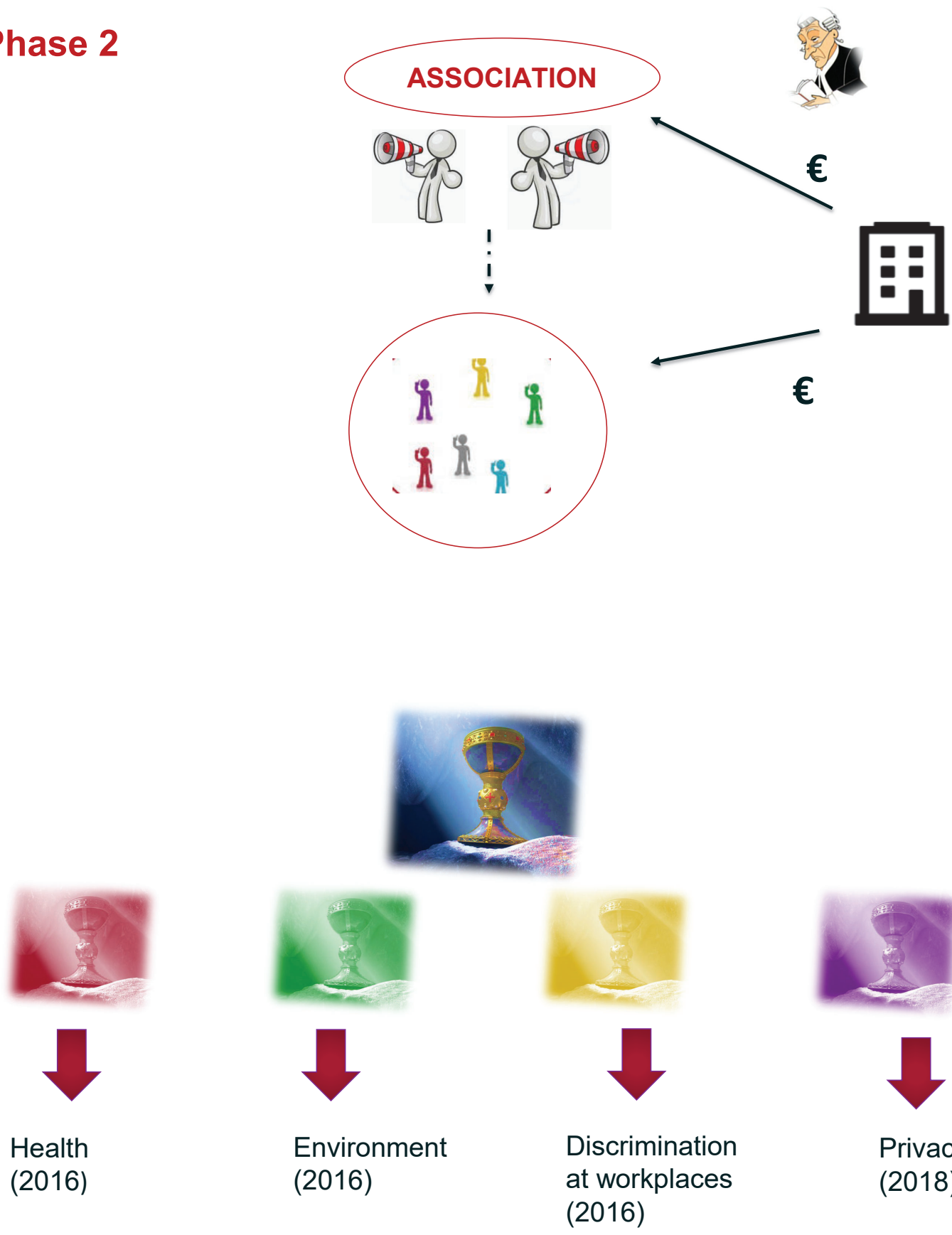
- Only in certain areas (consumer & competition)
- Only for certain types of damage
- Only for (15) associations



Phase 1



Phase 2



2014-2019

- Patchy developments
- Procedural rules progressively relaxed
 - Standing (e.g., 2018 proposal to facilitate standing for any groups of citizens)
 - Additional damage can be compensated



2014-2019: overview

19 actions...

 Consumer(12)
 Discriminations (4)
 Health (2)
4. privacy (1)

But no official register

Courts: Paris, Nanterre,
Versailles, Vannes

No cross- border cases

UFC: 5 actions
CLCV: 3
Familles rurales: 2

Against mobile
phone company,
pharmaceuticals,
banks, etc.

largest plaintiff group:
1-2 millions
Smallest: 36 individuals

2014-2019: outcomes

**11 cases still
pending**
5 rejected
2 settled

**No Phase 2
yet...**

Duration of Phase 1:
**between 3 and 4
years** (excluding
appeal)

From the perspective of associations

- Too burdensome
- Too costly
- Reputation

Media coverage

OCTOBER 2016



SÉCURITÉ SANITAIRE

Sanofi et sa Dépakine visés par la première action de groupe en France dans le domaine de la santé

6 OCTOBRE 2016 PAR OLIVIER PETITJEAN

Dépakine® : les victimes lancent une action de groupe contre Sanofi

L'association des victimes de l'anti-épileptique Dépakine® a annoncé le 28 septembre 2016 avoir l'intention de lancer une action de groupe contre le laboratoire Sanofi. Cette décision survient au lendemain de la parution du décret qui autorise cette procédure dans le domaine de la santé.

Sanofi visé par la première action de groupe en santé

Une quinzaine de victimes de la Dépakine vont déposer une action de groupe contre le laboratoire. Le décret autorisant cette nouvelle procédure est paru lundi.

Santé : la première action de groupe vise la Dépakine

Augmenter la taille du texte Diminuer la taille Poser une question sur le forum Ajouter aux favoris Réagir

Novembre 2016
Le Particulier n° 1126, article complet.
Auteur : La Rédaction du Particulier

Depuis le 28 septembre, l'action de groupe a été élargie au secteur de la santé (décret n° 2016-1249 du 26.9.16 ; voir "Allégez vos dépenses grâce aux réseaux de soins"). La première procédure, qui doit être lancée par l'Association d'aide aux parents d'enfants souffrant du syndrome de l'anticonvulsivant (Apesac), concerne Sanofi. Ce laboratoire commercialise la Dépakine, un

Sanofi sera la cible de la première action de groupe en santé

December 2016

13 December 2016: the Depakine action de groupe will start officially

Erasmus

From the point of view of judges

e.g., *Foncia v. UFC Que Choisir* (TGI Nanterre, 14 May 2018 RG 14/11846)

Class actions only possible for matters relating to consumers....

Restrictive interpretation



Broad interpretation

Loi ELAN, 23 November 2018: class actions now also valid in the field housing law

→ Mistrust among many judges

From the perspective of companies

- Reputation
- Parallel contacts with consumers (eg., UFC vs. Free (II))



Action de groupe contre Free mobile •
L'opération déminage a commencé

Publié le : 13/05/2019



Class actions in France: Holy Grail or... a simple cup?



The failure of class actions have triggered new techniques ...

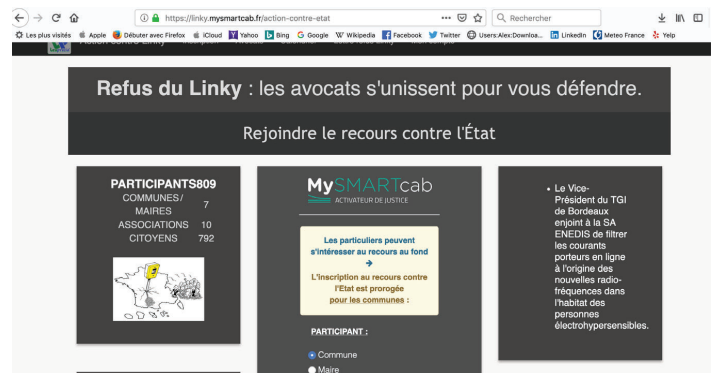
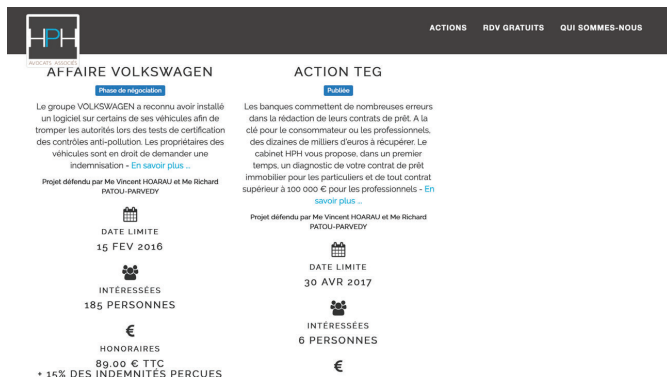
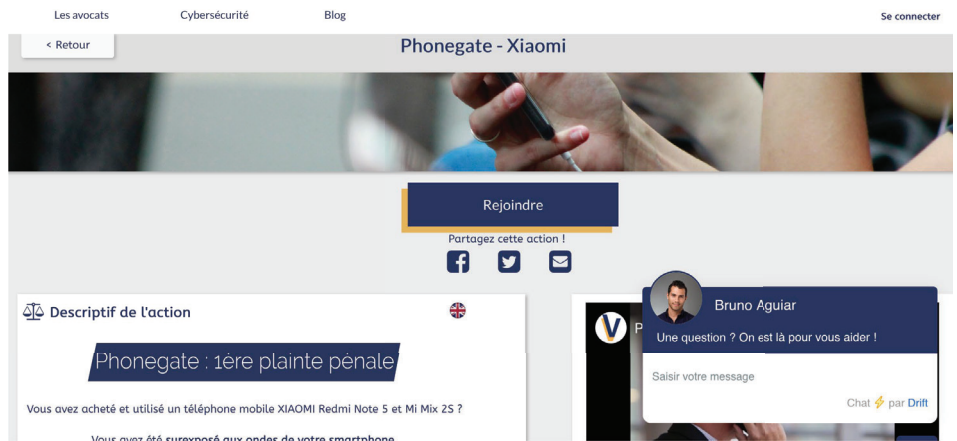


Lawyers as 'mass litigation entrepreneurs'

Mass litigation entrepreneurs & *Legaltech*: the new Knights of the Round Table?



- Easy to connect with the group
- Fast communication
- Easy exchange of information
- Chatbot/instant messaging between plaintiffs, and lawyers



Costs for plaintiffs (examples)=

Smart Cab : 96 € TTC + additonal fees if expertise + **additional 96€**
if appeal + (if successful) **12% of the recovery.**

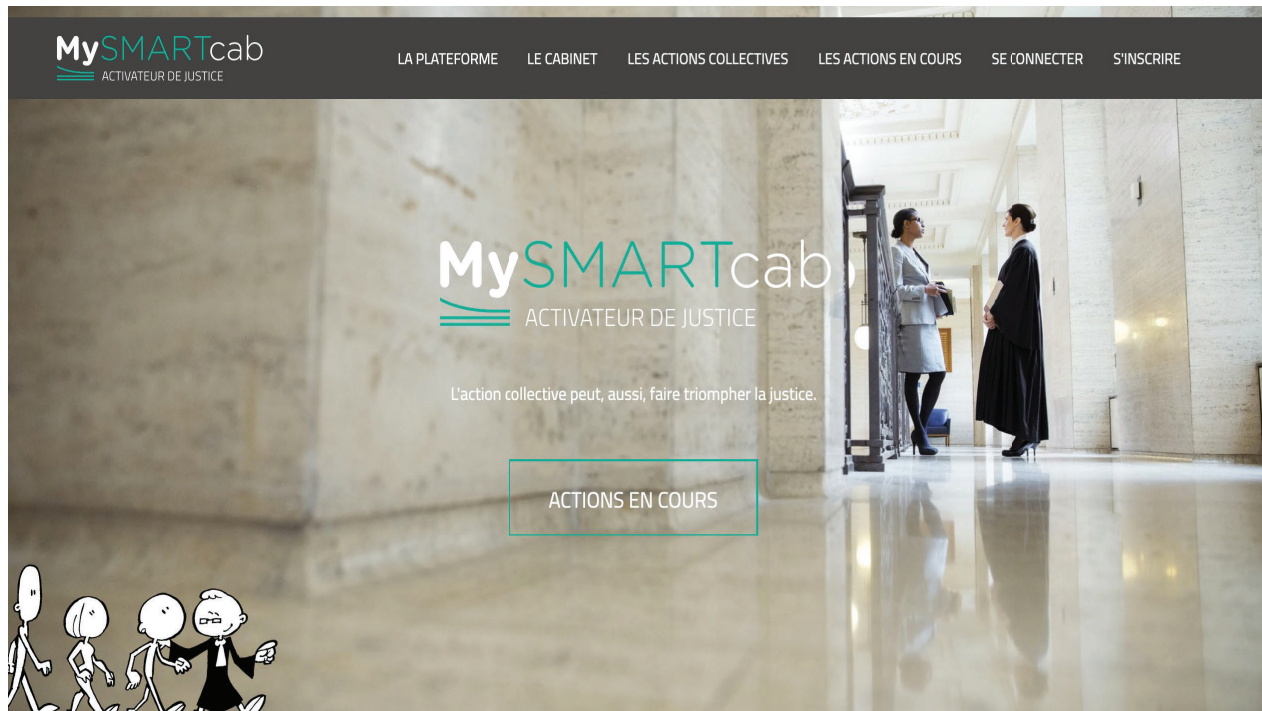
HPH avocats: 89 € + (if successif) **15% of of the recovery**

V pour Verdict : 30 € + **20% of of the recovery**

Action civile: between **15% and 35 % of the recovery**

(...)

But does this work?



So far limited success (but several cases are ongoing):

e.g. Levothyrox case (2019)

- 4,000 plaintiffs
- Active communication via social media
- 10,000 euros for damages

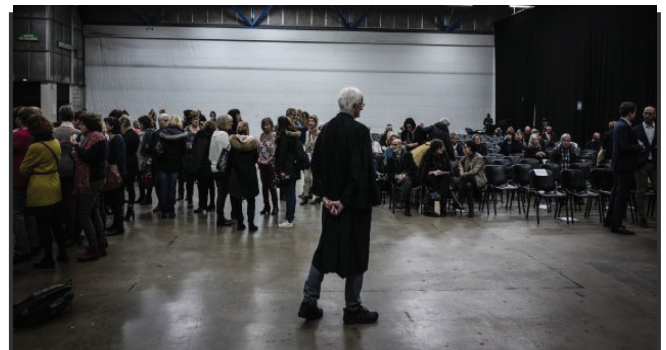
→ rejected in first instance but appeal pending



Levothyrox : action collective en justice était en direct.
5 mai 2018 · 🌐
Grigny - 5 mai 2018



Levothyrox : action collective en justice
10 mai 2018 · 🌐
Levothyrox : à la recherche du Graal perdu | @13h15 :
francetvinfo.fr/replay-magazin... via @franceinfo @MySMARTcab
@levothy on parle de notre recherche de la vérité !

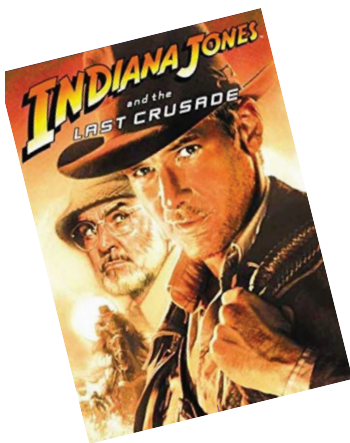


FRANCETVINFO.FR

Concluding remarks

It's not the Grail that matters at the end, but the Quest in itself...

- 5 years: significant changes (orivacy is a field where changes are expected in a near future)
- Parallel techniques for resolving mass litigation have flourished: lawyers as mass litigations entrepreneurs, and **maybe tomorrow ODR platforms using AI for resolving mass claims?**
- Other tools (free for plaintiffs!) also exist for resolving mass disputes ...but often are less known by the public

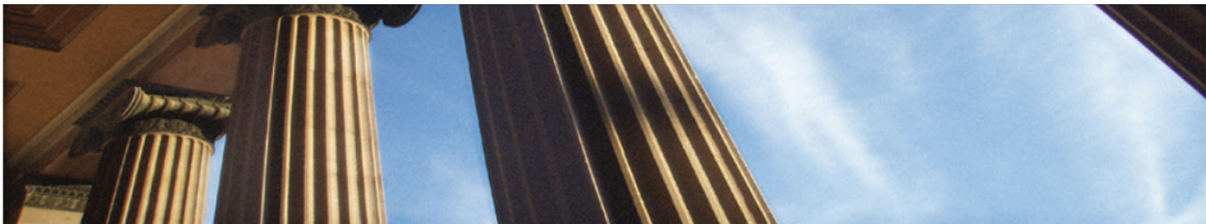


Thanks!

biard@law.eur.nl

www.euciviljustice.eu

Erasmus



UiO : Department of Public and International Law
University of Oslo

Maria Astrup Hjort

Class action and group litigation
– a Norwegian perspective



Dispute Act chapter 35: Class action

Section 35-2. Prerequisites for class action

(1) A class action can only be brought if:

- a) several legal persons have claims or obligations for which the factual or legal basis is identical or substantially similar,
- b) the claims can be heard by a court with the same composition and principally in accordance with the same procedural rules,
- c) class procedure is the most appropriate method of hearing the claims, and
- d) it is possible to nominate a class representative pursuant to Section 35-9.

(2) Only persons who could have brought or joined an ordinary action before the Norwegian courts may be class members

1

Opt-in or opt-out?

Opt-in or opt-out?

Or both?

3

Costs

4

Costs

Opt-out: The group representative is responsible

5

Costs

Opt-out: The group representative is responsible

Opt-in: coverage of the costs from the group members

6

Case law

7

Case law

- Cases concerning «the most appropriate method of hearing the claims»

8

Case law

- Cases concerning «the most appropriate method of hearing the claims»
- The Norwegian Bank vs. 180 000 fund costumers

9

Case law

- Cases concerning «the most appropriate method of hearing the claims»
- The Norwegian Bank vs. 180 000 fund costumers
- Westerdals School of Communication vs. previous students

10

Collective litigation

11

Collective litigation

- Subjective cumulation

12

Collective litigation

- Subjective cumulation
- Through an organisation

13

Collective litigation

- Subjective cumulation
- Through an organisation
- «Pilot cases»

14

Norwegian class action – an success?

15

Maria Astrup Hjort
m.a.hjort@jus.uio.no

16

**Group Actions in the Nordic Legal Culture -
Class Actions The Holy Grail for (European) Civil
Procedure?
IUC, Dubrovnik 2019**



Laura Ervo

Dr., Professor of Law

The Örebro University

E-post: laura.ervo@oru.se

http://www.oru.se/Personal/laura_ervo/

2019-05-31

1



The situation in Sweden

In Sweden, there has been the system of group actions in force since 2003 under the Group Action Act (Lag om grupprättegång 2002:599). The scope of group actions is open covering all civil cases which belong into the competence of general courts and environmental damages in environmental courts and the scope is not limited to consumer cases only. All three forms of group actions are allowed, namely public, private and organizational.

2019-05-31

2

The situation in Finland

Compared with Finland, the situation is the opposite. There, only a public group action is allowed by the Group Action Act and the only authority that can bring the action is the consumer ombudsman. This extremely careful start was made to guarantee safeguards against the abuse of the group action system and to reach the consensus to accept group actions in Finland. However, the careful start also means that a group action is merely the law in books. Until now there has been no group action in Finland despite the fact that the Act has been valid since the 1st October 2007.

2019-05-31

3

Group actions have not been as effective as wished

In Sweden, there have been also some case law including successful group action cases. All in all, there have been about 20 cases at courts in Sweden. Some cases have been dismissed, cancelled or they have ended with a friendly settlement or arbitration. Mainly they have been private suits.

The aim was to get about 20 cases per year (Lindblom).

2019-05-31

4

Three levels of the law

Kaarlo Tuori's model of legal systems bases on three levels of law, where the uppermost level is (1) the visible law, (2) the middle mediating level in the law consists of principles that guide interpretation of the law and which may - at times - invalidate or limit some of the legal activity at the surface (they are more enduring than the specific statute or individual case). The most stable level of all is (3) the deep structure of law where both the most basic principles (e.g. human rights) and the habits of mind or forms of rationality by which we think and argue about the law are rooted.

2019-05-31

5

Cultural interpretations

A legal system is not only articles but also always the legal culture underpinning the articles. As *Tuulikki Mikkola* has said, the interpreter has just started her/his trip when s/he has found the norm, but s/he is not even close to cross the finishing line yet.

2019-05-31

6

Legal culture and traditions

Class actions does not fit into legal culture and traditions?

Legal culture should be defined and described first.

Doesn't access to justice / access to court belong into the legal culture and traditions like consumer and environmental protection?

Legal culture and traditions should not prevent legal development, or?

2019-05-31

7

The Nordic legal culture

According to the official website of the Ministry for Foreign Affairs of Finland, under the topic of "Nordic Cooperation, the following information is conveyed: "[t]he main pillars of the Nordic model are a tradition of dynamic constitutional principles, active popular movements and civic organizations, freedom of expression, equality, solidarity and affinity with nature. Combined with hard work and enterprise, these elements form the basis of a society that promotes productivity, a sense of security and a balanced relationship between the individual and the community."

2019-05-31

8

Nordic legal culture has also been said to be democratic, transparent, human, flexible, pragmatic, situationally sensitive and reformistic. All those characteristics, which are not even linked with each other, affect the way that Nordic legal culture is sometimes referred to as 'folksy' - in a positive sense.

2019-05-31

9

The functions of civil proceedings

The sanction mechanism.

- Lindblom (a class action is seen as a threat)

The conflict resolution.

- Lindell (why not? A mass of clients are unhappy? To make them happy again is also the interest of the businessman?)

Court **service!**

2019-05-31

10

Procedures are instruments

The aim of proceedings is to guarantee the access to justice which means there is always a link between the procedural law and the material law.

In the case, the material law (tort law, damages) is not reformed (no punitive damages, the levels of negligence) class actions / collective redresses will not do it either, not as such.

Class actions should therefore be understood as an instrument to realise access to justice (= existing material law).

The fear of Americanisation is from this point of view amateurish.

2019-05-31

11

Sustainability

Tuula Linna, Professor, The University of Helsinki, Finland.

Group actions can be seen also from the perspective of sustainability. Sustainability is associated with justice as a fair balance between mutual claims and the obligations of the community. In this context, legal proceedings can preserve all kinds of resources (human, physical, social and ecological capital).

2019-05-31

12

Access to court and the passivity problem

The aim is to guarantee access to justice and access to courts *easily* (?) in situations when traditional proceedings are not fulfilling these aims.

Consumer and environmental **protection**.

The object is to solve the **passivity problem**, otherwise individual claims. According to some statistics 8 % opted out, 60 % “opted out” by not opting in.

2019-05-31

13

Scandinavian typicality: Ombudsmen and boards

It has been typical for the Scandinavian countries that there have existed different types of boards for solving disputes especially between consumers and entrepreneurs. For instance, in Denmark, there exist the Consumer Complaint Board and 17 approved private complaint boards. In addition, there are a number of non-approved private complaint boards.

The boards can give recommendations on how the case should be solved. However, the decisions are not binding. The recommendation is given by the board, which is working more or less like a court. Therefore the procedure can be seen as one kind of conciliation.

2019-05-31

14

Recommendations by e-claims

Before the complaint is filed with ARN, the business operator must have rejected the complaint in part or in whole (or not answered at all).

ARN submits recommendations on how disputes should be resolved. ARN's recommendations are not binding, but the majority of companies follow them.

It usually takes about six months from the claim to a decision. ARN's inquiry is free of charge.

It is possible to file a complaint directly on the web or it can be sent by e-mail.

2019-05-31

15

Statistics – the amount of claims

Department	2014	2015	2016
Total	11396	12035	13537
General	1487	1795	2024
Bank	363	412	470
Housing	1255	1486	1795
Boat	67	66	78
Electronics	1971	2083	2143
Real estate agent	81	88	97
Insurance	988	801	811
Motor	1994	2112	2369
Furniture	524	441	508
Travel	2160	2234	2636

2019-05-31

16

Comparative statistics – consumer won %

Department	2014	2015	2016
General	40	46	45
Bank	10	12	14
Housing	41	45	52
Boat	41	50	48
Electronics	26	30	36
Real estate agent	10	3	15
Insurance	10	12	13
Motor	38	41	46
Furniture	39	26	33
Travel	47	58	48
Shoes	14	20	32
Textil	38	35	40
Laundry	34	54	40

2019-05-31

17

Comparative statistics – how often recommendations are followed by enterprises %

Department	2014	2015	2016
Total	77 (1752)	81 (2225)	78 (2661)
General	78 (221)	78 (255)	72 (386)
Bank	94 (16)	86 (22)	91 (35)
Housing	70 (234)	76 (221)	70 (470)
Boat	75 (12)	76 (17)	68 (19)
Electronics	83 (166)	90 (184)	85 (324)
Real estate agent	67 (3)	100 (1)	100 (7)
Insurance	98 (45)	91 (46)	98 (51)
Motor	74 (394)	74 (605)	77 (634)
Furniture	84 (100)	88 (72)	86 (77)

2019-05-31

18

Mediation procedures in Finland

Character of the institution (figure is from Ervo-Sippel Civil and Commercial Mediation in Europe. Vol. 1: National mediation rules and procedures / [ed] Carlos Esplugues, José Luis Iglesias, Guillermo Palao, Intersentia , 2013, 371-425 p.			
Character of the procedure	Public authorities		Private
	Official (material law)		
	<ul style="list-style-type: none"> -judgements -promote of settlements in proceedings -consumer advice -debt advice -Conciliation boards -ombudspersons - Follo-mediation in family cases 		<ul style="list-style-type: none"> -arbitration -RIL Conciliation (continues the heritage of the Civil Engineering Conciliation Chamber founded in 1980) - different kind of softlaw systems
	Unofficial (needs and interests)	<ul style="list-style-type: none"> -court-annexed mediation -crime mediation -family mediation -family group conference from a child perspective 	<ul style="list-style-type: none"> - peer mediation at the schools - in-company mediation - family mediation -The Finnish Bar Association's Mediation

2019-05-31

19

Litigation Funding Inside Out

Prof. dr. I.N. Tzankova, Dubrovnik, 28 May 2019

On today's menu

- Litigation funding and collective redress in Europe
- The ABC of Litigation Funding (Third Party Litigation Funding: TPF)
- Some (un?)intended consequences

Financing of class actions/collective redress in Europe



EU collective redress funding landscape

- Opt in rather than opt out (costly bookbuild effort required)
- Cost shifting rule (UK rule on costs) in collective redress in most of the jurisdictions
- Non-profit entity (external funding required)
- No contingency fees in most of the jurisdictions

Costs in Collective redress

- Lawyers fees
- Expert fees
- Court fees
- Adverse costs orders risk
- Bookbuilding costs (opt in regimes; GDPR; IT structure, back office)
- Costs of representative entities
 - Fees of Board and Supervisory Board members
 - D&O insurance
 - Website and Communications group members
 - Accountant and Financial administration, tax advice



www.dsbbank.nl

Door de boedel betaalde kosten in de periode juni 2010 tot en met juni 2016: (getallen x 1.000, alle bedragen zijn inclusief eventuele BTW)

Organisatie	Eigen kosten	Advocaten	Totaal
- Hypotheekleed	€ 498	--	€ 498
- Steunfonds			
Probleemhypotheke	€ 804	€ 469	€ 1.273
- Platform Aandelen- Lease	€ 87	€ 755	€ 842
- Belangen Rechts- bijstandsverzekeraars	€ 266	€ 794	€ 1.060
- Adviezen t.b.v. alle organisaties	€ 35	--	€ 35
Totaal	€ 1.655	€ 2.053	€ 3.708

Deze kleine € 4 mio is een vergoeding van de BO tijdens de onderhandelingen en ,
voor de uitvoering van de regeling

Fortis settlement (litigation costs)

Organisatie	Kosten	AGEAS vergoeding	Succes fee (schatting)
Deminor	EUR 12,9 miljoen	EUR 10,5 miljoen	EUR 35 miljoen
FortisEffect	EUR 5,7 miljoen	EUR 7 miljoen	EUR 3,5 miljoen
SICAF	EUR 4 miljoen	EUR 2,5 miljoen	EUR 40-45 miljoen
VEB	EUR 7 miljoen	EUR 25 miljoen	X
ConsumentenClaim/ St Fortisclaim	Geen onderbouwing	EUR 3,6 miljoen	X

Funding options: starting point...

“...all fee (= agent/principaal; INTZ) arrangements create actual and potential conflicts; only the nature of the conflicts differ. Awareness of the conflicts may be lacking, but that does not mean they do not exist.”

Herbert M. Kritzer, C.J.Q., vol 28 (2009), issue 3, p. 360

Funding options: status quo

- Individual contributions?
- Legal Aid?
- Loan with the Bank?
- Legal Expense Insurance?
- Contingency fees?
- Publicly funded Class Actions Fund?
- Cy pres funded Class Actions Fund?
- Crowdfunding? (Claimshare)
- TPF?

Conclusion

Not many viable funding options available,
TPF being currently the most viable option in
Europe

QUIZ Time!

What is Litigation Funding (TPF)?

- A. A bank loan that a client or a law firm can obtain for the purpose of litigating against a very high interest rate
- B. A kind of 'after- the-event' insurance coverage or a liability insurance
- C. A funding facility that a 3rd party unrelated to the litigation provides on a 'non-recourse basis' to cover all or part of the litigation costs, in exchange for a success fee related to the outcome of the litigation
- D. A method for facilitating money laundering legally

Where does the money come from?

- A. Spin offs of insurers and re-insurers
- B. Family offices of high net individuals
- C. Hedge funds and private equity
- D. Publicly listed companies (pension funds; insurers etc)
- E. Panama

What do TPFers do?

- A. They finance single/stand alone cases (e.g. Collective redress)
- B. Buy claims (at any stage of the proceedings)
- C. Finance a client portfolio or a law firm portfolio (e.g. Collective redress)
- D. Asset tracing/asset recovery
- E. Enforcement of arbitral awards
- F. Financing of defence of claims
- G. Case origination, bookbuilding en litigation project management (e.g. Collective redress)
- H. Take over of a latent litigation risk
- I. Financing of companies active in the dispute resolution space (legal tech platforms)

What is covered?

- A. Lawyers fees, court fees and expert fees
- B. Book building (opt in system) and marketing costs (seed funding)
- C. Adverse cost orders
- D. Arbitrations: costs of arbitrators and administration
- E. Portfolio's: funding facility to use as the (corporate) client pleases
- F. All of the above

How do TPFers conduct due diligence?

- A. In-house teams
- B. External experts
- C. LegalTech (IBM's Ross)
- D. 'Skin in the game'
- E. All of the above

From litigation funding to corporate financing...



Specialisation trend?

- Geographical
- Litigation v arbitration
- Substantive area
 - IP
 - Cartel
 - Securities
 - Consumer
 - Commercial
- Asset tracing/enforcement
- Collective actions
- 'Special projects'



FALSE or TRUE

TPF is being used by 'poor' claimants only

FALSE or TRUE

TPFs operate on a percentage of outcome basis
(between 15-50 %)

TPF like to innovate and speculate

TPF in European Recommendation on collective redress

Funding

14. The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

(a) there is a conflict of interest between the third party and the claimant party and its members;

(b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;

(c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

TPF in European collective redress

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

- (a) to seek to influence procedural decisions of the claimant party, including on settlements;
- (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;
- (c) to charge excessive interest on the funds provided.

New Deal for Consumers

Article 7 Admissibility of a representative action

1. The qualified **representative** entity seeking a redress order (...) shall **submit to the court or administrative authority at the earliest** stage of the action **a complete financial overview, listing all sources of funds used** for its activity in general and its funds that it uses to support the action **in order to demonstrate the absence of conflict of interest.**
2. The representative action may be declared inadmissible (...) establishes that the funding by the third party would:
 - (a) Influence decisions of the (...) representative entity (...), including the initiation of representative actions and decisions on settlements;

Some (un)intended (ironic?) consequences

TPF might be available in EU only for businesses

What about access to justice for consumers...?



PPJ Course and Conference 2019

Class Actions: the Holy Grail for (European) Civil Procedure?

Collective Redress from a Dutch, international and European perspective



Xandra Kramer
kramer@law.eur.nl
www.xandrakramer.eu



The Erasmus logo, featuring a stylized script signature of the name "Erasmus" on a red background.

The Netherlands – Cross-Border Aspects and/or the European Approach



2

Erasmus

Some Preliminary Thoughts (or personal ponderings)

- Where do I come from?



The whole world is my homeland

Desiderius Erasmus (1466)

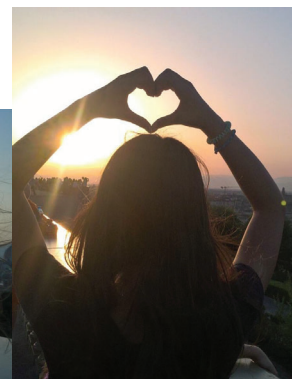
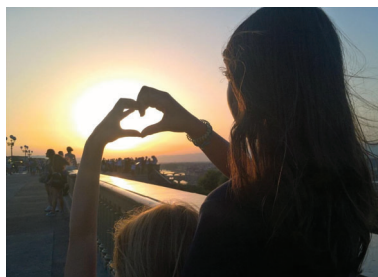
- But:



- ✓ High level of development and social security
- ✓ Well-functioning legal system
- ✓ High level of trust in judges
- ✓ PRAGMATISM

- Blended with personal beliefs:
 - ✓ fundamental rights protection
 - ✓ social justice
 - ✓ (access to) justice for ALL

3



Overview collective redress mechanisms NL

1. Collective action – **injunctive and declaratory** (1994)
2. Dutch Collective **Settlements** Act (WCAM) (2005)
3. New Act Redress of Mass Damages in a Collective Action (2019) – *effectively merged with no. 1, link to no. 2*
4. 'Regular' procedural means (bundling of claims – assignment)



4

Ezafun

1. Collective injunctive action (1)

- Art. 3:305a-d Dutch Civil Code (DCC) – introduced 1994
- Representative foundation or association (**old rules**)
 - ✓ E.g. consumer or environment protection association, public bodies (Financial supervision), ad hoc claim foundations
 - ✓ Must have **clear goal** to ensure representativeness - Art. 3:305a(2)
- Also for foreign representative bodies (including applicant - Art. 3:305c)

5

Ezafun

2. Collective injunctive action (2)

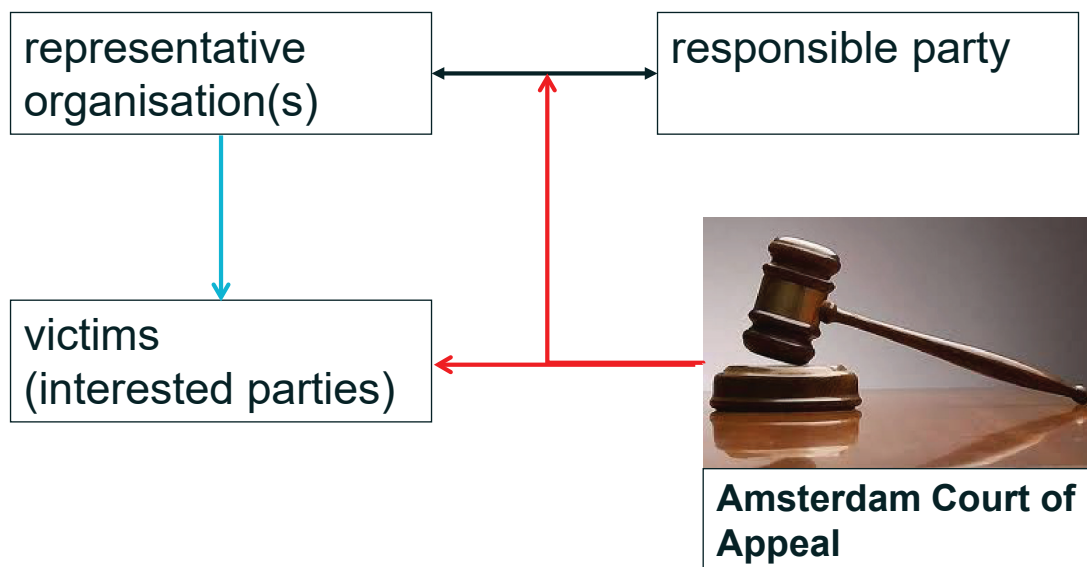
- Generally functions well
- Used approx. 40 times a year in recent years
- Costs for foundation or association can be considerable (*'pick your battles'*)
- More stringent rules on claim organizations introduced
 - ✓ Self regulation/soft law: **Claim Code 2011 - 2019**

BUT: till 2019 limited to **injunctive and declaratory relief**

6

Ezafun

2. The settlement scheme: WCAM



- Joint request to declare binding
- Based on **opt out** system (art. 7:907-908 DCC)

Ezafun

Preclusive effect and opt out

- Court declaration court binds all interested parties described - Art. 7:908(1) DCC
- Interested parties are notified: personal notification by mail (bailiff), announcement in newspapers, websites, etc.- Art. 1013(5), 1017(3) DCCP
 - ✓ In practice this is taken very seriously (parties, court)
- Parties have opportunity to be heard (Art. 1013(5) DCCP)
- Can exercise right to **opt out** - Art. 7:908(2)(3) DCCP
 - ✓ Period set by Court – at least **three months**
 - ✓ Form free declaration (e.g. email) to person/organization indicated in agreement
 - ✓ Possibility to lodge individual claim revives after expiration opt-out period

8

The Erasmus logo, featuring the word "Erasmus" in a stylized, cursive script.

Representativeness - role court

- Foundations/associations **must** have statutory goal to protect interests victims (Art 7:907(3.f) DCC)
 - ✓ Has to be described in the petition
 - ✓ Claim Code 2011 - 2019
 - ✓ In practice 1-5 organizations per case: permanent ones (e.g. VEB – shareholders association, Pension fund), and ad hoc (SPVs)
- More stringent rules and judicial review in recent years
- Active role of Court throughout the procedure (e.g. *Fortis* case)

9

The Erasmus logo, featuring the word "Erasmus" in a stylized, cursive script.

Overview settlements

Case/company	Type	Interested parties	Opt outs	Settlement
DES I (2006) DES II (2014)	Product liability (pharmaceutical)	Not clear, 17.000 registered in 2005, drug used by approx. 200.000 women (mainly NL residents)	-	€ 38 million
Dexia (2007)	Securities lease products	300,000 (4000 residing outside NL, settlement limited to NL residents) -private investors	25.000 (8,3%)	€ 1 billion
Vie d'Or (2009)	Financial damage bankruptcy (insurance)	11,000 (500 residing outside NL) -policy holders (life)	-	€ 45 million
Shell (2009)	Securities (misleading information)	500,000 (complementary to US settlement, limited to non-US residents residing worldwide)	-	\$ 352.6 million
Vedior (2009)	Insider trading (merger)	2,000 (55% resident outside NL, including US)	-	€ 4.25 million
Converium (2012) (Swiss comp)	Securities (misleading information)	12,000 (only 3% NL residents, 8500 Swiss, 1500 UK)	-	\$ 58.5 million
DSB (2014)	Securities (misleading information)	345.000 (mostly Dutch)	300 (0,1%)	€ 500 million
Fortis (Ageas) (2018)	Securities (misleading information)	Approx. 60-70.000 active and 100-200.000 non-active (pending)	?	€ 1.3 billion

(some) WCAM/collective redress challenges

- **Representativeness requirements**
- **Financing**
 - ✓ Fortis settlement refused in 2017, *inter alia*
 - Fees: “the court acknowledges the societal importance of collective actions. Financing should be found for this. (Representative organisations) can in principle claim a compensation for its reasonable costs from the liable party. However, it is required that claimant organisations are transparent and open about this.” (fees: 3,5% of settlement)
- **Cross border aspects**
 - ✓ Especially international jurisdiction
 - ✓ Claimants? Defendants? It’s a sort of three parties settlement



12

Ezafun

3. New Act: Redress of Mass Damages in a Collective Action (2019) (1)

- Background
- Key features:
 - ✓ Single regime for collective actions (injunctive and compensatory – link to settlements)
 - No. 1 regime (Art. 3:305a DCC) extended
 - No. 2 procedural regime (WCAM) extended
 - ✓ Further strengthening of **representativeness** (‘quality check’), and **standing**
 - ✓ Appointment **Exclusive Representative Organisation**
 - ✓ **Opt out** mechanism: at least one month
 - ✓ If parties reach settlement => WCAM regime

13

Ezafun

New Act: Representativeness and standing

- Extensive list **governance and transparency** (art. 3:305a), incl.
 - Supervisory body
 - Appropriate and effective mechanisms of participation and representation
 - Sufficient financial means
 - Internet page with all info (management report, remuneration etc)
- **International scope rule – part of standing requirements**
 - Claim sufficient close connection with the NL:
 - ✓ Majority of interested persons habitually residence in NL, or
 - ✓ ‘liable’ party domiciled in the NL and additional circumstances suggesting a sufficient relationship with the NL
 - ✓ Event(s) underlying the action took place in the NL

14



‘Judicial Hellhole’ – ‘Dangerous’ – Holy Grail?

- **No** judicial hellhole:
 - ✓ careful jurisdictional assessment - A2J
 - ✓ Existing EU jurisdiction framework inadequate
- **Not** dangerous: Recent criticism US CoC (ILR) not justified => *Call for a nuanced approach* (see www.conflictoflaws, Kramer/Biard/Tillema)
 - ✓ One sided picture: few ‘bad apples’ and remedied
 - ✓ Safeguards strengthened and work (or even go too far?)
 - ✓ No increase of the number of cases
- **No** holy grail – tailor-made devise for certain cases, among
 - General civil procedures
 - ADR mechanisms
 - Regulation

15



And Next? Challenges

- Settlements and injunctive relief too limited

- New Act:



- **Challenges**

- ✓ Strict representativeness rules
- ✓ Financing – keeping up with reality
- ✓ Compatibility with EU approach (opt out)
- ✓ Cross-border aspects & strange interaction scope rule and int'l jurisdiction

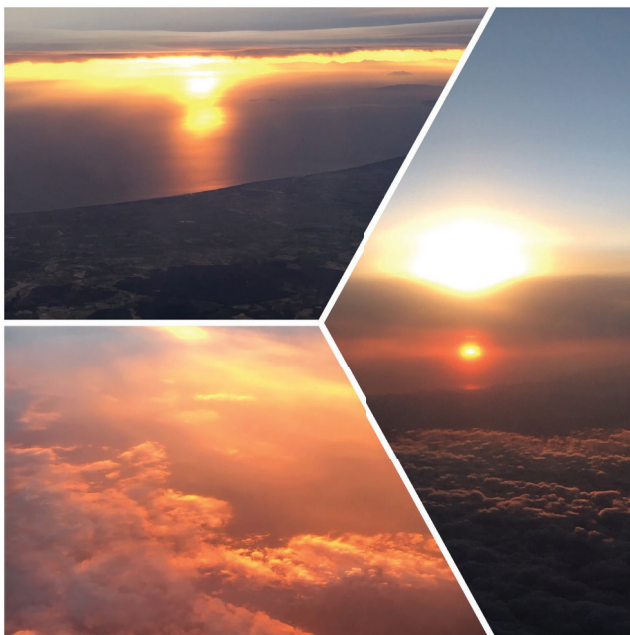
- **EU - Europe**

- ✓ Little support for further harmonization
- ✓ Commission proposal 2018 as shortcomings
- ✓ PIL regime falls short
- ✓ Soft Law (ELI-Unidroit rules) as a way forward?

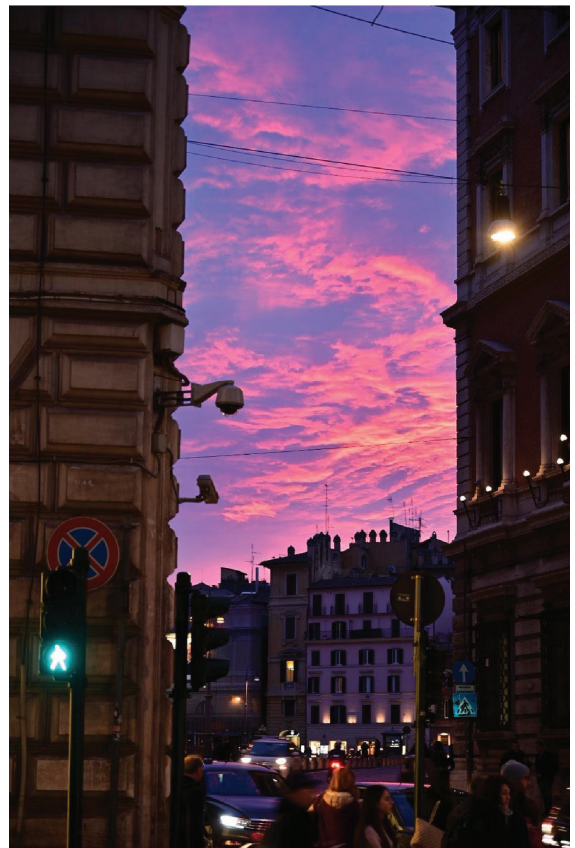
16

Ezafun

Look at it from all angles... view from above and below



Rome, 26-02-2019, after ELI-Unidroit meeting
© Xandra Kramer & Alan Uzelac



Thank you

**ERC Co – Building EU Civil Justice
challenges of procedural innovations –
bridging access to justice**



**Connect with us and help bridging:
www.euciviljustice.eu**



www.euciviljustice.eu

Xandra Kramer
kramer@law.eur.nl
www.xandrakramer.eu



Ezafun

TEXASLAW

**Class Actions:
The Holy Grail for (European) Civil
Procedure?**

**14TH PUBLIC & PRIVATE JUSTICE: DISPUTE RESOLUTION IN
MODERN SOCIETIES CONFERENCE**

DUBROVNIK, CROATIA MAY 2019

TEXASLAW

For the Defense: 28 Shades of EU Class Actions

Prof. Linda S. Mullenix
University of Texas School of Law
May 2019



Inspiration

Collective redress in the Member States of the European Union



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
PE 608.829 - October 2018

EN



EUROPEAN
COMMISSION

Brussels, 25.1.2018
COM(2018) 40 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the implementation of the Commission Recommendation of 11 June 2013 on common
principles for injunctive and compensatory collective redress mechanisms in the
Member States concerning violations of rights granted under Union law (2013/396/EU)

**‘WHERE THE WILD THINGS ARE’
REFLECTIONS ON THE STATE
AND FUTURE OF EUROPEAN
COLLECTIVE REDRESS**

Stefaan Voet *

“And when he came to the place where the wild things are they roared their terrible roars and gnashed their terrible teeth and rolled their terrible eyes and showed their terrible claws till Max said “BE STILL” and tamed them with the magic trick of staring into all their yellow eyes without blinking once and they were frightened and called him the most wild thing of all”.
(M SENDAK, *Where the Wild Things Are*, HarperCollins Children’s Books, New York 1963)

1. INTRODUCTION

Almost a decade ago, I started to dig into the topic of complex litigation and collective redress. My supervisor, who had written a PhD about *res judicata* and had touched on the issue of the binding effect of a judicial decision on third parties, recommended me to talk with an American scholar, since the class action mechanism was seen as ‘the hallmark feature of the American legal system’.¹ Over the course of the years, this (now) colleague, provided me with a wealth of information about American class actions. However, the very first book (s)he gave me was a children’s book. It was Maurice Sendak’s epic book ‘Where The Wild Things Are’.² Since

* Associate Professor KU Leuven, host professor UHasselt, 2016-2017 TPR Chair University of Utrecht. Stefaan.Voet@kuleuven.be. The law is stated as at 1 January 2017. I thank Prof Peter Cashman (University of Sydney), Prof Deborah Hensle (Stanford Law School), Prof Christopher Hodges (Oxford University), Prof Jasminka Kalajdzic (University of Windsor), Prof Hans-Wolfgang Micklitz (European University Institute), Prof Linda Mullenix (University of Texas), Prof Catherine Piché (Université de Montréal), Michael Spyres (one of the best tenors of our time) and Eline Verhage (PhD fellow Leiden University) for their insightful comments.

¹ CH MILLER, ‘The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation’ (2009) 72 *Albany Law Review* 117, 130.

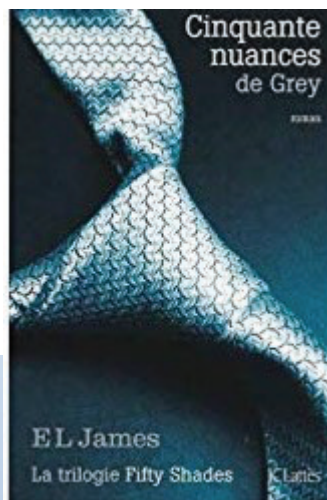
² M SENDAK, *Where the Wild Things Are*, HarperCollins Children’s Books, New York 1963.

TEXASLAW



The following presentation contains materials of a mature nature concerning class actions and sex that may be problematic for some audiences.

Listener discretion is strongly advised.



French Critical Reviews:

“No intellectual construction . . . Fifty Shades of Boredom.”

“Barbie doll eroticism unworthy of attention in the land of the Marquis de Sade.”

L’Express: “crass, pseudo porn.”

French Have It Right



- *Hard Core:*

- Explicit
- No Subtlety
- Direct
- Pragmatic
- Goal-Oriented
- Actual Relief
- Real Thing

*American Class
Action*

- *Soft Core:*

- Indirect
- Suggestive
- Titillating
- Idealized
- Self-Satisfying
- Pseudo relief
- Not-the Real-Thing

EU “Class Actions”




• *Hard Core Class Actions*

- Entrepreneurial lawyering
- Adversarial system
- Lawyer-driven
- Contingency Fees
- Fee shifting
- Third-party financing
- Opt-Out
- Punitive Damages
- Cy pres
- Aggregate Damages
- Jury trials

• *Soft Core “Class Actions”*

- Eschews entrepreneurial lawyering
- Non-adversarial
- Inquisitorial judging
- No contingency fees
- Loser-pay rule
- No third-party financing
- Opt-in
- No punitive damages
- No cy pres
- No aggregate damages
- No jury trials



FOR THE DEFENSE

Report From the Commission to the European Parliament (on the implementation of the Commission Recommendation of 11 June 2013)

- Reforms not always followed Principles of Recommendation
- All member states: injunctive relief for consumer cases
- Compensatory redress available (19 states):
 - But, in half, limited to sectors (such as consumer, competition, financial services, labour, environment, antidiscrimination)
 - 9 member states: no compensatory redress
- Standing issues:
 - Only public entities can bring representative actions
 - Qualified entities must be properly constituted under national law
- Loser-Pay Rule/Funding:
 - All member states use loser pay rule
 - None have regulated third-party financing (but increasingly used in several member states)
- Lawyer's Fees:
 - 9 allow some form of contingency fee
 - Other states: “performance fees”
- Punitive Damages:
 - Only 3 member states permit, but in limited form

Report From the Commission to the European Parliament (on the implementation of the Commission Recommendation of 11 June 2013)

- Opt-In/Opt-Out:
 - 13 member states opt-in
 - 4 member states hybrid
 - 2 member states opt-out
- Admissibility:
 - Criteria varies among member states
 - Injunctive relief: standing of entity most important
 - Commonality of joined claims – condition in all member states
 - Several member states cautioned against use of principle
- Publicity/Information:
 - No member state regulates issue at preparatory stage
 - If admissible, courts entrusted with determination of modalities
 - 5 states: no provision of information in collective damages, at all
 - Even less provision of information in injunctive actions
- Cross-border disputes:
 - No general obstacles
 - But, no provision for representative entities designated by other Member States

Report Findings: Collective Redress in the Member States of the EU

- 12 Member States
- Divergence of forms of redress available
- *Compensatory redress* either not provided; or to limited extent
- Scope differs; most usually confined to consumer law
- Some larger sectoral approaches
- Opt-in/opt-out “problematic discrepancies”
- Standing only to designated entities; criteria not the same
- Publicity not regulated
- Contingency fees prohibited or strictly regulated
- Loser pay rule in all 12 States

Summary Conclusions

- Cross-border disputes not addressed or insufficiently addressed
- Bundling of claims burdensome & unattractive
- Not all EU citizens afforded same level of protection
- Jurisdictional rules ill-adapted to collective redress
- Highlights insufficiency of European action to date
- Need for changes:
 - parallel proceedings
 - applicable law
 - recognition of judgments
 - coordination of proceedings
- Strong need for EU intervention

Conclusions

For the Defense?

- *What is there to Like?*
 - *No/limited contingency fees*
 - *Loser-pay rule in place*
 - *No punitive damages*
 - *No cy pres*
 - *Limited compensatory damage actions*
 - *Chiefly injunctive relief actions*
 - *Circumscribed standing requirements*
 - *No settled provisions for cross-border disputes*
 - *No settled provisions re applicable law*
 - *Unsettled provisions concerning third-party financing*
 - *Unsettled jurisdictional rules*
 - *General lack of harmonization across EU member states (opportunities for forum shopping)*





Rebooting Italian Class Actions

Elisabetta Silvestri

Disposizioni in materia di azione di classe

2

Act no. 92 of April 12, 2019, published in the Italian
Official Journal (*Gazzetta Ufficiale*) on April 18, 2019

COMMISSION

RECOMMENDATION of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

- The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations (Article 1, sec. 1)

Disposizioni in materia di azione di classe

Act no. 92 of April 12, 2019

- ‘Dei procedimenti collettivi’
- [...] agire nei confronti dell'autore della condotta lesiva [...]
 - [...] to bring an action against the author of wrongful conduct [...] (my translation).

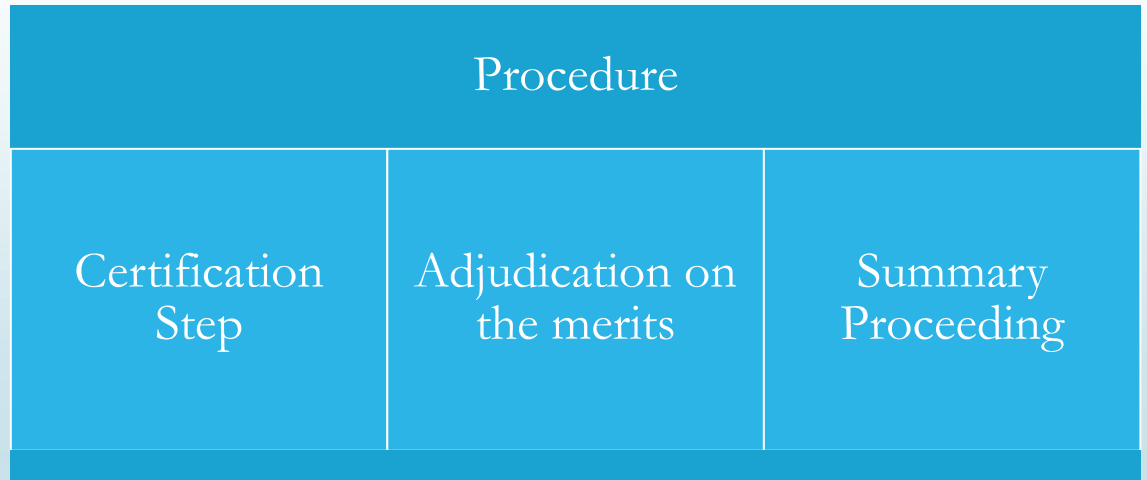
Article 840-bis of the Code of Civil Procedure – Scope of application
Homogenous individual rights can be enforced through class actions according to the rules that follow ...

Each member of the class

Non-profit entities and organizations

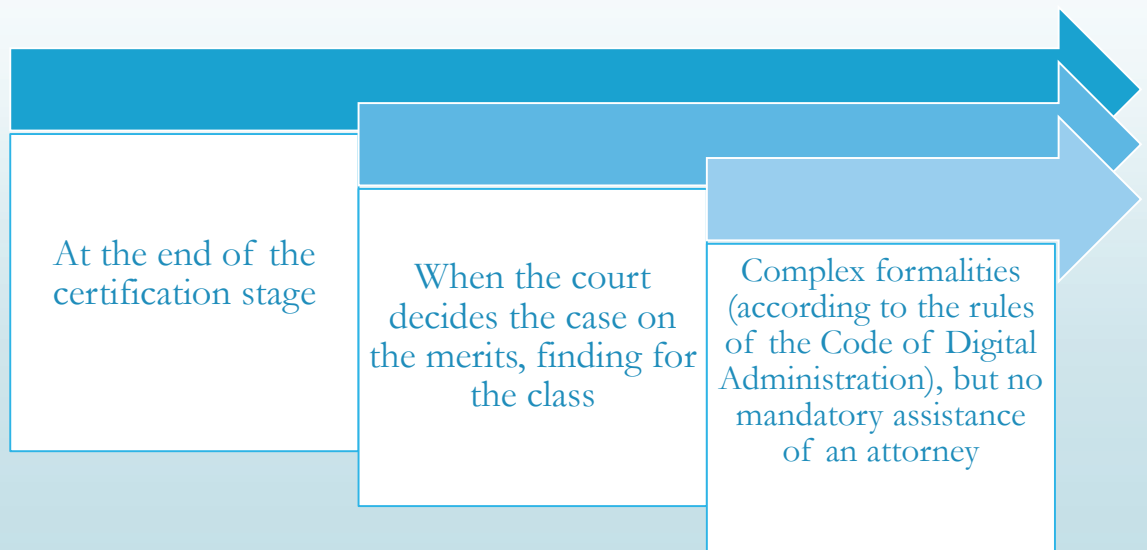
Against ‘harmful misconduct’ perpetrated by business entities or public services providers

5



6

Opt-In Procedure

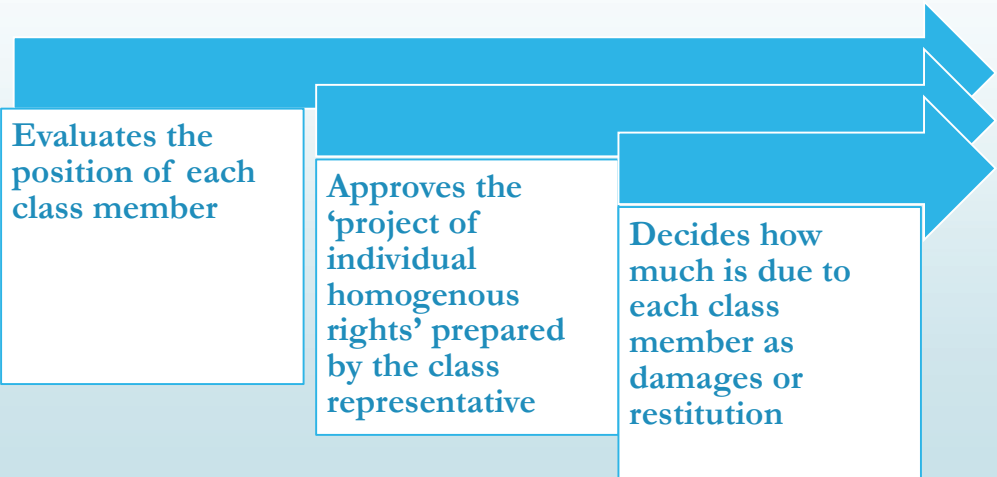


New features

Evidence-taking stage:

- ✓ Order of disclosure against the defendant
- ✓ Pecuniary sanctions
- ✓ Adverse inferences
- ✓ Appointment of the judge in charge of the opt-in procedure
- ✓ Appointment of the class representative

The Judge in Charge of the Opt-In Procedure



Evaluates the position of each class member

Approves the 'project of individual homogenous rights' prepared by the class representative

Decides how much is due to each class member as damages or restitution

The Class Representative

Is an officer of the court

Draws the 'project of individual homogenous rights'

Receives a special 'remuneration' or 'reward' (contingent fees)

Collective actions for injunctive relief Article 840-sexiesdecies of the Code of Civil Procedure

- ✓ Standing granted to 'all those who are interested'
- ✓ Action to be commenced before a 'business court'
- ✓ Procedural rules applicable to non-contentious matters
- ✓ Enforcement through *astreintes*

What do we say about rebooting Italian class actions?

Not today (and maybe not even tomorrow).

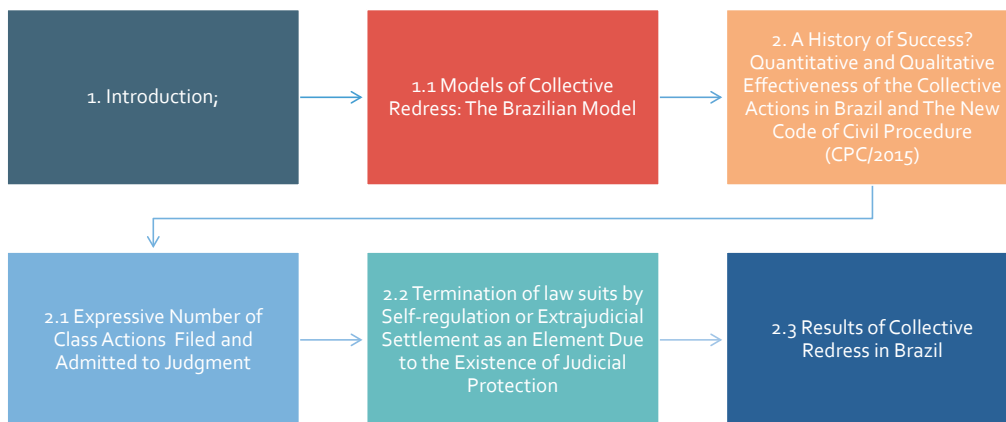


Thank you for your attention.

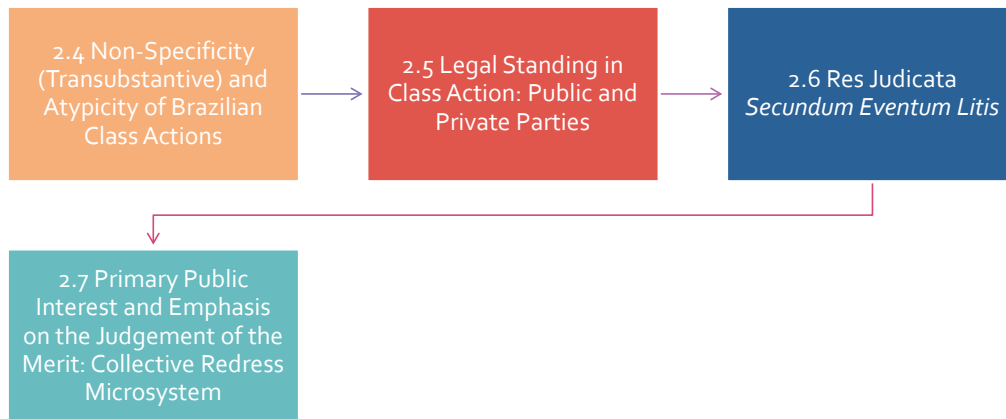
COLLECTIVE REDRESS IN BRAZIL: SUCCESS OR DISAPPOINTEMENT?



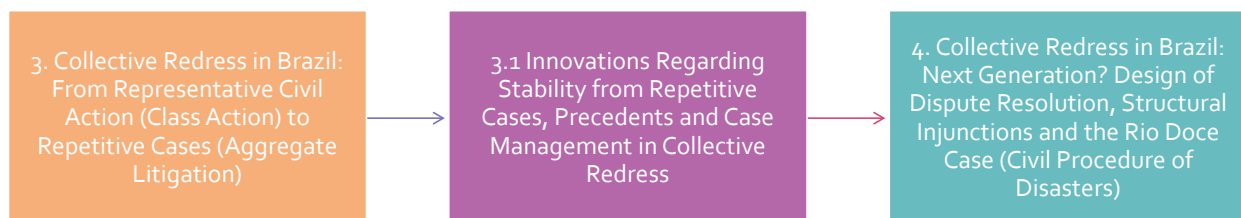
Prof. Dr. Dr. Hermes Zaneti Jr.
Tenured Professor at Federal University of the Espírito Santo –
Vitória (UFES)
Public Prosecutor at State of Espírito Santo (MPES)



INTRODUCTION – HISTORY AND DEVELOPMENT



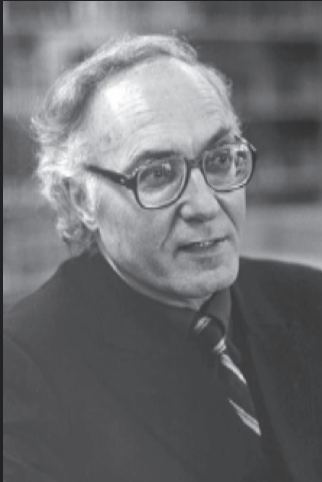
DOGMATIC OF THE PROCEEDINGS AND DUE PROCESS



NOVELTIES, FUTURE AND IMPROVEMENTS IN THE BRAZILIAN COLLECTIVE REDRESS

HISTORY AND DEVELOPMENT

- Brazil is in debt with Italy in the judicial collective redress: an Italo-american *class action*
- Mauro Cappelletti; Michele Taruffo; Barbosa Moreira; Ada Pellegrini Grinover.



ITALO-AMERICAN *CLASS ACTION*

hamburger & pizza





ITALO-AMERICAN

STATISTICS

Brazilian Collective Redress: A Portrait



JUDICIAL COLLECTIVE REDRESS DATA IN BRAZIL

*National Council of the Judiciary - CNJ reports and National Council of Public Prosecutor's - CNMP
reports 2014 - 2018*

TOTAL OF CLASS ACTIONS FILED IN BRAZIL (2014-2017)

04 Types

- 1) Ação Civil Pública (Public Interest Class Action);
- 2) Ação de Improbidade Administrativa (Corruption Fighting Class Action);
- 3) Ação Civil Coletiva (Consumers Class Actions);
- 4) Ação Popular (Actio Popularis)

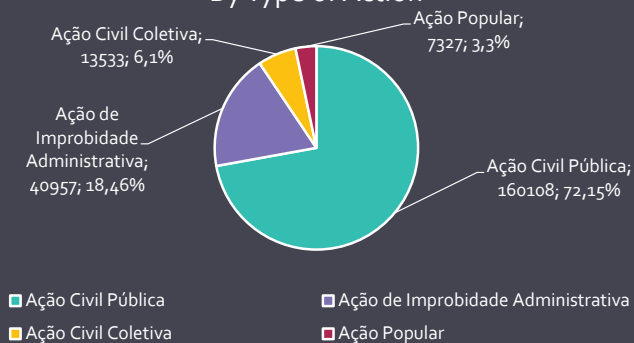
TOTAL in 04 Years

221.925

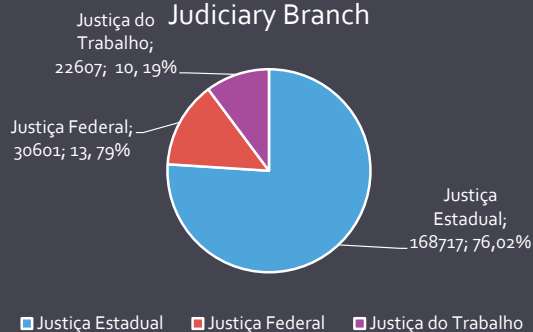
Judiciary Branch

- 1) State Justice;
- 2) Federal Justice;
- 3) Labor Justice

By Type of Action

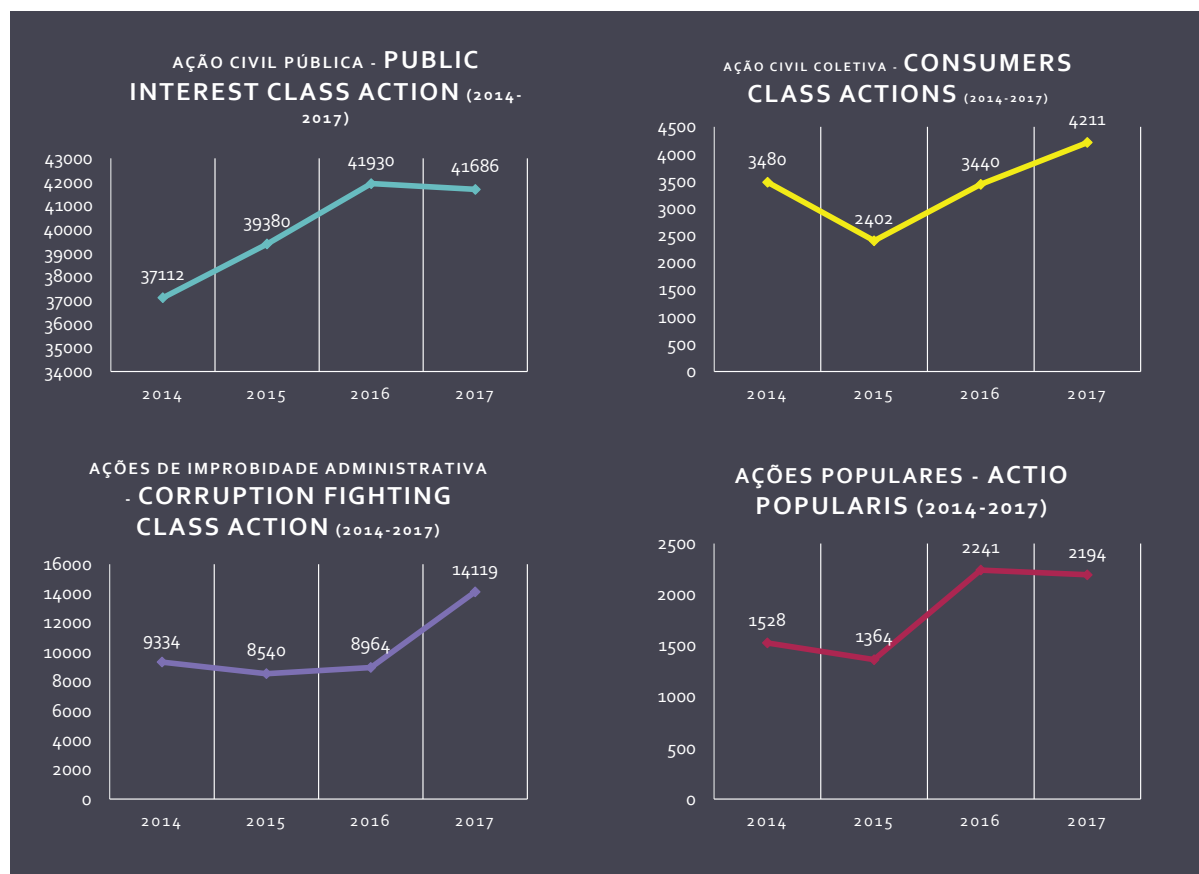


Judiciary Branch



Brazilian Class Actions Data (2014-2017)

Increase of Corruption Fighting Almost the Double of Actions (2016-2017)



PUBLIC PROCUTORS IN BRAZIL: INDEPENDENCE AND ESPECIALIZATION

Class Actions

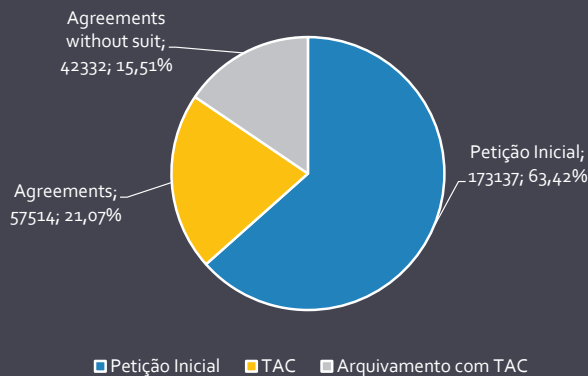
- article 129. The following are institutional functions of the Public Prosecution:
 - i – to initiate, exclusively, public criminal prosecution, under the terms of the law; (...)
 - iii – to institute **civil investigation** and public civil suit to **protect public and social property, the environment and other diffuse and collective interests**;

Ombudsman

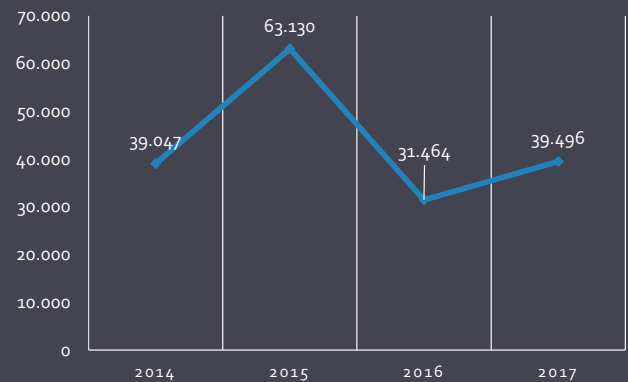
- ii – to **ensure effective respect by the public authorities and by the services of public relevance** for the rights guaranteed in this Constitution, **taking the action** required to guarantee such rights; (...)
- IX – (...) **judicial representation and judicial consultation for public entities being forbidden.**

TOTAL OF CLASS ACTIONS FILED BY PUBLIC PROSECUTORS: 173.137 (80% *AT LEAST*)

ADMINISTRATIVE PROCEEDINGS IC E PP
(2014-2017)

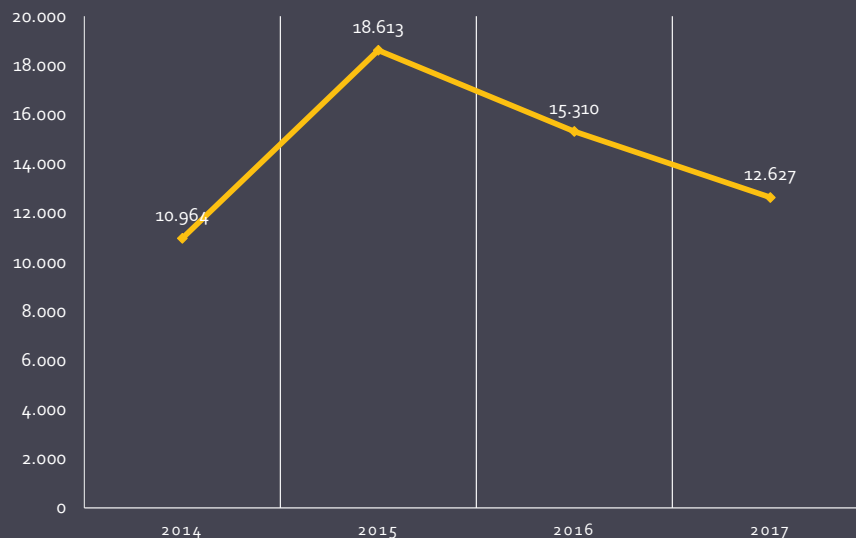


APPLICATION INITIATING PROCEEDINGS IC e PP (2014-2017)

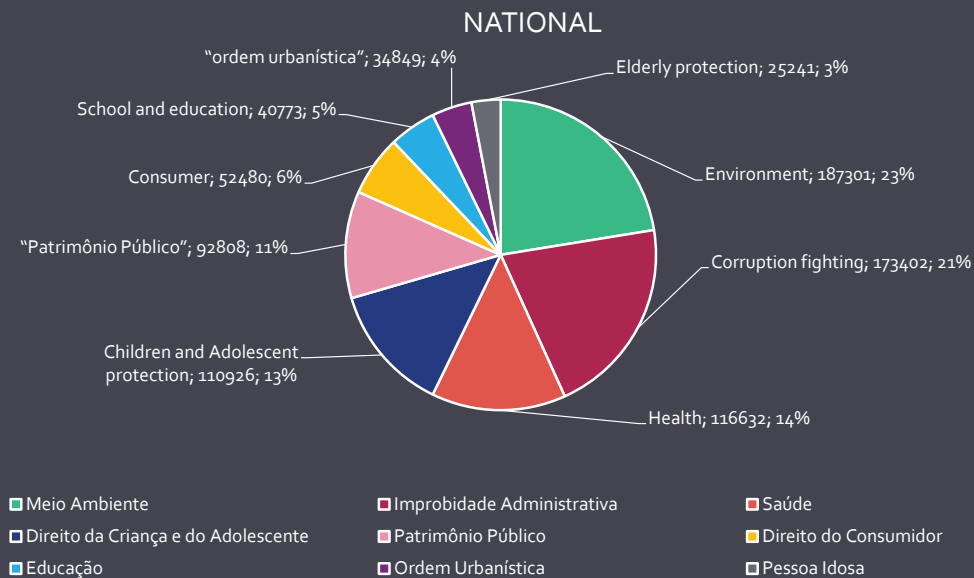


TOTAL OF SETTLEMENTS BY PUBLIC PROSECUTORS IN BRAZIL: 57.514 — *AT LEAST* (2014-2017)

TAC - IC E PP (2014-2017): 57,504



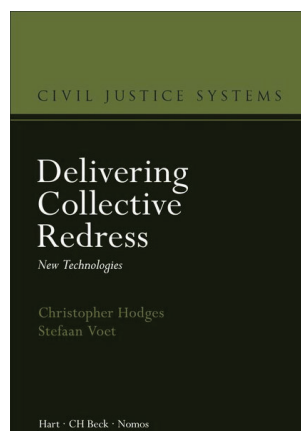
APPLICATION INITIATING PROCEEDINGS IN THE PUBLIC PROSECUTOR OFFICE: ENVIRONMENTAL PROTECTION, CORRUPTION FIGHTING, HEALTH, CONSUMER RIGHTS ETC.



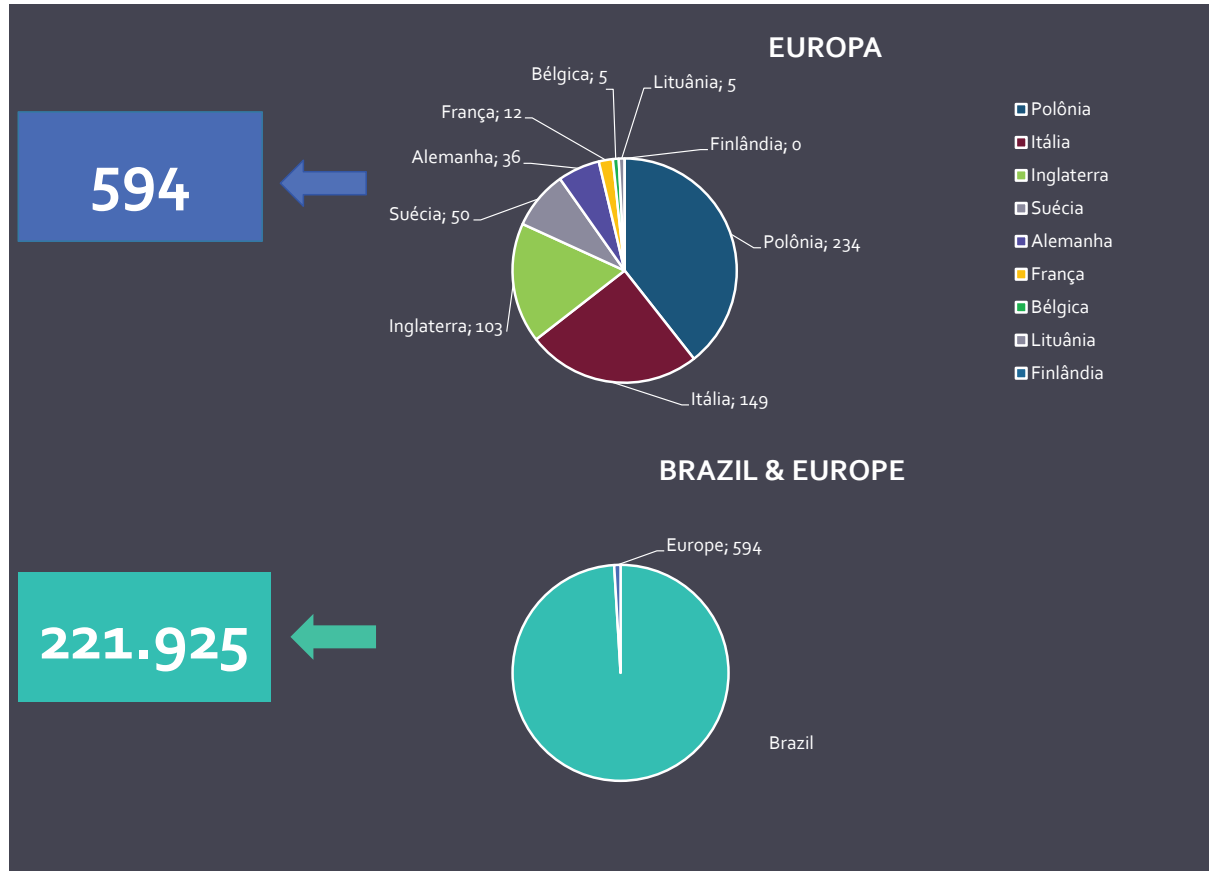
	total	certified	final decision	pending	settled	dismissed	withdrawn
Belgium (consumer class action) (Sept 14–Nov 17)	5	2	0	1	1	0	1
England and Wales (CAT class action) (2015–Aug 17)	2	0	0	0	0	1	1
England and Wales (CLO cases 1999–2017)	101	–	–	–	–	–	–
Finland (2007–17)	0	0	0	0	0	0	0
France (actions de groupe) (Oct 14–Nov 17)	12	0	0	9	2	1	0
Germany (KapMuG) (2005–9/2009)	24 + 12 ¹						
Italy (2005–17)	50–100 ² 49 'tracked'	22	6	1	1	19	0
Lithuania (1/2015–8/2017)	5	0	0	2	0	3	0
Poland (civil + commercial) (2010–6/2017)	227 + 7	0	60 + 0 (49 cases still pending)	74 + 2	0	93 + 5	0
Sweden (2003–17)	30–50						



EUROPEAN
COLLECTIVE
JUDICIAL REDRESS
HODGES AND VOET



EUROPE HAS
HAD IN A
LONGER
PERIOD LESS
THAN 1% OF
THE BRAZILIAN
JUDICIAL
COLLECTIVE
REDRESS



DOGMATICS AND LEGAL THEORY

• Transubstantive rights (Non-Specificity)

- It is good to note that they are not isolated experiences, members of the Public Prosecutor's Office can narrate cases and successful experiences of:
- **reformation works in prison, schools, hospitals, cancellation of abusive clauses in consumer contracts, changes in abusive market practices that affect the consumers, protection of the environment in cases of pollution with the obligation to install equipment, ceasing of polluting activities by companies...**
- prohibition of local **practices of cruelty against animals**, land regularization, determination of construction of public facilities in real estate sales in unregulated areas, **as well as fighting acts of administrative misconduct by other branches of power, which have led to the dismissal of corrupt politicians in the executive and legislative powers**, prohibition to the companies involved therein of signing new contracts with the public administration, and the return of deviated public resources to the State. etc.

DOGMATICS AND LEGAL THEORY

- Atipicity:
 - “any type of action to provide an adequate and effective protection is allowed”.
 - Art. 83 of the Consumer Protection Code
- Declaratory judgement
- Constitutive judgement
- Injunctions
- Compensatory/Money judgments (payment obligations)
- Others (deliverable and negative obligations etc).



CAR WASH (LAVA-JATO) – CORRUPTION – 2
FORMER PRESIDENTS IN JAIL – CRIMINAL AND
CIVIL MEASURES – RECOVERING 2,97 BILLIONS
EUROS

*Atipicity: We are served with
a broad quantity of legal
instruments*

- Class action for public interests (Ação civil pública - Law 7.347/1985)
- Collective action (art. 91 and others of the Law 8.078/1990 – Consumer Code)
- Específic Estatutes to Protect Children, Elderly, Team Supporters, Racial Equality, etc.
- Corruption Fighting (Ação de Improbidade Administrativa - Law 8.429/1992 and Acción Anticorruption Act - Law 12.846/2013).
- Collective Mandado de *segurança* (art. 21 e 22 da Lei 12.016/2009)
- Collective Mandado de *injunção* (art. 11 e 12 da Lei 13.300/2016) etc.



THE CASE OF MONEY SAVERS: THREE MILLION PEOPLE

Microsystem:
laws that interpenetrate and
support themselves: *Natalino Irti*

- All these Laws and Actions “they constitute a microsystem of transindividual redress and under this multidisciplinary perspective interpenetrate and support (...)”. (STJ – RESP nº 510.150/MA – Luiz Fux).
- Transubstantive rights “and other diffuse and collective interests” art. 129, III de la cf/1988.

APPLICATION OF THE COLLECTIVE REDRESS MICROSYSTEM

- There are several examples of the application of the collective redress microsystem recognized by doctrine.
- a) When in the position of the defendant, Companies and Government authorities may respond the initial claim, opting for defend themselves, change for the active pole or not to respond the claim at all, this triple option often is called depolarization of the demand or mobile intervention;
- b) the enforcement of judgments against a defendant who is a debtor of the State may be carried out by means of a payroll-deduction (which is an exception of the principle of non-leviable of salaries or wages);
- c) the necessary remittance to the court of appeal in the judgments of dismissal of merit and in the judgments of extinguishment of the case without resolution of the merit;
- d) jurisdiction of the site where the damage occurred (near to the facts);
- e) the principle of the primacy of merit in the collective process, which among other things determines, for example, the procedural succession, with the call of other parties with legal standing rather than the decision of the case without ruling on the merits for lack of *legitimatío ad causam*.

CASE LAW - SUPERIOR COURT OF JUSTICE

- STJ, 1ª, T T., REsp n. 791.042/PR, rel. Min. Luiz Fux, j. em 19.10.2006, publicado no DJ de 09.11.2006, p. 26
- article 14, § 3º, LAP; article 833, CPC.
- REsp 1447774/SP, Rel. Ministro FRANCISCO FALCÃO, SEGUNDA TURMA, julgado em 21/08/2018, DJe 27/08/2018; REsp 1.108.542/SC, Rel. Ministro Castro Meira, Segunda Turma, DJe 29/5/2009.
- CC 97.351/SP, Rel. Ministro CASTRO MEIRA, PRIMEIRA SEÇÃO, julgado em 27/05/2009, DJe 10/06/2009.
- REsp 1177453/RS, Rel. Ministro MAURO CAMPBELL MARQUES, SEGUNDA TURMA, julgado em 24/08/2010, DJe 30/09/2010,

THE PRINCIPLE OF THE PRIMACY OF MERIT IN THE COLLECTIVE REDRESS – CASE LAW

- STJ - TESE 23: *The **lack of standing** or an **irregularity in the representation** does not lead to the decision of the case without ruling on the merits, the **judge must open the opportunity** for other legal determined **complaintiffs** to **take the role of plaintiff in the claim**.* Ex.: 4ª T. REsp n. 1.192.577/RS, Rel. Ministro Luis Felipe Salomão, j. em 15/05/2014, DJe 15/08/2014.
- Procedural succession – the *complaintiff* assumes the place of the original plaintiff in the claim.

DOGMATICS AND LEGAL THEORY

- Standing – locus standing by law definition (*ope legis*) and judicial control of adequacy of representation (*ope judicis* – second stage) – coplaintiffs: **Public Prosecutors, associations, Federal State (Union), Member States, Municipalities, Public Defender** and, *actio popularis*, also the citizen
- Res judicata secundum eventum litis (only to benefit the individual claimants)
- Res judicata secundum eventum probationis (redo the claim if there is a new evidence capable to reverse the judgement)
- No fees or judicial costs for the plaintiffs (public interest class actions are financed by the State, FDD (Fund) and masswrongdoer – **loser pays rule**).

STANDING TO SUE

- **Public Prosecutors, Civil associations (NGO)**, legal entities of public law as the **Federal State**, the **Member States** of the Federation and **Municipalities** and their autarchies and foundations, **Public Defender** and, in the case of the popular action, also the citizen (Law nº 4.717 / 1965), all of them can propose class actions in Brazil. **In all cases, the Public Prosecutor's Office**, in case it does not function as the author, **will be an intervening body for the protection of the public interest** (*custos juris*, art 178, CPC).
- The characteristic of broad legal standing, with a large number of coplaintiffs, is, therefore, another peculiarity of the Brazilian collective redress. This **standing is autonomous, exclusive, concurrent and disjunctive or simple** and, although there is some conceptual divergence in doctrine, it is a kind of procedural substitution (representative proceedings) in which the group (holder of the right) is replaced by the authorized party by statutory law (*ope legis*) and its standing (adequacy of representation) can be judicially controlled later in the concrete case (*ope judicis*).

CASE LAW – SUPREME COURT - STANDING TO SUE OF THE PUBLIC PROSECUTORS OFFICE IN REGARD TO DISPOSABLE INDIVIDUAL HOMOGENEOUS RIGHTS (RE 631.111/GO – DVPAT – [VEHICLE MANDATORY INSURANCE])

▪ Relevant social interests (Relevantes Interesses Sociais):

- A) Private Educational Tuitions (RE 163.231/S P, Rel. Min. MAURÍCIO CÔRREA, Tribunal Pleno, julgado em 26/02/97, DJ de 29/06/2001);
- B) Contracts related to the SFH – Governmental Housing Financing Program (AI 637.853 AgR/S P, Rel. Min. JOAQUIM BARBOSA, Segunda Turma, DJe de 17/09/2012);
- C) *Leasing* Contracts (AI 606.235 AgR/D F, Rel. Min. JOAQUIM BARBOSA, Segunda Turma, DJe de 22/06/2012);
- D) Social Security for Rural Workers (RE 475.010 AgR/RS, Rel. Min. DIAS TOFFOLI, Primeira Turma, DJe de 29/09/2011);
- E) Determination to Construct Public Facilities in Real Estate Sales in Unregulated Areas (RE 328.910 AgR/S P, Rel. Min. DIAS TOFFOLI, Primeira Turma, DJe de 30/09/2011);
- F) Difference in interest indexation of accounts related to FGTS – Governmental Program to Secure Workers (RE 514.023 AgR/RJ, Rel. Min. ELLEN GRACIE, Segunda Turma, DJe de 05/02/2010).

RES JUDICATA AND LIS PENDENS

- Another characteristic element of Brazilian collective actions is the *Res Judicata erga omnes secundum eventum litis*. But this matter must be well understood, bearing in mind that it is not always very clear. “***Secundum eventum litis*” actually is the subjective extension of the *Res Judicata***, and not the formation of the *Res Judicata* itself. Once the *Res Judicata pro et contra* is formed, one can not intend to file a new class action (regardless the name given to the action, e.g., collective *mandado de segurança*, *actio popularis* or *ação civil pública*) under the basis of the same cause of action and the same claim. However, a class action that might have been dismissed does not prevent the holders of individual rights from filing their actions or continuing until the judgment of the actions already filed (article 103, CDC). For the same reasons, it is stated that there is ***no lis pendens*** between individual action and class action (article 104, CDC; article 22, Federal Law nº 12.016 / 2009), that is so, because **the cause of action regarding the group right may not be deemed to be the same as the cause of action related to the individual right**, there is, therefore, *no lis pendens* nor *Res Judicata*.

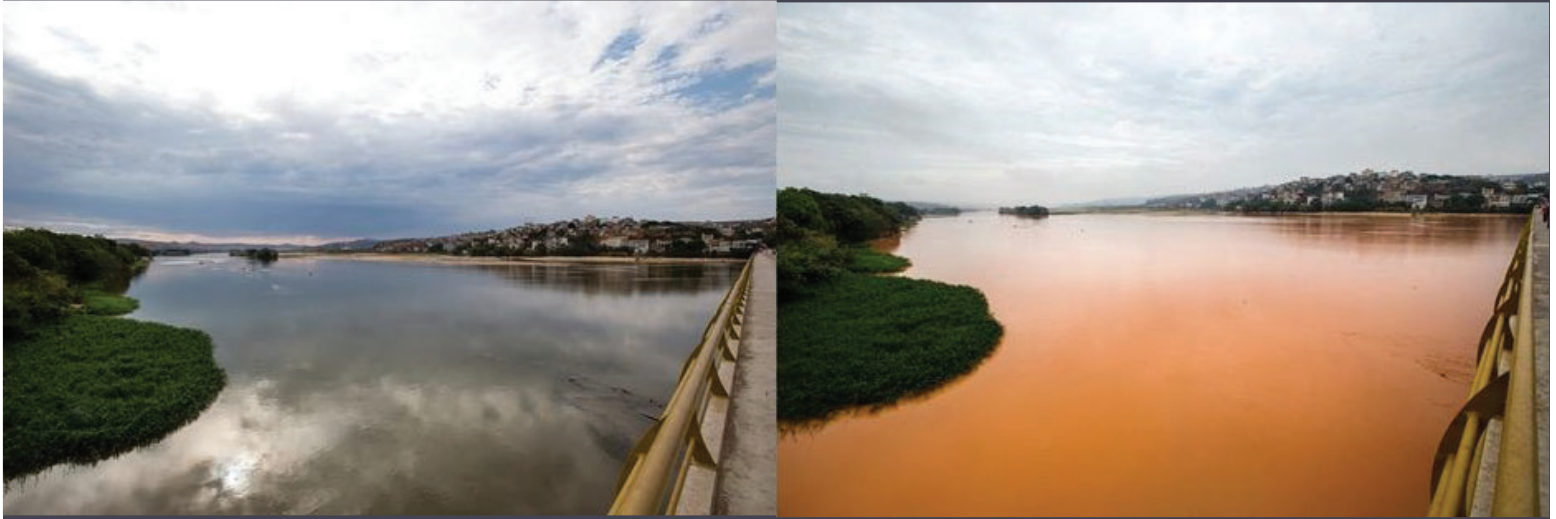
NO FEES OR COSTS

- No fees or judicial costs for the plaintiff
- In Brazil the costs and fees of the class action litigation are normally supported by the State and the *loser pays rule* is only applied at the end of the process.
- There might be some litigation about who will support the costs of production of evidence, in such cases, there are at least three possible arrangements: a) the defendant agrees to bear the costs of the evidence production, in a kind of procedural agreement or as a consequence of the distribution of the burden of proof by the judge; b) the State pays for the costs either directly or by accepting (under the judge's determination) that some technical facility such as a State lab or university produces the evidence; c) the diffuse rights fund pays for the evidence to be produced. In all of these cases if the plaintiff loses at the end, he will be faced with the burden of the costs, if he wins all remaining expenses will be charged to the government. Recently we have had a new feature regarding the CPC. That is because the new code determines that the Public Prosecutors Office must provide for the expenses incurred with the production of expert evidence, if there is a budget provision, such cost may be advanced by whoever requests the evidence. Instead to the simple reading of the rule, it is common sense in the doctrine and in the STJ that this rule does not apply to the class actions proceedings (lex specialis derogat lex generali).

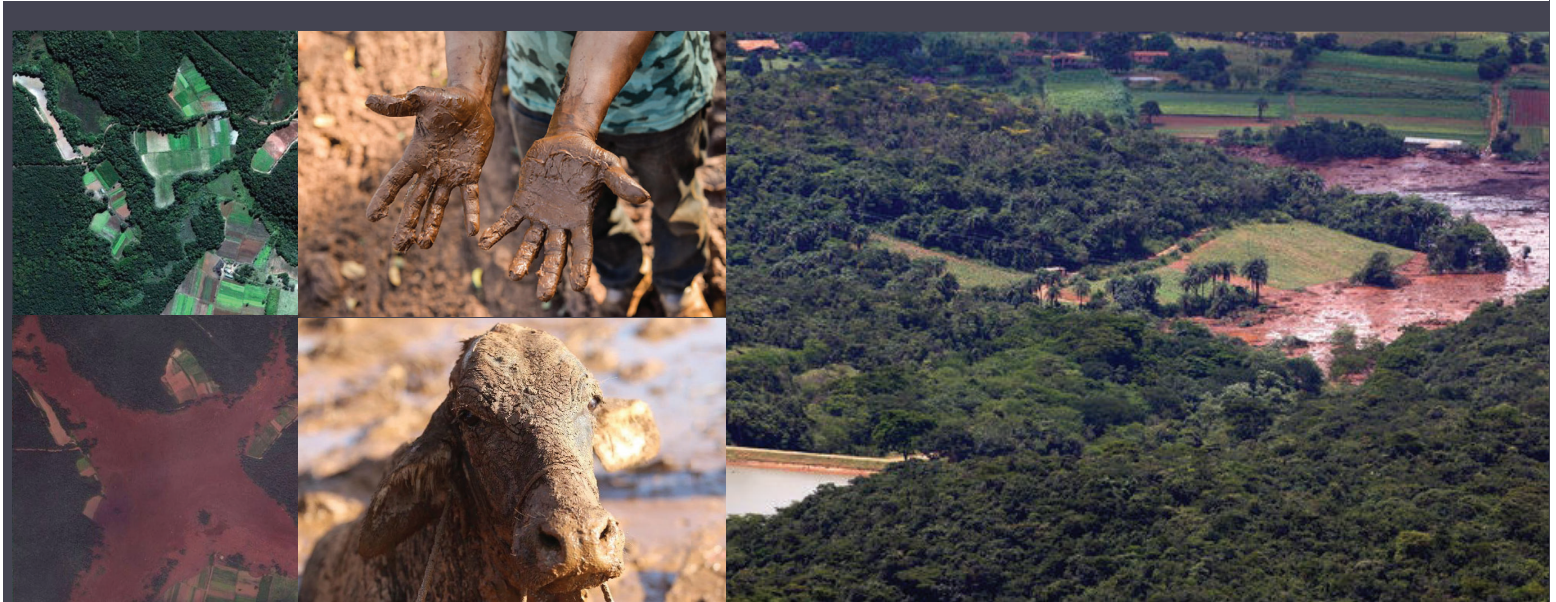
PROCEDURAL LAW OF DISASTERS
(SAMARCO/MARIANA-MG RIO DOCE CASE)
(BRUMADINHO/MG CASE)

NEW FRONTIERS

SAMARCO / MARIANA-MG – RIO DOCE CASE



BRUMADINHO / MG - DISASTER



NEW FEATURES

- Structural Litigation (Structural Injunctions – Owen Fiss)

- Mass procedural agreements: evidence, jurisdiction, funds, effects of limitation etc
- Claim resolution facilities (Fundação Renova)
- Opt in agreements (case of money savers – 2,66 Billion euros – 3 Million people – only 17 Thousand indemnified)

- Internal Judicial cooperation (New Code):

- Art. 69, II – the joinder or severance of cases;
- Art. 69, § 2º II – “obtainment and submission of evidence and the taking of testimony”
- Art. 69, § 2º VI – “centralization of multiple claims or appeals” (aggregate litigation)

THE MODELS OF COLLECTIVE REDRESS:

a) Brazilian Class Actions. *Opt-out Collective Redress;*

b) Aggregate litigation (or Brazilian Pilot-Verfahren/Musterverfahren/Group Litigation Order). *Opt-in Collective Redress (New Code);*

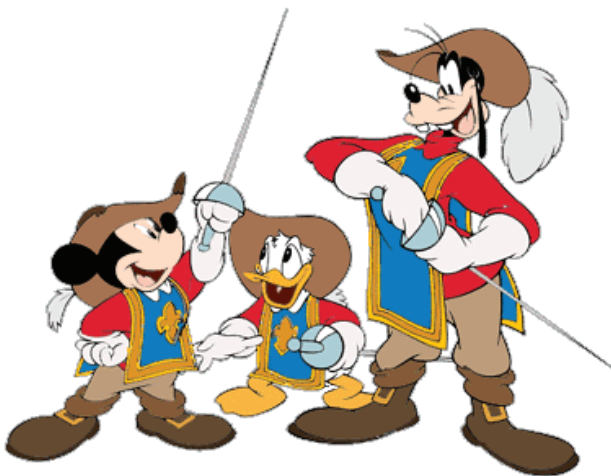
DISAPPOINTMENT (S)?

Many procedural discussions that last long years IN THE CASE LAW:

- Standing of the Public Prosecutor's Office in the field of disposable Individual Homogeneous Rights
- Jurisdiction in large cases that affect more than one local (regional or national damages)
- Extention of the res judicata (effects of the decisions) to the whole group or just to the group in the territory of the jurisdiction of the judge
- Costs of the expert witness and to produce technical evidence in environmental cases
- Enforcement of decisions in disposable individual homogeneous rights and in large cases of diffuse and collective rights

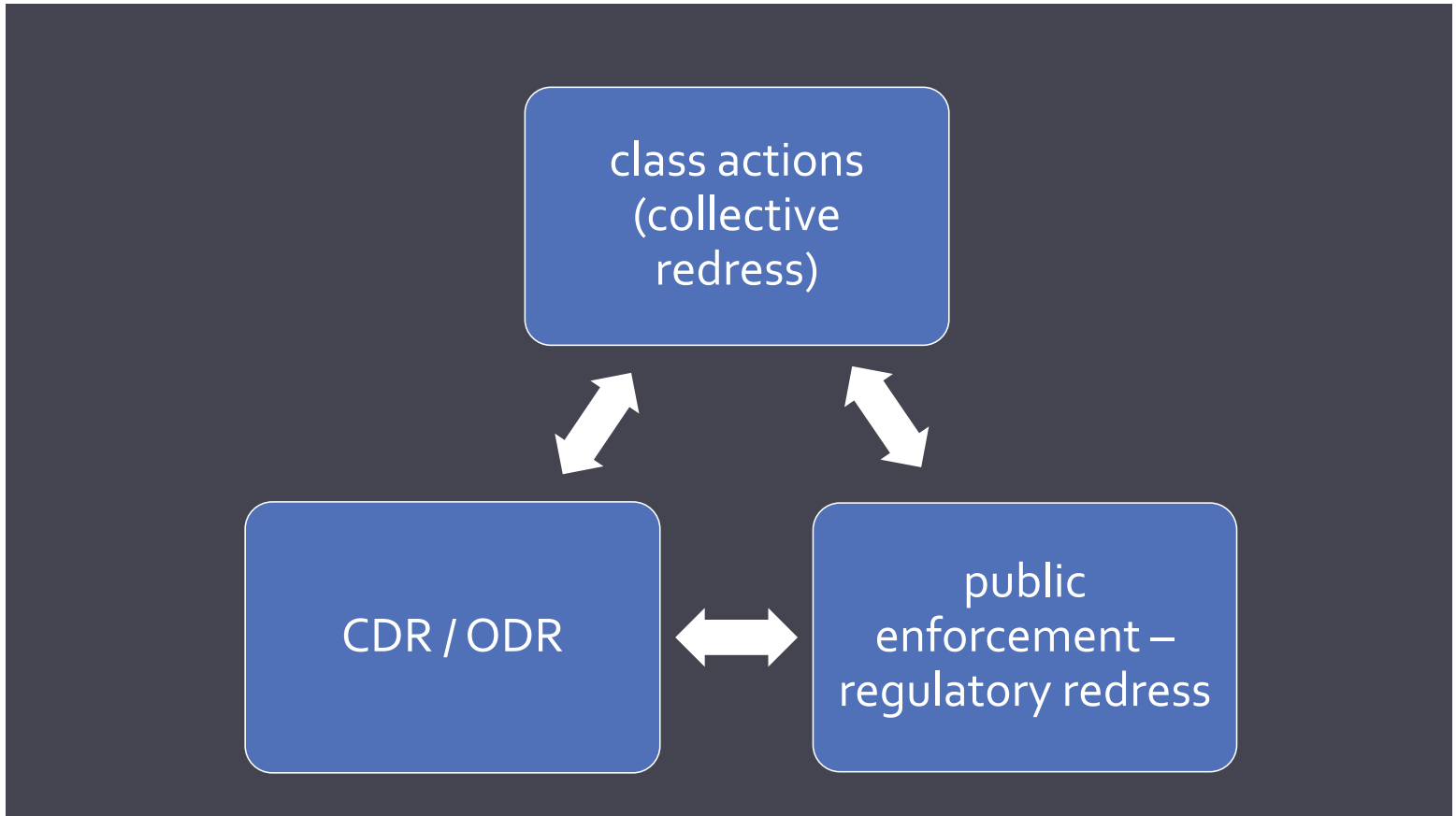
Many theoretical discussions in DOCTRINE that are never ending:

- Legal standing nature: ordinary (very rare), extraordinary (substituição processual – dominant in theory and in practice) or autonomous standing to conduct the proceedings (*selbständige Prozeßführungsbefugnis*)
- Adequacy of representation and the argumentative representation of subgroups and absent members
- The collective rights concept (great disputes about the concept of diffuse, collective and individual homogeneous rights as autonomous collective rights)
- Criticism of the class action *opt out* Brazilian system that is characterized by *secundum eventum litis* without binding effect against the holders of individual rights



Stefaan Voet suggested:

Unus pro omnibus, omnes pro uno



DUTY OF
COOPERATION AND
CASE MANAGEMENT:
ALAN UZELAC AND
JUDGE WEINSTEIN



Democracy is the worst form of Government

except all those other forms that
have been tried from time to time.

Don't Forget
to Smile!



www.365greetings.com

THANK YOU!

HERMESZANETIJR@GMAIL.COM

CEAF
Centro de Estudos e Aperfeiçoamento
Funcional

MPES
MINISTÉRIO PÚBLICO
do Estado do Espírito Santo

FPCC
Fundamentos do Processo Civil
Contemporâneo

ProcNet
Rede Internacional de Pesquisa sobre
Justiça Civil e Processo Contemporâneo

PPGDIR
Mestrado em Direito - UFES

Selected EU Member States



- i. Belgium
- ii. Bulgaria
- iii. England and Wales
- iv. Finland
- v. France
- vi. Germany
- vii. Italy
- viii. Lithuania
- ix. Netherlands
- x. Poland
- xi. Sweden



Belgium

- Court based
- Representative without a mandate
- Court rules on admissibility of the claim
- Consumer Mediation is solely for the purposes of settlement only



Bulgaria

- Litigated in court
- Group of people suffered harm
- Association
- Judgment subject to the Court of Appeal then Court Cassation
- Opt-out parties may appeal the judgment



England and Wales

- Court based
- Group litigation order
- Competition Appeal Tribunal



Finland

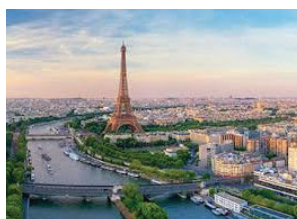
- Court
- Private
- Consumer claims
- Opt in principle



France



- Court
- Consumer and competition
- Environmental
- Administrative
- Civil
- Quantum: material damage to the consumers assets
- Association



Germany



- Court
- Association
- Consumer
- Unfair terms
- Competition or copyright



Italy

- Court
- Association
- Two stages: 1. Certification 2. Merits
- Restitution or compensatory relief
- Unfair business practice
- Contractual rights



Lithuania

- Court
- Association
- Statutory claim
- Relief is limited to injunctive or declaratory relief
- Does not make provision for damages or compensatory relief



Netherlands

- Only settlement claims (new Act to be promulgated)b
- Court of Appeal has exclusive jurisdiction
- Inherent power to adjust the compensation
- Plaintiff and Defendant jointly file a petition to the court to have the settlement made an order of court



Poland

- Court
- Opt-in
- Consumer law
- Product law
- Tort liability
- Representative



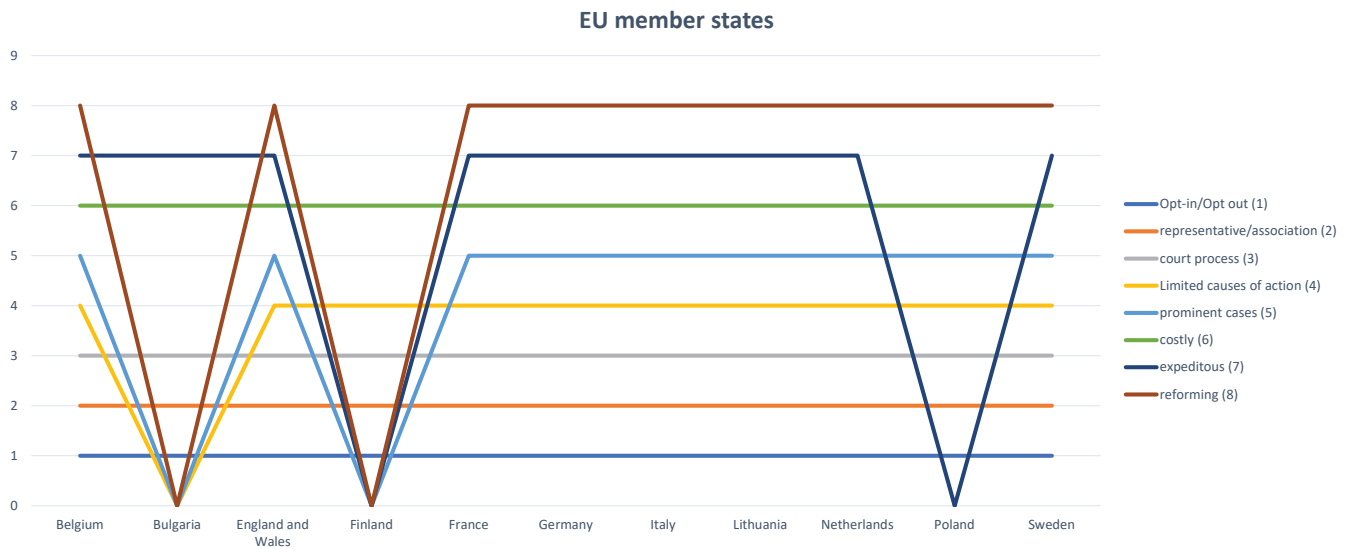
Sweden



- Court
- Opt-in
- Relief: compensatory, declaratory and injunctive
- Association

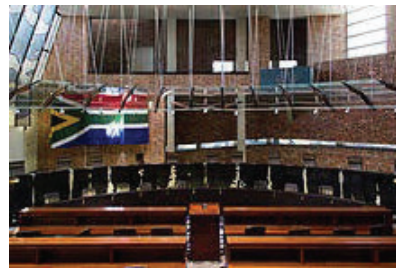


Graph representation: Common variables

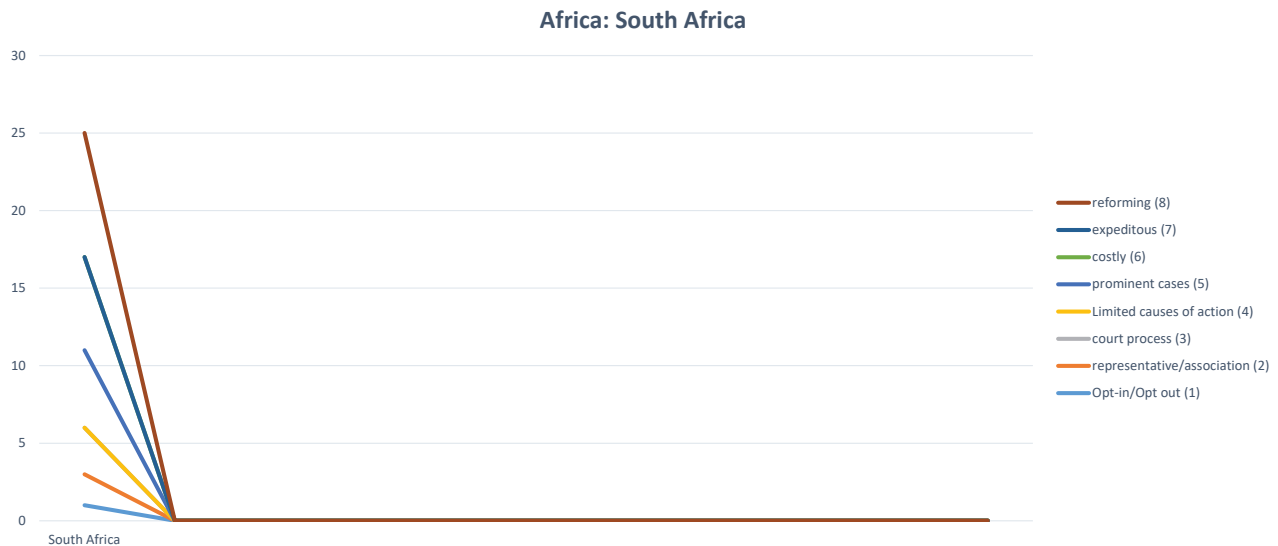


South Africa perspective

- Court
- Public and Private
- Constitution-public
- Case law-private
- Expensive
- Time
- Requirements
- Settlement: Nkala



South African perspective



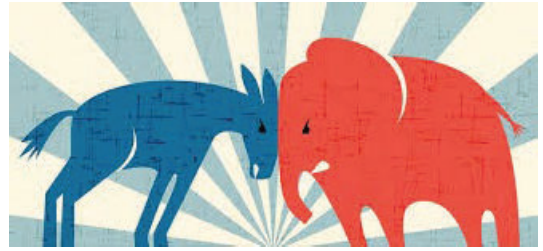
ADR

- Mediation
- Conciliation
- Arbitration
- Online ADR
- No provision made for ADR
- The parties elect ADR and run their own processes to reach settlement
- The settlement must be made an order of court: specific processes set out



Proposed Model

- Hybrid model
- Political legal landscape: indigent people
- ADR
- Expeditious
- Time frames



Recommendations for reform

- Legislation needs to be drafted setting out the procedures
- ADR procedures must also be incorporated



- Expeditious
- Reduce Time frames
- Legislation
- ADR





Could Judicial Collective Redress Schemes Work in Ukraine?

Iryna Izarova,

Prof. at Law Faculty, Taras Shevchenko National University of Kyiv,

East European Law Research Center



2014-2019 Judiciary and court proceedings reform

- Strategy of reforming the judiciary, court proceedings and related legal institutions for 2015-2020 available at <http://zakon2.rada.gov.ua/laws/show/276/2015>
- Law of Ukraine *On making amendments to the Constitution of Ukraine (concerning justice)* 2016 available at <http://zakono.rada.gov.ua/laws/show/1401-19>
- Law of Ukraine *On judicial system and status of judges* No 1402-VIII of June 02, 2016 available at <http://zakon3.rada.gov.ua/laws/show/1402-19/print1452602755913155>
- Law of Ukraine *On High Council of Justice* No 1798-VIII of December 21, 2016 available at <http://zakon2.rada.gov.ua/laws/show/1798-19/print>
- Law of Ukraine *On Enforcement Proceedings* No. 1404-VIII of June 2, 2016 <http://zakono.rada.gov.ua/laws/show/1404-19/print>
- Law of Ukraine *On the Bodies and Persons Who Execute the Enforcement of Court Decisions and Decisions of Other Bodies* No. 1403-VIII of June 2, 2016 <http://zakono.rada.gov.ua/laws/show/1403-19/print>
- Bill on amendments to the Commercial Code of Ukraine, Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts No 6232 March 23, 2017 available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415
- Draft Law on amendments to the legislative acts concerning collective redress for consumer rights protection, right to environment No 10292 May 15, 2019 available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65935



Some of results

+

- Abusing the Procedural Rights
- Compulsory Professional Legal Assistance in Court
- Settlement with the Judge
- Proportionality and Court Fees
- Case Management and Two Tracks for Disputes Resolution
- Priority of Written Procedure

-

- Caseload per one judge and per court
- Lack of ADR
- Problem of Decisions Enforcement
- Consultation with Stakeholders, in particular, with small and medium business, business associations and others

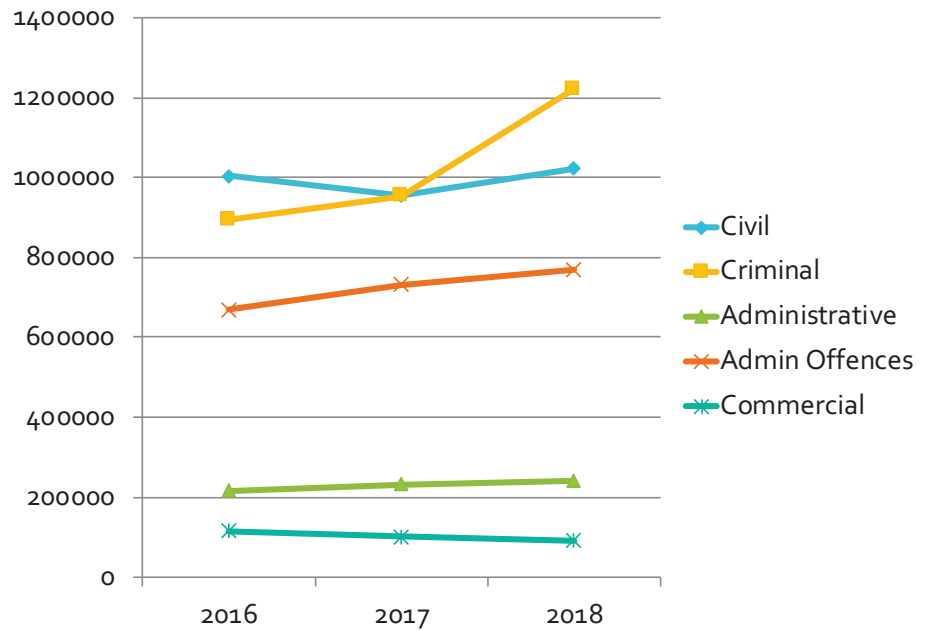


To compare

- On 1 January 2018
the number of inhabitants of Ukraine – 42 386 400
- Total number of court cases in
 - 2018 – 3 792 758
 - 2017 – 3 413 000
 - 2016 – 3 302 244

-
- **Formula**

Statistic data



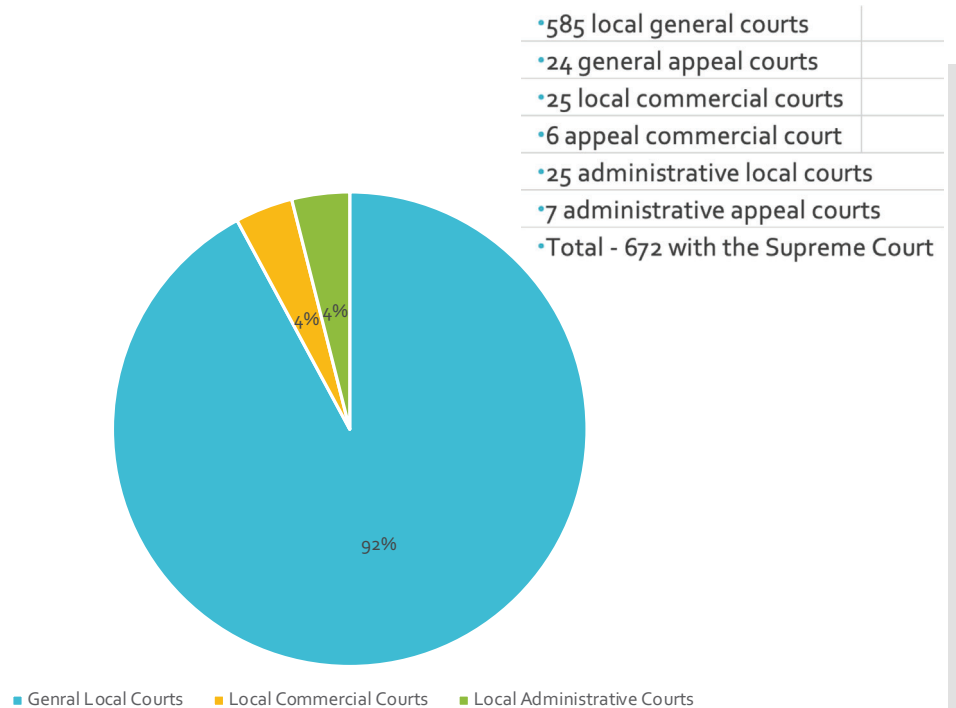
May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

5

Courts



May 29, 2019

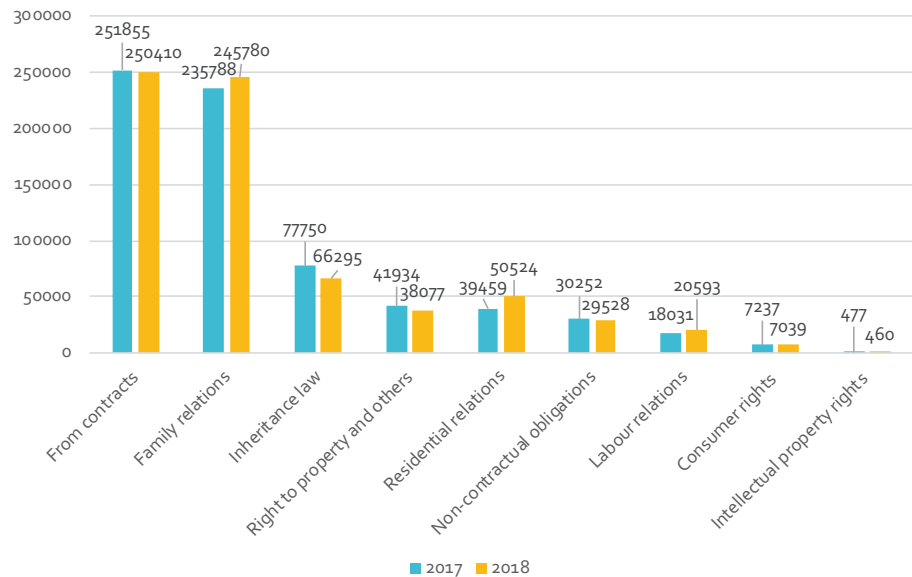
Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

6

Types of civil cases

The top civil cases



How we deal with a lot of claimants or defendants in 1 case...

JOINDER of CLAIMANTS

According to CPC, art. 188:

- 1. One claim may be combined with several requests related to one cause of claim or evidence, main and **derivative** claims.
- The **derivative** claim is a claim, the satisfaction of which depends on satisfaction of another claim (main claim).
- 2. The court, taking into account the provisions of the first part of this article, may, upon the petition of a party or on its own initiative, combine in one proceeding several cases :
 - 1) same claimant to the same defendant;
 - 2) one claimant to different defendants;
 - 3) different claimants to the same defendant.

CONSOLIDATION of ACTIONS

According to CPC, art. 50:

- 1. A claim may be filed jointly by several claimants or to several defendants. Each claimant or defendant acts in the civil process independently.
- 2. Number of claimants and (or) defendants participation (procedural complicity) is allowed if:
 - 1) the subject of the dispute is the common rights or obligations of several claimants or defendants;
 - 2) the rights and obligations of several claimants or defendants arose from one ground;
 - 3) the subject of the dispute is the same rights and obligations.

Special ways of multiple parties case consideration

May 29, 2019

Civil Procedure Code of Ukraine

- *Grounds for issuing the order for payment*
- 1. The order for payment may be issued by court if:
- 6) a claim is made for the return of the value of the goods of inadequate quality if there is a court decision which has become valid, establishing the fact of sale of goods of inadequate quality, approved **in favor of an uncertain range of consumers... (art. 161)**

Iryna Izarova, KNU, EELRC

Code of Administrative Procedure of Ukraine

- 22) **Model case** – a typical case, considered by the Supreme Court as a court of first instance for the model judgment's issuing (art. 4)
- **§ 3. Model and typical cases' consideration, art. 290-291**

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

9

Some examples of cases with multiple parties

May 29, 2019

With numbers of claimants

- A claim of 216 people to several defendants for non-pecuniary damage caused by a fire at a petroleum station, which lasted more than 10 days and burned a large number of fuel tanks
- <http://www.reyestr.court.gov.ua/Review/80991645>

Iryna Izarova, KNU, EELRC

With numbers of defendants!)

- One claimant and a farm to 577 defendants on the invalidation of meeting minutes of the union of the property shares co-owners of the reorganized collective agricultural enterprise
- <http://www.reyestr.court.gov.ua/Review/78388513>

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

10

Some cases' examples with multiple third parties

- A claim of one person against another person on the recognition of the title to movable and immovable property with **787 third persons** (the regional state administration has exceeded the limits of its own powers, provided by law, since it disposed of land in private property, instead of state-owned land)
- Two persons to the local council with the participation of third parties – **three legal entities and 278 individuals** on the recognition as unlawful of actions, the recognition as illegal and the abolition of the decision to establish a tariff for centralized water supply and centralized drainage.

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

11

Main types of cases with multiple parties / possible collective redress?

- against utility charges;
- violation of land and property rights;
- the recognition of transactions invalid (null and void);
- cancelation of the local authority orders etc.

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

12

Main Challenges

Do we need Collective Redress in Ukraine and what may stop us before its implementation?

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

13

Which court and what jurisdiction?

- Constitutional Court of Ukraine
- Supreme Court
 - **Article 37.** The Composition and Structure of the Supreme Court
 - 1. The Supreme Court shall consist of not more than two hundred judges.
 - 2. Within the Supreme Court there shall be:
 - 1) Grand Chamber of the Supreme Court;
 - 2) Administrative Cassation Court;
 - 3) Commercial Cassation Court;
 - 4) Criminal Cassation Court; and
 - 5) Civil Cassation Court.
- High Specialized Court in Intellectual Property and Anti Corruption Court
- 37 Appeal Courts
- Local courts of all jurisdiction (approx. 635, proposal - 277 circuit courts)
- Approx. 6000 judges

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

14

Judges and Judicial power

- New case management in litigation
- Problems with the judicial cooperation, inside and outside Ukraine
- Principle of reciprocity in decisions' mutual recognition and enforcement

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

15

E-Justice

- Since 2011 the *Unified Judicial Informational (Automated) System* (division of cases between judges etc)
- Since 2006 *Single state register of judicial decisions* (full text decisions)
- The general concept of "*Electronic Court*" approved in 2012
- **Article 15¹**. The Single Judicial Information and Telecommunication System
- 1. The Single Judicial Information and Telecommunication System functions in the courts, in the High Council of Justice, in the High Qualifications Commission of Judges of Ukraine, in the State Judicial Administration of Ukraine, their bodies and departments
- <https://id.court.gov.ua> and <https://court.gov.ua>

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

16

Qualified claimants and representation

Qualified claimants

- No practice of organizations' and associations' judicial activities
- Only legal entity participates in trial
- Unknown conflict of interests
- Mandatory legal representation

Qualified defendant?

- Equal arms
- Fair trial

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

17

Advocacy v. Public Prosecutor

- 1THE ROLE OF PUBLIC PROSECUTOR OUTSIDE THE CRIMINAL LAW FIELD IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS
- 8. In *Menchinskaya v. Russia*, no. 42454/02, 15 January 2009, referring to the Venice Commission's Opinion on the Prosecutor's Offices Act (2005) and to the Parliamentary Assembly's Resolution 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law, the Court established that support by the prosecutor of one of the parties in civil proceedings may be justified in certain circumstances, "*for example the protection of rights vulnerable groups – children, disabled people and so on - who are assumed unable to protect their interest themselves, or where numerous citizens are affected by the wrongdoing concerned, or where State interests need to be protected*" (§ 35)
- https://www.echr.coe.int/Documents/Research_report_prosecutor_RUS.pdf
- Law of Ukraine About the prosecution
<https://zakon.rada.gov.ua/laws/show/1697-18/print>

May 29, 2019

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

18

Mass harm

May 29, 2019

Draftlaw 10292

- The purpose of the collective redress – violation of the right to environment or customers' rights protection

Draft ELI

- A collective redress action for the recovery of damages or other collective remedies or for a declaratory judgment...
- Mass harm is not restricted to particular fields of law and it can be an event which causes injury or damages to at least two persons...

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

19

ADR

May 29, 2019



Court Settlement

- Article 16. General provisions of pre-trial settlement of a dispute
- 1. The Parties shall take measures for the pre-trial settlement of a dispute by agreement between themselves or in cases where such measures are mandatory in accordance with the law.
- 2. Persons who violated the rights and legitimate interests of other persons are obliged to restore them without waiting for a complaint or claim.
- The law also refers to the mandatory settlement of the dispute, but today there are no such provisions of the law.
- <http://zakon3.rada.gov.ua/laws/show/1618-15/print>.



Out-Court Settlement

- Mediation?
- Conciliations?
- Negotiations?

Iryna Izarova, KNU, EELRC

PPJ conference *Class Actions - The Holy Grail for (European) Civil Procedure?*

20

The goal

May 29, 2019

Goal 16: Promote just, peaceful and inclusive societies

16 PEACE, JUSTICE AND STRONG INSTITUTIONS



The threats of international homicide, violence against children, human trafficking and sexual violence are important to address to promote peaceful and inclusive societies for sustainable development. They pave the way for the provision of access to justice for all and for building effective, accountable institutions at all levels.

While homicide and trafficking cases have seen significant progress over the past decade, there are still thousands of people at greater risk of intentional murder within Latin America, Sub-Saharan Africa and around Asia. Children's rights violations through aggression and sexual violence continue to plague many countries around the world, especially as under-reporting and lack of data aggravate the problem.

To tackle these challenges and build a more peaceful, inclusive societies, there needs to be more efficient and transparent regulations put in place and comprehensive, realistic government budgets. One of the first steps towards protecting individual rights is the implementation of worldwide birth registration and the creation of more independent national human rights institutions around the world.

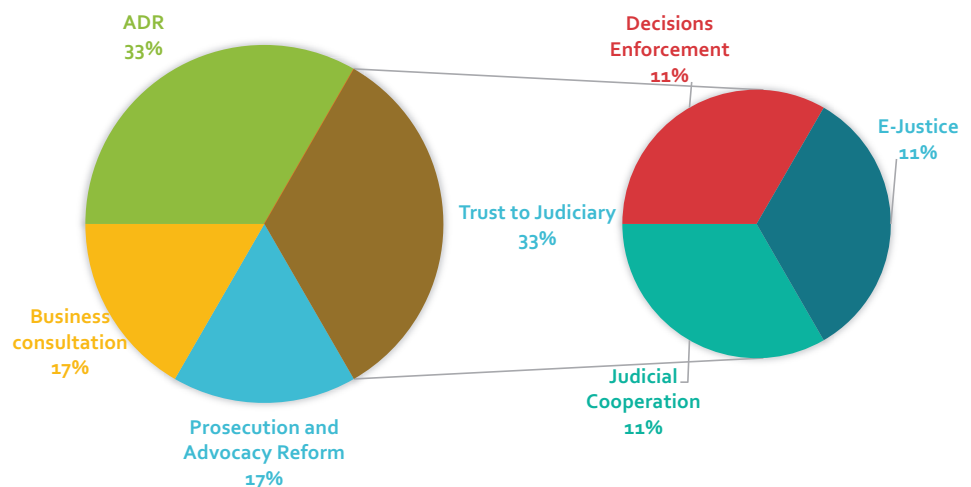
• <https://www.un.org/sustainabledevelopment/peace-justice/>

Iryna Izarova, KNU, EELRC



What should we do:

May 29, 2019



Iryna Izarova, KNU, EELRC

PPJ conference Class Actions - The Holy Grail for (European) Civil Procedure?



Thank you!

irina.izarova@gmail.com

Law Faculty
Taras Shevchenko National University of Kyiv
Volodymyrska str., 60, 01030, Kyiv, Ukraine
femida@law.knu.ua

East European Law Research Centre
Mazepy Ivana str., 10, 01010, Kyiv, Ukraine
info@ajee-journal.com

May 29, 2019

23

CENTRE FOR SOCIO-LEGAL STUDIES



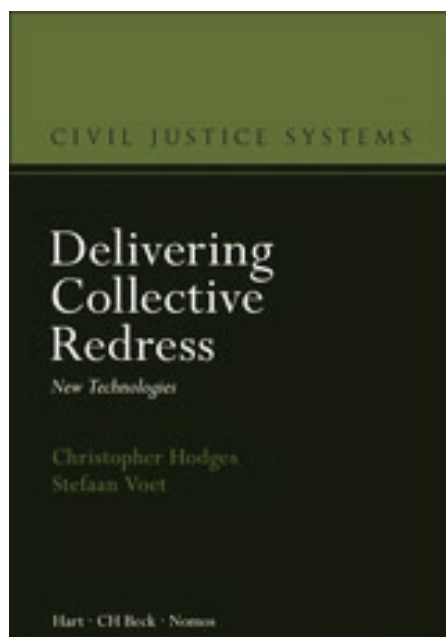
COLLECTIVE REDRESS: EVALUATING MECHANISMS

Professor Dr Christopher Hodges





Prof. dr. Stefaan Voet
University of Leuven



The Historical Rationales

- Delivering compensation for harm
 - Procedural economy
 - Overcoming barriers to accessing justice
- Upholding rights
- Deterrence

The Real Objectives

- Delivering redress for harm
- Upholding the law
- Affecting future behavior

Criteria: Outcomes, Cost, Efficiency

Theory	Mode of action	Effectiveness
Deterrence	Fear	Traditional, ingrained, but very limited evidence or support
Economic deterrence: rational profit calculation	Disrupt the calculation, incentivise by cost internalisation	Widely applied, significant flaws
Behavioural psychology & genetics	Human and group drivers, incentives and disruptors	Empirical support, Increasingly applied in some sectors
Responsive regulation	Advice, support, negotiation	Empirical support, Increasingly applied
Ethical Regulation	Open commitment to internal belief system	Very effective Being rediscovered! This is the fundamental concept

The Mechanisms

1. Litigation: class actions etc
2. Piggy-back: *Partie Civile*
3. Regulatory Redress
4. Ombudsmen: consumer, property
5. Administrative Injury Schemes

Performance Indicators

1. **Advice.** To what extent does the mechanism enable consumers to access advice before or during the processing of their complaint? To what extent also does the system provide advice to traders, especially small traders who may not be familiar with the law or dispute resolution options or processes, so as to achieve swift, cost-effective and fair resolutions?
2. **Identification of infringement and harm.** How is it that a problem involving breach of law and/or damage has occurred is identified?
3. **Identification of people harmed and due redress.** Must individuals come forward, or can they be identified without coming forward?
4. **Access.** To what extent is the mechanism user-friendly for consumers or claimants to access?
5. **Cost to access.** What cost must a person who claims to have suffered harm pay, and fund, in order to access the process? Or is access free?
6. **Triage.** To what extent does the mechanism act as a triage to prevent unmeritorious cases or unnecessary cases proceeding further? This may include, at one extreme, preventing fraudulent claims being advanced and, at the other extreme, to swiftly resolving cases that should be resolved one way or the other?
7. **Duration.** How long does the mechanism take from start to conclusion? How long does it take to resolve issues, from when they first arose (i.e. when damage occurred, before a claim was made) to final resolution?
8. **Costs.** How much are the gross transactional costs of a collective procedure, and the standing costs of a process? Who bears the costs, both initially, and finally?
9. **Outcomes.** What is achieved? Are the outcomes the ones desired by the parties, the law, or society?
10. **Compensation for loss: making whole.** Is a person who has suffered harm fully recompensed? How much of an award is lost in transactional costs, e.g. of intermediaries? Are extra emotional or other costs incurred and recompensed?
11. **Changes in Behaviour.** Does the mechanism directly produce changes in systemic behaviour that reduces the incidence or future risk of non-compliance with the law? To what extent does the mechanism, therefore, act as a regulatory mechanism?



Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013)

Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015)

Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014)

Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497 (2016)

John C Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press, 2015)

Christopher Hodges, *US Class Actions: Theory and Reality* EUI Florence working paper 2015/36 (ERC ERPL 14) <http://hdl.handle.net/1814/36536>

Safeguards in Collective Actions

<ul style="list-style-type: none"> • Stand-alone instead of follow-on • Opt-in instead of opt-out • Restriction of standing to certified personnel • Independent governance 	<ul style="list-style-type: none"> • Certification by Court • Certification criteria • Notice to class members • Judge not jury 	<ul style="list-style-type: none"> • Identify common issue(s) • Adequacy of representation • Superiority of the collective procedure • Prioritisation of other pathways • Evaluation of merits 	<ul style="list-style-type: none"> • Loser pays • No contingency fees or third party litigation funding • Identical damages • No punitive damages 	<ul style="list-style-type: none"> • Court approval of settlement • Court approval of lawyers' fees
---	---	---	---	---

R. Money-Kyrle and C. Hodges, 'Safeguards in Collective Actions' (2012) 19.4 *Maastricht Journal of International and Comparative Law* 477-504

Class actions:

Belgium, Bulgaria, Denmark, England and Wales, Finland, France, Israel, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden

Group proceedings:

Austria, England and Wales, Germany, Switzerland

Each national model is different!

Role local legal culture!

Jurisdiction	Year of introduction	Act	Number of cases
Portugal	1995	Law 83/95 of August 31, 1995 on the right to take part in administrative proceedings and the right of popular action	179 filed (2007 – 2015) 29 pending in 2015
Lithuania	2002	2015 Amendments to the Code of Civil Procedure (introduction of group legal actions)	- 3 dismissed - 2 pending (January 2015 – August 2017)
Sweden	2003	2003 Group Proceedings Act	30-50 (2003 – 2017)
the Netherlands	2005	2005 Dutch Collective Settlement Act	9 (2005 – November 2017)
Finland	2007	2007 Class Action Act	0
Denmark	2008	Chapter 23a (§254a-254k) Administration of Justice Act	- 66 decided cases before the district courts - 3 decided cases before the courts of appeal (2008 – 2016)
Italy	2010	2009 Law no. 99 – Article 140bis Italian Consumer Code	50-100 (January 2010 – November 2016)
Poland	2010	Class Actions Act of 17 December 2009	227+7 (2010 – 2017)

Jurisdiction	Year of introduction	Act	Number of cases
Belgium	2014	2014 Act Introducing a Consumer Collective Redress Action in the Code of Economic Law	- 1 settled - 1 withdrawn - 3 pending (September 2014 – November 2017)
France	2014	Articles L.623-1 et seq. and R.623-1 et seq. of the French Consumer Code (Code de la Consommation) and the similar procedures in health, discrimination, environment, privacy and data protection law	- 2 settled - 9 pending - 1 pending in appeal (October 2014 – November 2017)
England & Wales	2015	2015 Consumer Rights Act (Competition Class Action)	- 1 dismissed - 1 withdrawn (2015 – August 2017)

Defendant	Nature	Number of class members	Opt-in or opt-out	Status
Thomas Cook Airlines Belgium	Delayed airplane	183	Test-Achats asked for opt-out; the court imposed opt-in	Finished (certification decision on April 4, 2016 and final judgment (settlement) in July 2017)
Proximus (telecom company)	Misleading information about digital decoders (for watching digital TV)	+ 30.000 potential class members	Test-Achats asked for opt-out; the court imposed opt-out	Pending (certification decision on April 4, 2017; Proximus appealed)
Volkswagen & d'leteren (Belgian Volkswagen distributor)	Emissions-cheating software	+ 11.000 people registered, but + 400.000 cars are involved	Test-Achats asks for opt-out	Pending (certification hearing on October 30-31, 2017)
Various websites reselling concert tickets	Illegal reselling of concert tickets	2.650 people registered	Test-Achats asks for opt-out	Pending (introductory hearing on September 4, 2017)
Belgian Rail	Compensation for delayed trains (during strikes)	44.000 people registered		Case was withdrawn (most passengers were compensated and there was an agreement between Test-Achats and Belgian Rail allowing Test-Achats to help improve the existing compensation system)

Case	Year	Nature	Number of class members	Funding	Settlement	Fee for association
Des	2006 2014	Product liability	N/A (17.000 registered)	Subsidies & donations	€ 38 mil	N/A
Dexia	2007	Financial product	300.000 (25.000 opt-outs)	€ 45 Contribution per class member	€ 1 bil	N/A paid by Dexia
Vie d'Or	2009	Financial product	11.000	Funding by regulator	€ 45 mil	€ 8,5 mil (max) paid by regulator
Shell	2009	Securities	500.000	Funding by Shell	\$ 448 mil	\$ 12 mil (association) \$ 47 mil (U.S. lawyers)
Vedior	2009	Securities	2.000	Contributions	€ 4 mil	€ 212.000 (maximum)
Converium	2012	Securities	12.000	Funding by defendants	\$ 58 mil	€ 1,6 mil \$ 11,6 mil (U.S. lawyers)
DSB Bank	2014	Financial product	345.000 (300 opt-outs)	Funding by DSB Bank	€ 500 mil maximum	N/A paid by DSB Bank

Case	Year	Nature	Number of class members	Funding	Settlement	Fee for association
Des	2006 2014	Product liability	N/A (17.000 registered)	Subsidies & donations	€ 38 mil	N/A
Dexia	2007	Financial product	300.000 (25.000 opt-outs)	€ 45 Contribution per class member	€ 1 bil	N/A paid by Dexia
Vie d'Or	2009	Financial product	11.000	Funding by regulator	€ 45 mil	€ 8,5 mil (max) paid by regulator
Shell	2009	Securities	500.000	Funding by Shell	\$ 448 mil	\$ 12 mil (association) \$ 47 mil (U.S. lawyers)
Vedior	2009	Securities	2.000	Contributions	€ 4 mil	€ 212.000 (maximum)
Converium	2012	Securities	12.000	Funding by defendants	\$ 58 mil	€ 1,8 mil \$ 11,6 mil (U.S. lawyers)
DSB Bank	2014	Financial product	345.000 (300 opt-outs)	Funding by DSB Bank	€ 500 mil maximum	N/A paid by DSB Bank

- Procedural design flaws (not an effective/efficient instrument, but a “(political) compromise”); eg.:
 - certification hurdles
 - appeal procedures / long duration
 - irrevocable opt-in or opt-out
 - distribution of damages
- Safeguards – catch 22-situation
- Lack of appropriate funding and financing
- Good outcomes? is redress being offered or achieved?

Piggy-back

- public enforcement, criminal trial initiated by Public Prosecutor
- victim who wants redress / damages:
 - no formal party to the criminal proceedings (only a witness) (eg, in the US)
 - party to the criminal proceedings if allowed by judge (eg, Germany & the Netherlands)
 - in Belgium & France: formal party to the criminal proceedings
- initiating civil claim before criminal judge
- piggybacking on the (evidence brought forward by the) Public Prosecutor

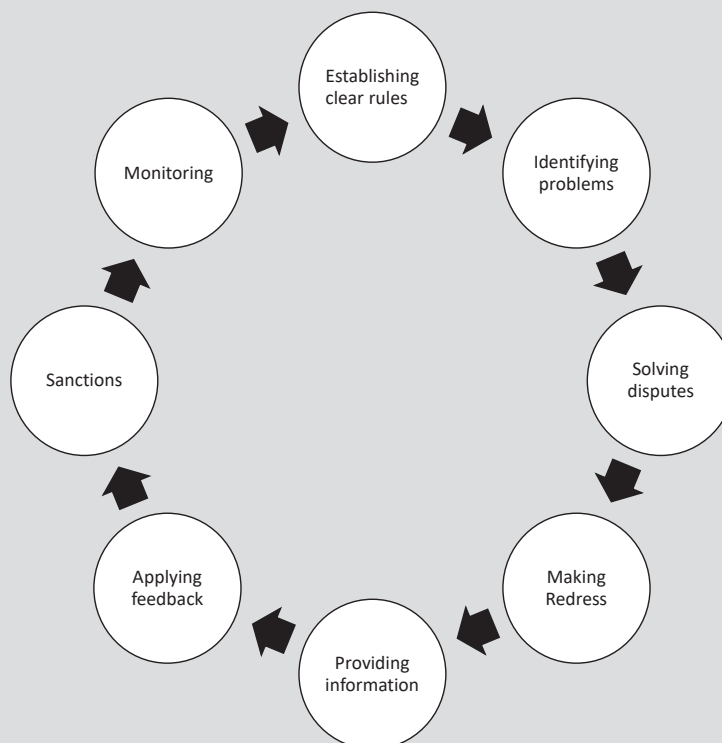
Regulatory Redress

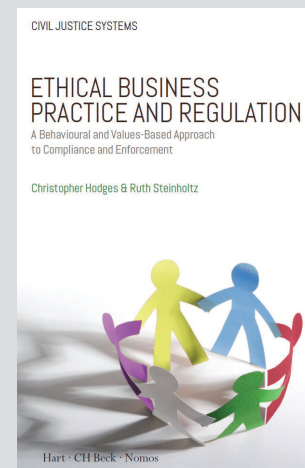
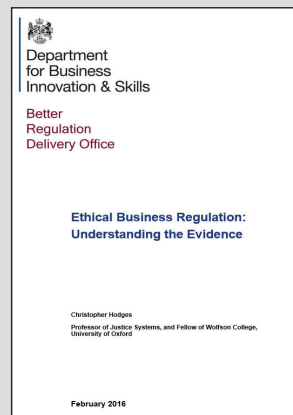
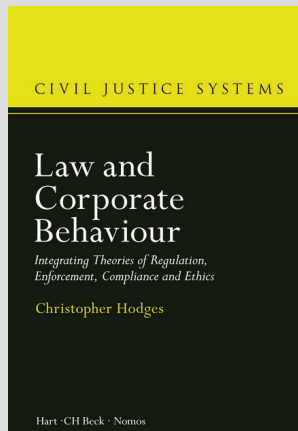
- Redress ordered or brought about by the intervention of public enforcers
- Single integrated process of response to problems
- Power to effect redress as one of the enforcement tools
- Regulators viewing redress as a key objective
- In practice: negotiated solutions
- Safeguards to protect the independence of the public enforcement agencies

Market Objectives

1. Identification of individual and systemic problems
2. Cessation of illegality
3. Decision on whether behaviour is illegal, unfair or acceptable
4. Identification of the root cause of why the problem occurs
5. Identification of what actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk
6. Application of the actions (a) by identified actors (b) by other actors
7. Dissemination of information to all (a) firms (b) consumers (c) other markets
8. Redress
9. Sanctions
10. Ongoing monitoring, oversight, amendment

Which mechanisms deliver these objectives? And do it best?





Regulatory Redress

Denmark

- Consumer Ombudsman: unique opt-out class action since 2008 and antitrust 2010; no action yet brought, but the power constantly influences discussions and resolution of cases

UK

- Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006)
→ Enforcement and Sanctions Act 2008
- Redress powers:
 - Financial Services and Markets Act 2000, s404 [consumer redress scheme] and s404F(7) [single firm scheme]
 - Energy Act 2013
 - Competition: CRA 2015: CMA power to approve a scheme
- Redress through licence conditions: water, gambling...
- Consumer: Consumer Rights Act 2015: *Enhanced Consumer Measures*

EU

- DG COMP in Deutsche Bahn case
- Financial services: cases by Central Banks in Ireland, Italy
- Energy: cases by Italian regulator
- EU harmonisation of consumer enforcement policy and powers: 2017 revision of CPC Regulation

NB Change in enforcement policy from deterrence to achieving outcomes through support: Better Regulation

**OFGEM secures £1.7 million for
consumers following E.ON error**

*BT must pay nearly £100m to
rivals after overcharging*

**BT FACES
£94M IN
REPAYMENTS
FOR
OVERCHARG-
ING**

OFFICE OF THE GAS AND ELECTRICITY
MARKETS (OFGEM) RESTORATIVE JUSTICE
POWERS IN ACTION—SECURING PAYBACK
OF AROUND £1.4 MILLION GBP FROM E.ON

**Barclays refunds
300,000**

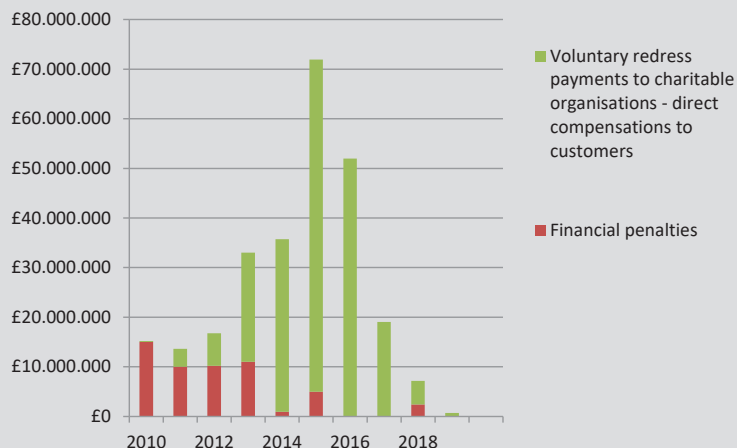
customers after blunder

*Npower pays £3.5m
Ofgem penalty out to customers*

**E.ON forced to hand back
£1.7m after overcharging**

**BT forced to refund
rivals £100m for
overcharging**

CENTRE FOR SOCIO-LEGAL STUDIES



(Ofgem) (UK Office of Gas and Electricity Markets)

UK Consumer Protection Enforcement Policy - Consumer Rights Act 2015

Civil *Enhanced Consumer Measures* available to enforcers:

- Enforcement Orders; Undertakings
- Toolbox approach with traditional criminal measures

Objectives

- Deliver redress
- Improve compliance
- Increased information to consumers to enable exercise choice

Flexibility but Requirements:

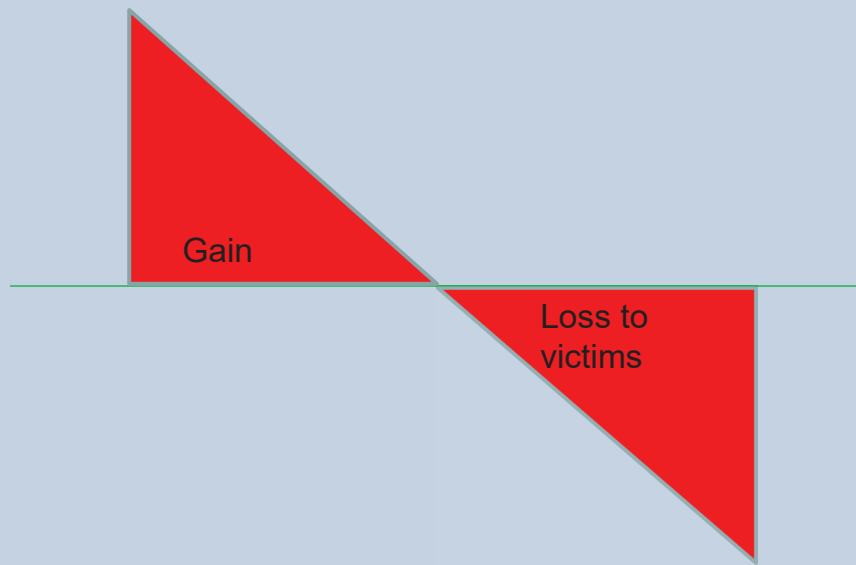
- Measures must be just, reasonable and proportionate

Enforcers: Competition and Markets Authority, Trading Standards Services in Great Britain, Department for Enterprise, Trade and Investment in Northern Ireland, Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, Ofcom, Ofwat, Ofgem, Phonepay Plus, The Information Commissioner, Office of Rail Regulation, the Financial Conduct Authority, community enforcers under the Injunctions Directive, Secretary of State for Health, Department of Health, Social Services and Public Safety in Northern Ireland.

C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Redress' [2015] 23(5) *European Review of Private Law* 829; See *Enhanced Consumer Measures. Guidance for enforcers of consumer law* (Department for Business Innovation & Skills, 2015)

Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Final Report
(Australian Law Reform Commission, 2018)

Maintaining a level playing field



CIVIL JUSTICE SYSTEMS

Consumer ADR in Europe

Civil Justice Systems

Christopher Hodges
Iris Benöhr and
Naomi Creutzfeldt-Banda

C.H. Beck - Hart - Nomos



ADR

- ADR: alternative dispute resolution
- mediation
- arbitration
- conciliation
- court-connected and not court-connected
- ODR: online dispute resolution
- Consumer or Property Ombudsmen
- Redress schemes



CENTRE FOR SOCIO-LEGAL STUDIES



Functions of an Ombudsman

- Information to consumers
- Triage
- Information to businesses
- Investigating complaints
- Platform for mediation between parties
- Making a decision
- Aggregating data, feedback, intervention with businesses & regulators

Belgium – Consumer Mediation Service

total number of treated cases	7.105
total number of cases for which the Consumer Mediation Service was competent	4.342
total number of cases for which the Consumer Mediation Service was not competent	2.763
total number of cases that were referred to another competent entity	2.374
total number of cases that could not be transferred to another competent entity (eg, for non C2C cases)	389

settlement	1.307 (50%)
complaint stopped	342 (13%)
recommendation	956 (37%)

Recommendation followed	Recommendation partially followed	Recommendation not followed	No answer
14,4%	3,6%	20,2%	61,8%
138	34	193	591



KU LEUVEN

CENTRE FOR SOCIO-LEGAL STUDIES

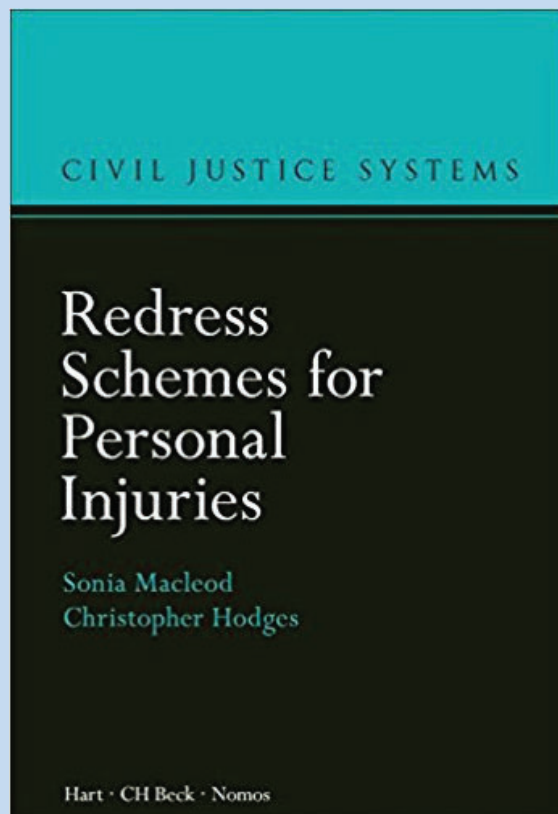


	Initial enquiries & complaints	New cases	Cases resolved informally by adjudicators	Cases resolved by ombudsman decision
2017/18	1,456,396	339,967	400,658	32,780
2016/17	1,394,379	321,283	336,381	38,619
2015/16	1,631,955	340,899	398,930	39,872
2014/15	1,786,973	329,509	405,202	43,185
2013/14	2,357,374	512,167	487,749	31,029
2012/13	2,161,439	508,881	198,897	24,332
2011/12	1,268,798	264,375	201,793	20,540
2010/11	1,012,371	206,121	147,434	17,465
2009/10	925,095	163,012	155,591	10,730
2008/09	789,877	127,471	105,275	8,674
2007/08	794,648	123,089	91,739	7,960
2006/07	627,814	94,392	104,831	6,842
2005/06	672,973			
2005	614,148			
2004	562,340			
2003	562,340			



Collaboration between Ombudsmen and Regulator

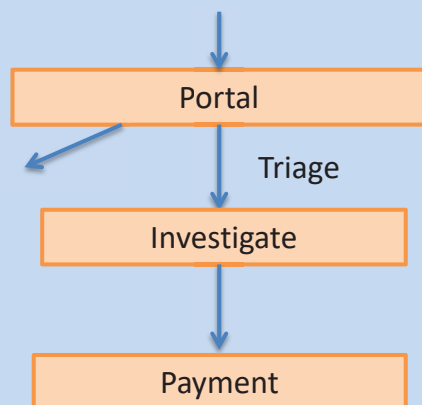
1. Ombudsman identifies a number of similar claims – a trend;
applies a consistent approach to resolution
2. Ombudsman publishes information on complaints activity
3. Reactions:
 1. Traders: ability to correct
 2. Consumers: buying choices, switching
 3. Competitors: market response
 4. Media/market comment: reputation
 5. Regulators: appropriate scrutiny and action
4. Regulator discussion with companies:
 1. Power to make trader review records and pay redress, with claims over to the ombudsman
 2. Power to impose redress scheme
 3. Oversight of voluntary/scheme redress: enforced
 4. Consumers may go spontaneously to ombudsman



Personal Injury Compensation Schemes

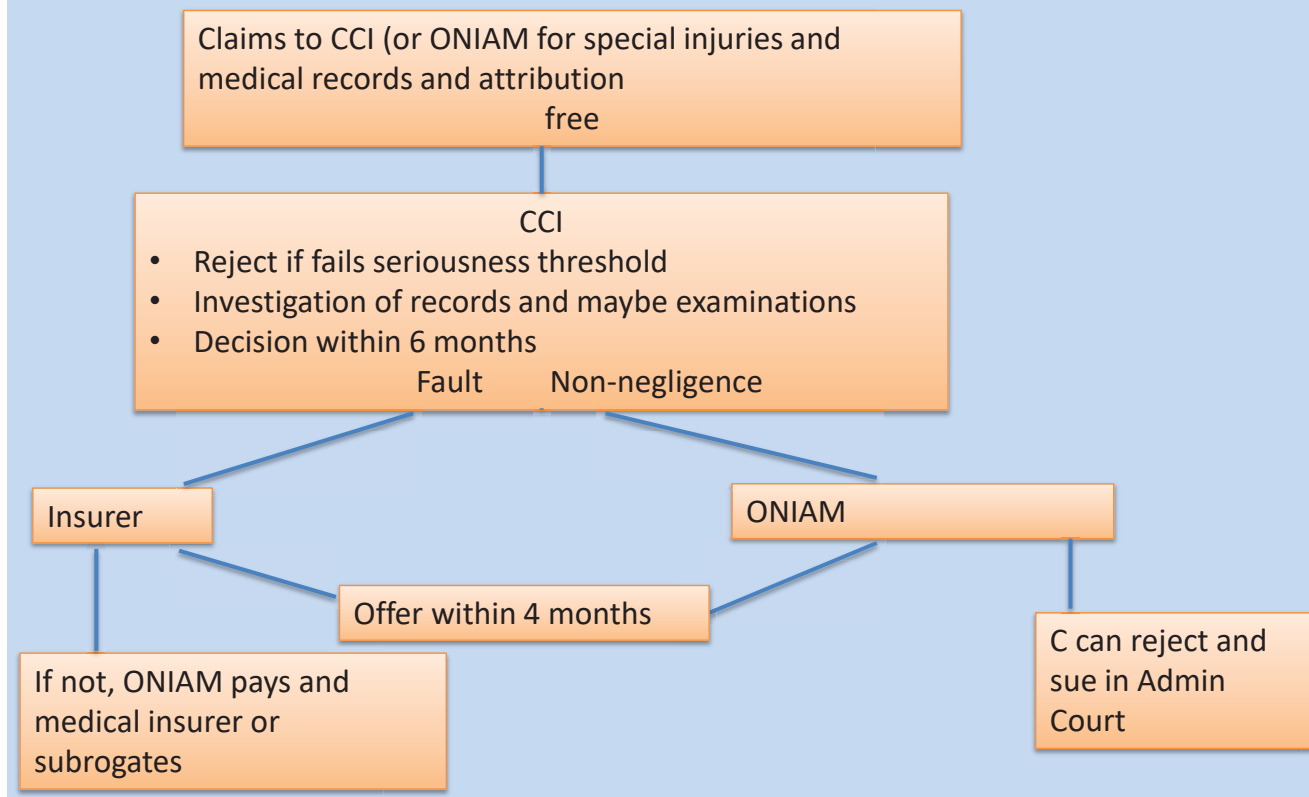
- New Zealand Accident Compensation Scheme
- Australian workers compensation
- Swedish Road Traffic Injuries Commission
- Swedish Patient Compensation
- Swedish Drug Insurance
- Danish Industrial Injuries Board
- Danish Road Traffic, Patient & Drug Compensation
- Finnish Workers Compensation, Motor Vehicle Insurance Commission, Patient & Drug Insurances
- Norwegian Patient & Drug Compensation
- *L' Office National d'Indemnisation des Accidents Médicaux, des affections iatrogènes et des infections nosocomiaux (ONIAM)*
- Polish No-Fault Medical Liability Scheme
- German Pharmapool
- German medical Schlichtungsstellen
- Irish Personal Injuries Assessment Board
- Japanese Pharmaceutical Injury Compensation Scheme
- U.S. no fault motor vehicle injuries schemes: Florida, North Dakota, Colorado
- 9/11 Compensation funds
- Vaccine Injury Compensation Schemes: eg UK, USA, Ebola,
- NICA - Florida Birth-Related Neurological Injury Compensation Association
- Virginia Birth-Related Neurological Injury Compensation Fund
- The Industrial Injuries Disablement Benefit (IIDB)
- The Armed Forces and Reserve Forces Compensation Scheme
- The Criminal Injuries Compensation Scheme
- The Mesothelioma Compulsory Insurance Fund and Compensation Scheme
- The Coal Workers Pneumoconiosis Scheme 1974
- The Coal Health Compensation Schemes
- The Thalidomide Trust
- The Skipton Fund for Hepatitis C and HIV
- The vCJD Trusts
- The ABPI *Guidelines for Compensation in Clinical Trials and Healthy Volunteers*
- The ABHI Clinical Investigation Compensation Guidelines
- The General Dental Council's dental Complaints Service
- Dow Corning breast implant scheme
- Trilucent breast implant scheme
- J&J ASR hip reimbursement programme

Basic model



- Portal for complainants
 - Information and assistance
 - Triage
 - Online submission + upload evidence
- Investigate & Determine Eligibility
- Feedback element
- Payment authorisation
 - Can be from integral or separate fund

France - ONIAM -Process



Sweden Pharma Insurance

Claims Year	Number of claims	Paid	Case reserves	Total costs
1994	378	35,035,104	890,981	35,926,085
1995	380	32,596,766	8,454,552	41,051,318
1996	435	38,090,122	13,882,389	51,972,511
1997	492	39,223,893	3,098	39,226,991
1998	411	15,199,748	6,007,241	21,206,989
1999	352	14,061,161	3,270,689	17,331,850
2000	620	16,898,274	200,812	17,099,086
2001	1,208	53,965,880	3,870,205	57,836,085
2002	850	32,191,185	9,155,004	41,346,189
2003	590	23,026,808	10,792,753	33,819,561
2004	625	33,657,219	8,949,251	42,606,470
2005	698	24,158,664	3,518,600	27,677,264
2006	534	18,519,153	17,374,656	35,893,809
2007	568	25,146,019	15,915,586	41,061,605
2008	557	25,199,640	30,961,462	56,161,102
2009	514	18,657,178	11,913,998	30,571,176
2010	647	23,941,153	5,463,075	29,404,228
2011	755	40,462,946	56,259,341	96,722,287
2012	932	40,183,396	49,963,181	90,146,577
2013	906	29,921,528	25,081,018	55,002,546
2014	748	22,665,410	31,452,188	54,117,598
2015	716	16,787,665	13,944,043	30,731,708
2016	657	14,740,026	10,887,831	25,627,857
2017	609	9,263,950	8,309,924	17,573,875
2018	560	3,905,526	3,968,493	7,874,019
Mean number of claims	630	647,498,413	350,490,371	997,988,784
Average claim				63,397

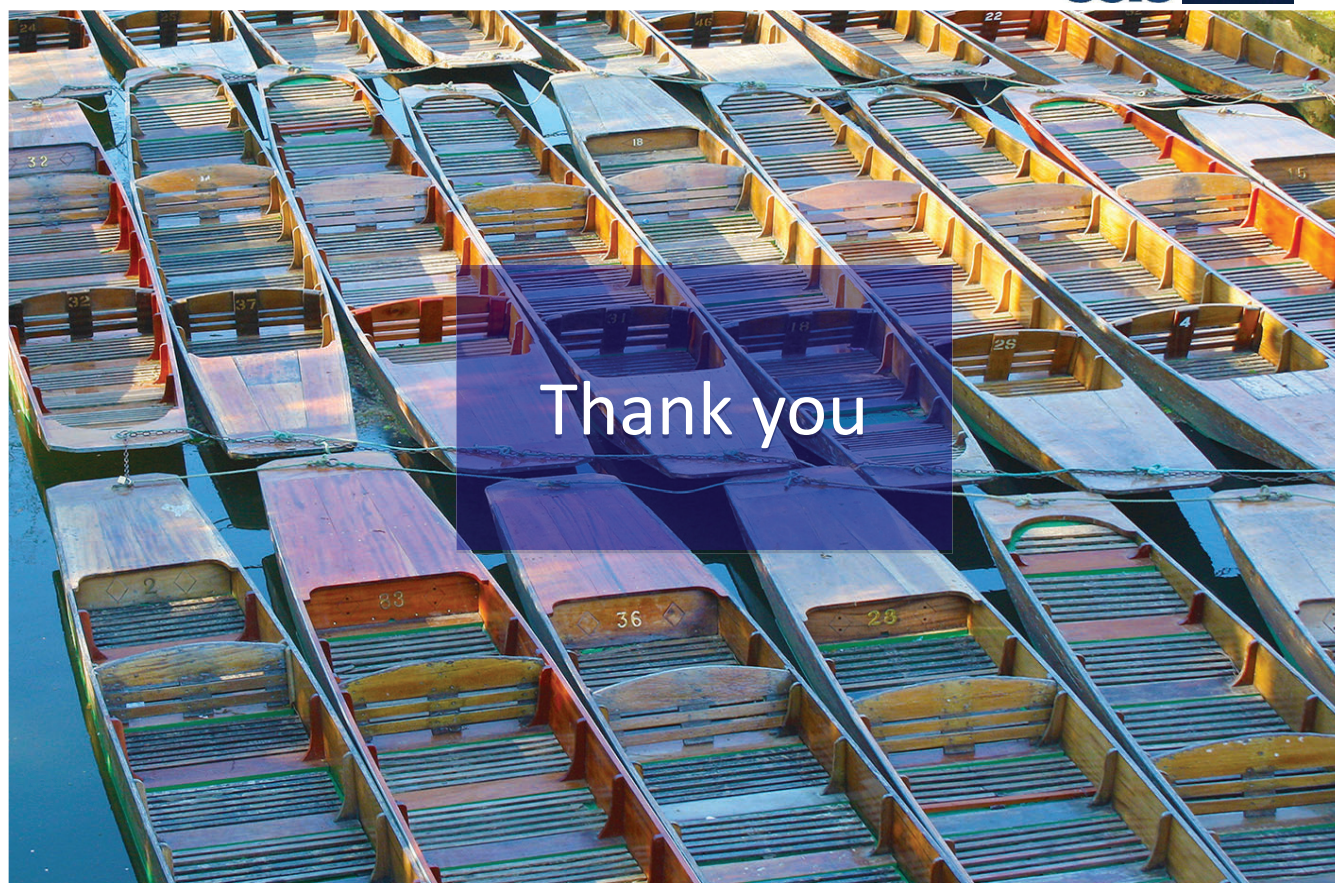
Nordic Pharmaceutical Schemes

Number (Made/Accepted) and Cost of Claims

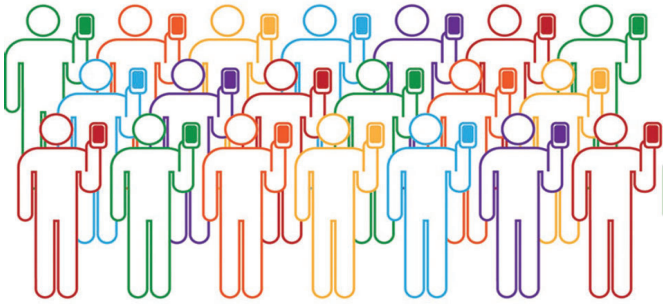
	Sweden		Denmark		Finland		Norway	
2015	716	630m Skr	862	55.7m DKK	230	2.26m €	125/6	99.2m £
2016	657	607m	1003	46.4m	173	3.53m	124/4	104.4m
2017	609	618m	910	50.0m	182	3.54m	146/3	105.3m
2018	560	598m			190	2.05m	123/3	110m
Acceptance rate of drug claims	40%		26%		27%		Main rule 35% Infection rule 62%	

Follow the Empirical Evidence

Mechanism	Collective Action	Piggy-back	Regulatory Redress	Simple ADR	Consumer Ombudsman
1. Advice	2	1	1	0	3
2. Identification of infringement	0	0	1	0	3
3. Identification of people harmed	2	0	2	0	2
4. Access	2	3	3	2	3
5. Cost to access	1	3	3	2	3
6. Triage	1	0	0	0	3
7. Duration	1	2	3	-	3
8. Costs	1	2	3	-	2
9. Outcomes	3	3	3	-	3
10. Compensation	2	3	3	-	3
11. Behaviour change	1	1	3	0	3
Total	16	18	25	4	31



WHAT EMPIRICAL DATA TEACHES US ABOUT THE CHALLENGES AND FUTURE OF CLASS ACTIONS: OVERVIEW OF SUCCESSES AND CHALLENGES OVER 25 YEARS IN CANADA



**CLASS ACTIONS LABORATOIRE
SUR LES ACTIONS COLLECTIVES**
FACULTÉ DE DROIT | UNIVERSITÉ DE MONTRÉAL | FACULTY OF LAW

Université 
de Montréal

PROF. CATHERINE PICHÉ

UNIVERSITÉ DE MONTRÉAL, FAC. OF LAW

DIRECTOR, CLASS ACTIONS LAB

PPJ COURSE & CONFERENCE; UNIVERSITY CENTER DUBROVNIK,

DUBROVNIK, MAY 29, 2019

1

CLASS ACTIONS IN CANADA – AT A GLANCE

1. Representation **without mandate + opt-out + collective damages**
2. **Every province and territory** except PEI
3. Federal Court system too
4. Plaintiff-friendly system (loose certification test)
5. Many procedural peculiarities

2

High Volume of Class Litigation



3

The Sixties Scoop Settlement



4

The Tobacco Litigation

- Class estimated at 1 million people
- Claims totalling 20 billion\$
- Largest class action ever in history of Canada
- More than 100 judgments issued to this day
- 16 years of procedures, 2 years of trial
- Court of Appeal decision issued on March 1, 2019
- Insolvencies and ensuing proceedings



5

CLASS ACTION OBJECTIVES

Compensation +

Deterrence & Behav. Modif. +

A2J & Judic. Economy

6

What Is the Class Action's True *Purpose/Objective*?

- For good empirical scholarship, we **must know/define why we need the data** (McGill's Rod Macdonald)
- A2J in Class Actions = ***to compensate* an entity for the harm caused /to permit a group to actually benefit**

7

Who ultimately benefits from class action cases?

- **No empirical data** relative to judicial activity – or outcomes – in Canada
- Class actions have a **major impact** on the system, the courts, the defendants, the market
- Some research about class action outcomes but **results are uncertain** and **anecdotal**



8

Defining the Value of Class Actions

- Theoretical inquiry: what is the *actual recovery* achieved *for the benefit of the class*?
 - Compensation in the class action context is **imperfect**
 - **Successful vs. Optimal** class actions
 - Notion of **rough justice**
 - **Novel framework** for analysis is required

9

Measuring the Value of Class Actions

- **Accessing** the information is difficult
- Data kept **confidential** by settlement administrators
- **Measuring/comparing** the data is challenging
- Judges presented with **one solution** – tend not to question distributions systems
- Lawyers do not have **incentives** to ensure that members are wholly compensated

10

THE CLASS ACTIONS LAB AT UDEM

- Who we are
- What we do



11

3 PROJECTS; LOTS OF DATA

➤ **Class Actions Lab Compensation Project**

- 1306 class action files from 1993-2017 (Qc. Sup. Ct.)
 - 217 cases with compensation data
 - Stats on delays, costs, typology of cases, technology

➤ **Ontario Law Commission Project on Class Actions**

- 956 class action files from 1993-2017 (Ont. Sup. Ct. J.)
 - No data on compensation; some on typology, certification and delays

➤ **Quebec Ministry of Justice Class Actions Project**

- Transformation – Volet Civil - Direction générale des affaires juridiques, législatives et de l'accès à la justice
- Delays, costs & fees, technologies

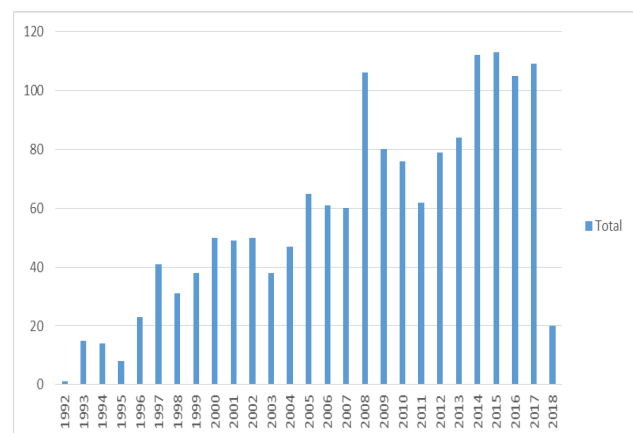
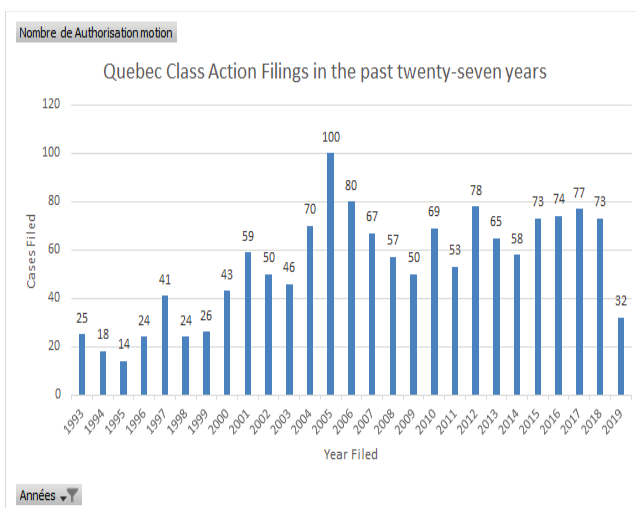
12

Research Goals

1. Appreciate & understand the **value** of class actions
 - How much are members receiving through class actions?
2. Understand **delays**, **types** of cases, structuring and scope of cases, and probability of settlement versus trial too
3. Appreciate whether certain types of cases « **perform** » better than others

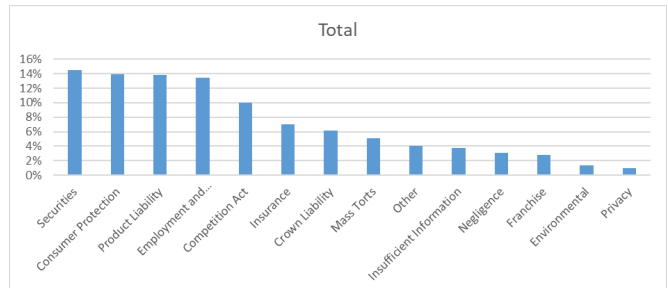
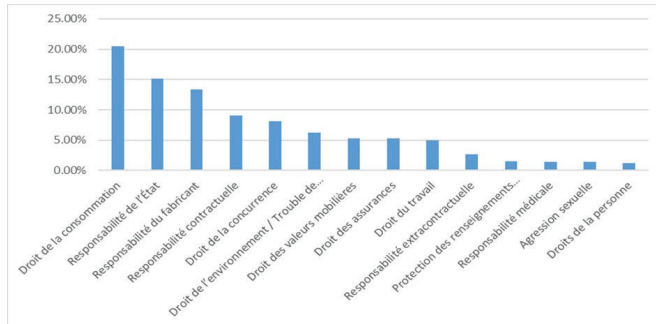
13

VOLUME OF CLASS ACTIONS: QUEBEC VS ONTARIO



14

TYPOLOGY OF CLASS ACTIONS: QUEBEC VS ONTARIO



15

DELAYS



16

Average time...

- **Until certification:**
 - Quebec: 2 years, 185 days
 - Ontario: 2 years, 300 days (2,55?)
- **Between certification and end of case:**
 - Quebec: 4 years, 266 days
 - Ontario: 2 years, 59 days (TBC)
- **To settle a case:**
 - Quebec: 4 years, 110 days
 - Ontario: 4 years, 157 days
- **Between start of proceedings and closing judgment (Qc): 8 years, 92 days**

17

AUTHORIZATION IN QUEBEC

- **Average delay** until auth.: **2 years, 185 days**
- 90/424 were appealed from (21%)
- **Appealing** from authorization incurs an **additional delay** of 1 year, 263 days (+ 1 for S.C.C.)
- **63% of cases are authorized**
- Authorization refused on **lack of appearance of right** (575(2)) in 70% of cases

18

CERTIFICATION IN ONTARIO

- Average delay until cert.: 2 years, 300 days
- 74% of certifications are granted – a large proportion by way of consent
- Cert. denied on common issues and preferability

19

CLASS ACTION SETTLEMENTS (QC)

PROPORTION OF SETTLEMENTS	% of Files
Judgment on the Merits	15,30%
Settlement	82,79%
Special Cases	1,91%
Total:	100,00%

TIME OF SETTLEMENT	% of Files
Before Authorization	60,40%
After Authorization	39,60%
Total:	100,00%

20

ARE MEMBERS COMPENSATED BY CLASS ACTIONS?



21

The Take-Up Rate: Best Measure of Value and Success?



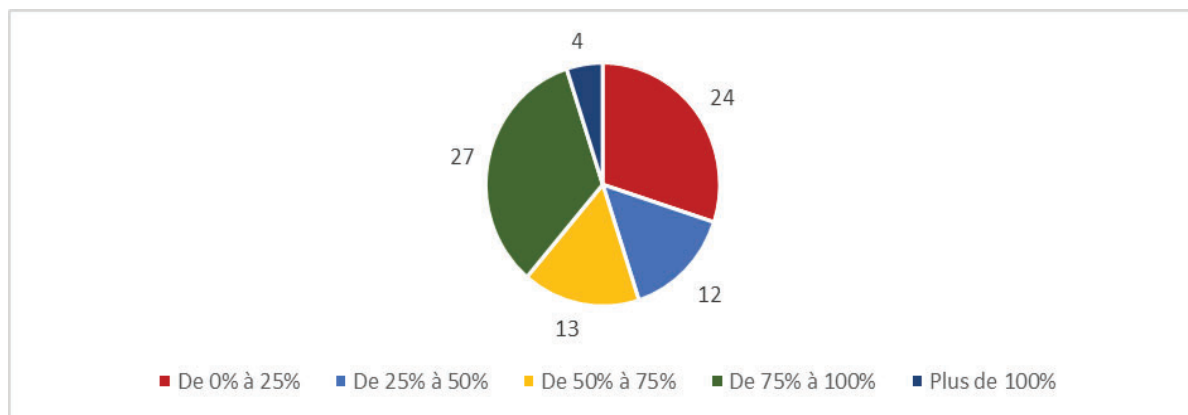
22

56% TAKE-UP RATE IN QUEBEC

- Definition
- Calculation
- Challenges
- (no) comparison

23

IN MORE THAN HALF THE CASES, MORE THAN HALF THE CLASS IS COMPENSATED



24

LARGE SUMS OF MONEY ARE AWARDED TO MEMBERS IN QUEBEC CLASS ACTIONS – GLOBALLY AND INDIVIDUALLY

Total Awards Distributed (Av.)	Individual Member Awards (Av.)
7 939 984,24 \$	13 188,09 \$



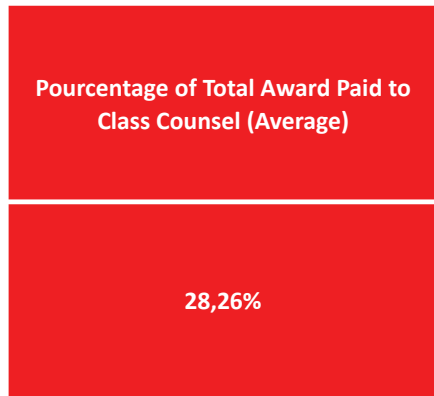
25

THE ART OF CLASS DISTRIBUTION

- **Automatic (Direct) distributions are less frequent but lead to higher take-Up rates:** 86% automatic VS 45% individual
- The most frequent automatic (direct) mode of compensation is the cheque– credit is second
- Generally, when claimants file a claim, they are likely to be paid something (participation rate)

26

1/3 OF THE AWARD IS PAID TO CLASS COUNSEL
(AV.)



27

TECHNOLOGICAL CLASS ACTION NOTICES
LEAD TO HIGHER TAKE-UP RATES



28

Type of Class Notice & Distribution Rates

CATEGORY OF CLASS NOTICE	TYPE OF NOTICE	DISTRIBUTION RATE (av)
Technological Notices (Use of ICT)	Notice Posted on Website of Plaintiff and/or Defendant and/or Claims Administrator	74,57% (12)
	Use of Settlement Website	62,95% (10)
	Email Message	54,76% (3)
	Social Media Advertising	40% (1)
	Keywords and Internet Advertising (Google)	36,59% (3)
	Notice Posted on a Facebook/Twitter Page	15,94% (2)
Direct Notices	Members (or Potential Members) Contacted Individually	69,65% (14)
Direct & Automatic Distributions without Additional Effort Warranted	Automatic Compensation Involved	74,95% (10)

29

In sum, what are the lessons to be had?

- Regarding the challenges facing class actions in Canada and elsewhere...
- Regarding the future of class actions...

30

Thank you!

- Any questions?

Catherine.piche@umontreal.ca

514-343-7052

<http://www.classactionslab.ca/>

31

Civil Litigation in China

- **Prof. FU Yulin**
- **Peking University Law School**
 - 20/3/2018 2-402

Main Contents of Civil Procedure Law

- **Part 1: Basic Systems of Civil Proceedings**

- 1. System of the Court of Second Instance Being the Final Instance
- 2. System of Public Trial
- 3. System of Panel Hearings
- 4. System of Recusal
-
-
-

Procedure Law

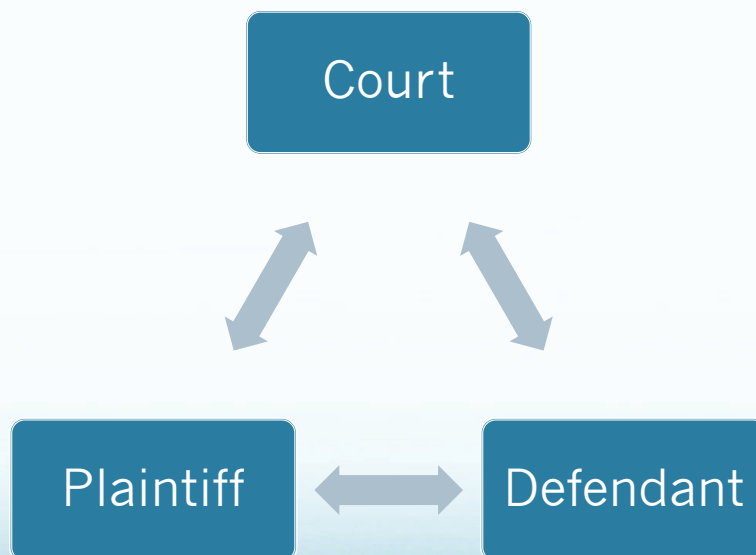
-
- 1. Competence for Civil Litigation
- 2. Jurisdiction for Civil Litigation
- 3. Parties to Civil Actions and Agents ad Litem
- 4. Evidence of Civil Actions
- 5. Time Periods and Service
- 6. Property Preservation and Advance Execution
- 7. Compulsory Measures Against Obstruction of Civil Proceedings
- 8. Litigation Costs

- **Part 3: Procedure for Civil Proceedings**

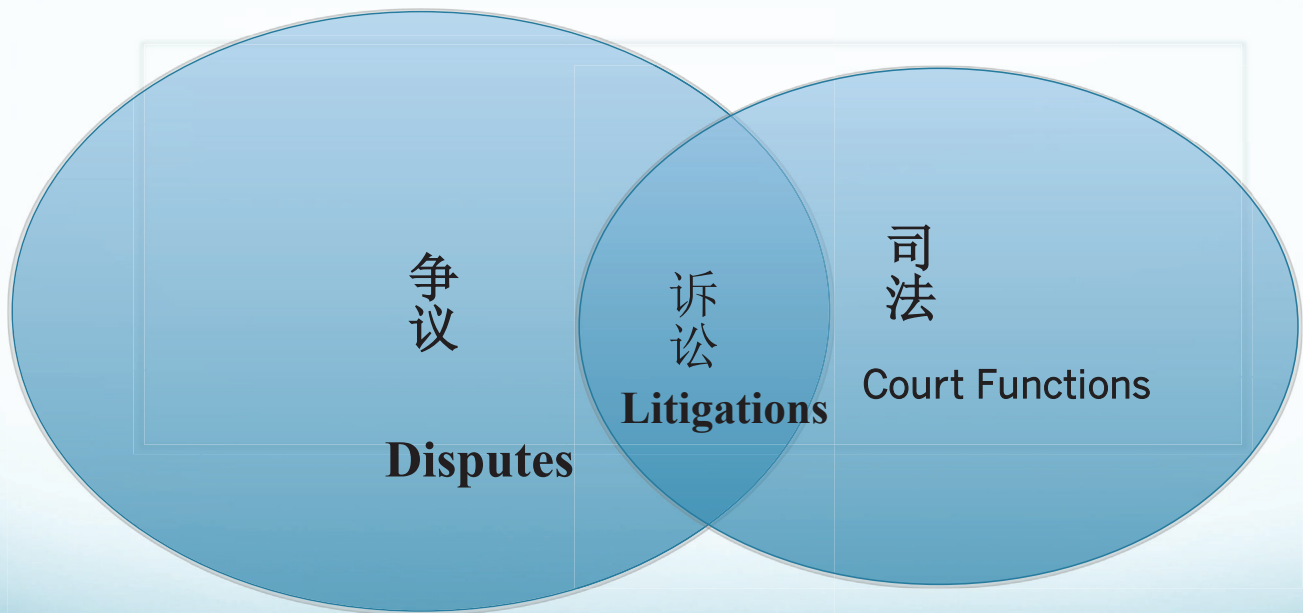
-

- 1. Ordinary Litigation Procedure
- 2. Particular Litigation Procedure
- 3. Procedure of Execution
- 4. Civil Procedure of Cases Involving Foreign Element

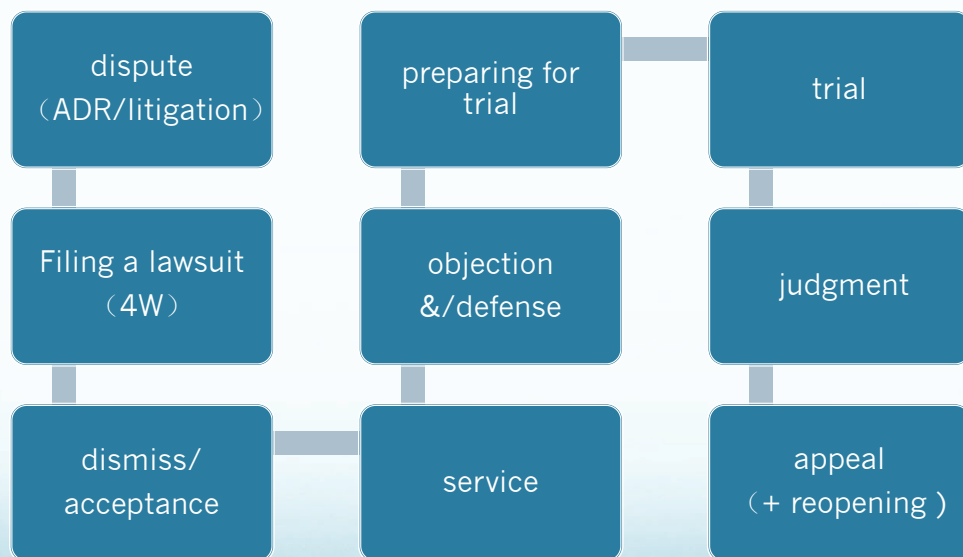
Roles of the Court vs. the Litigants



Relation between disputes and justice or court functions:



Basic Process of Civil Litigation



1.1 Filing-acceptance-defense



1.2 filing-accepting-defending



Plaintiff's suing

- Who sues (standing to sue) ? Sue who (standing to be sued) ? Sue what (claim) ?
- Sue to who and where (jurisdiction) ?



Court's docketing

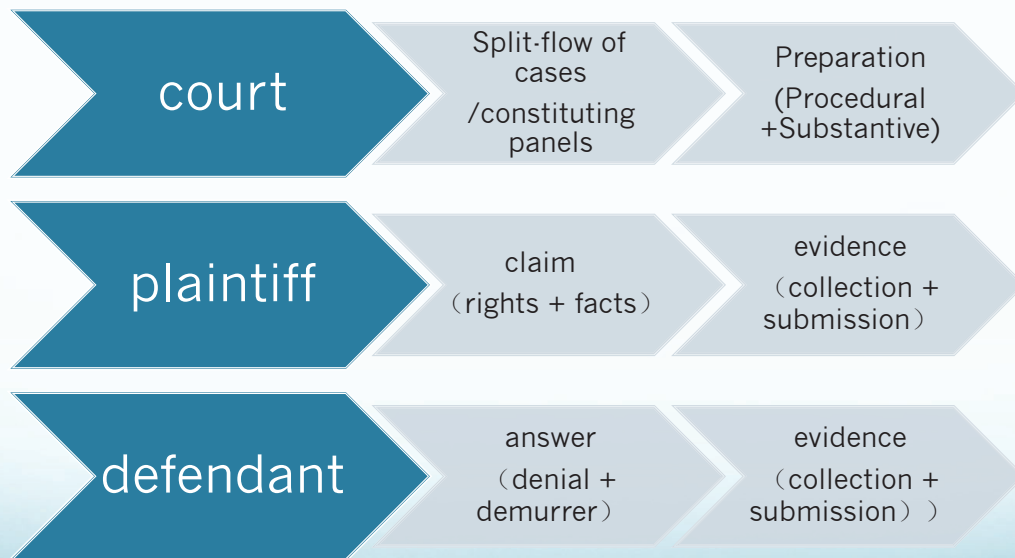
- Registration (requirements + procedures + legal effects)
- Acceptance (requirements + procedures + legal effects)



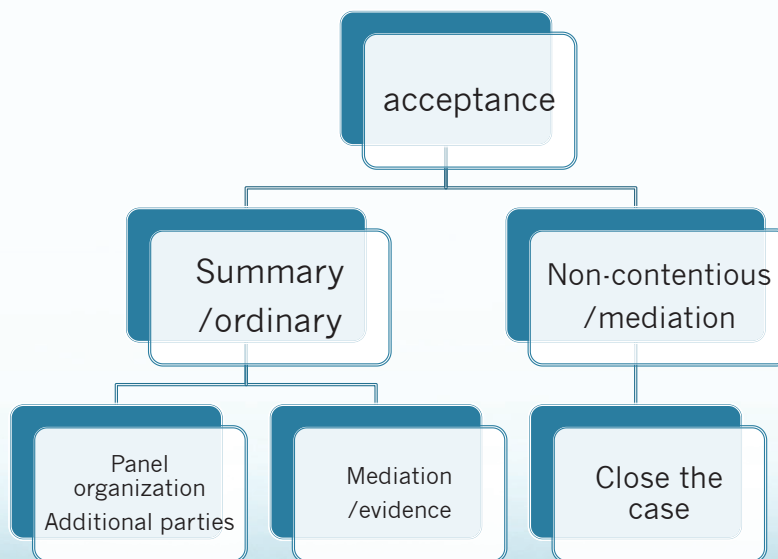
Defendant's answering

- Procedural defense (jurisdiction objection, standings of the parties)
- Substantive defense (denial or/ & demurrer—claim/rights, facts, laws)

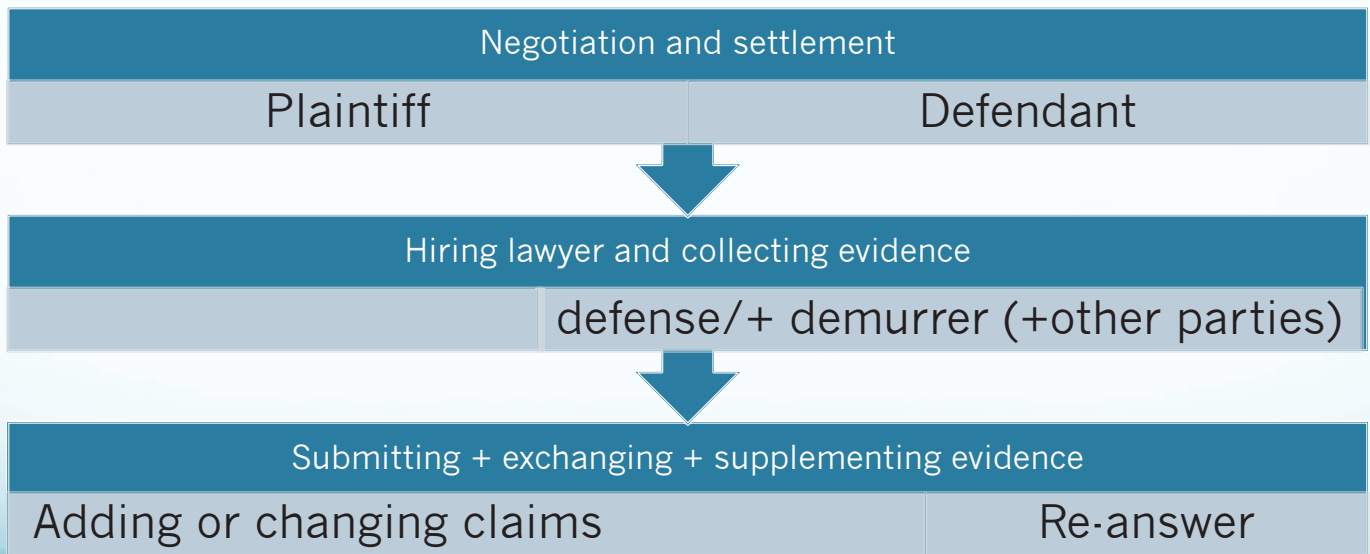
2.1 preparation for trial (pretrial)



2.2 preparation before trial (court)



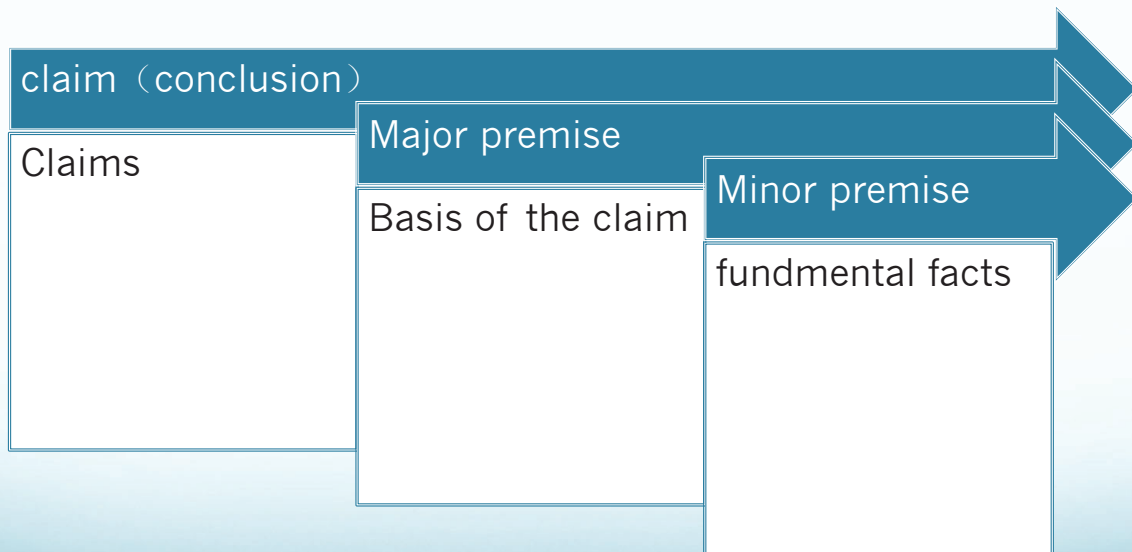
2.3 preparation before trial (parties)



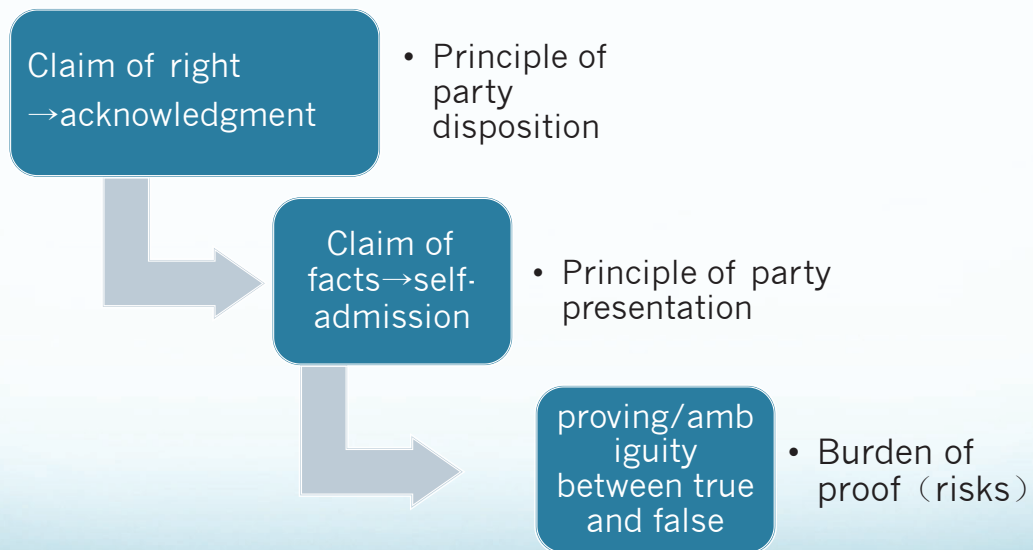
3.1 Trial (basic concepts and structure)



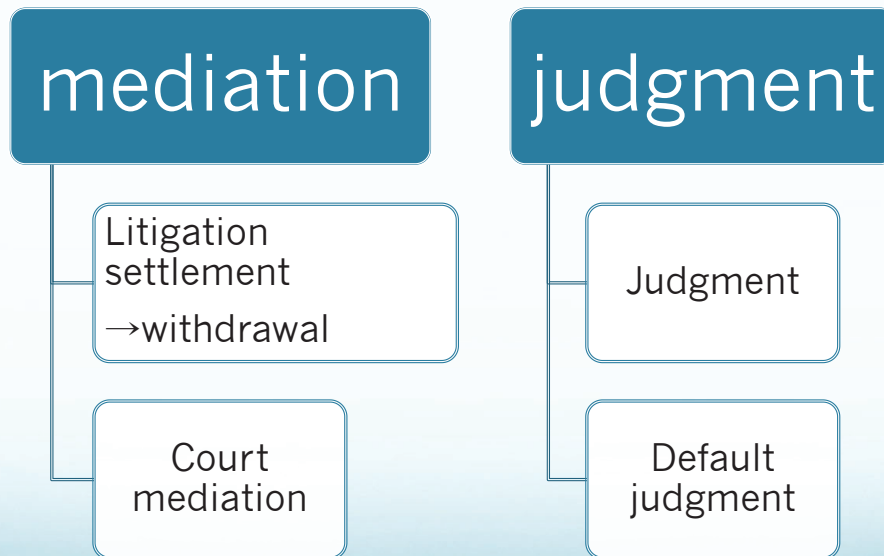
3.2 claim and Trial (basic logic)



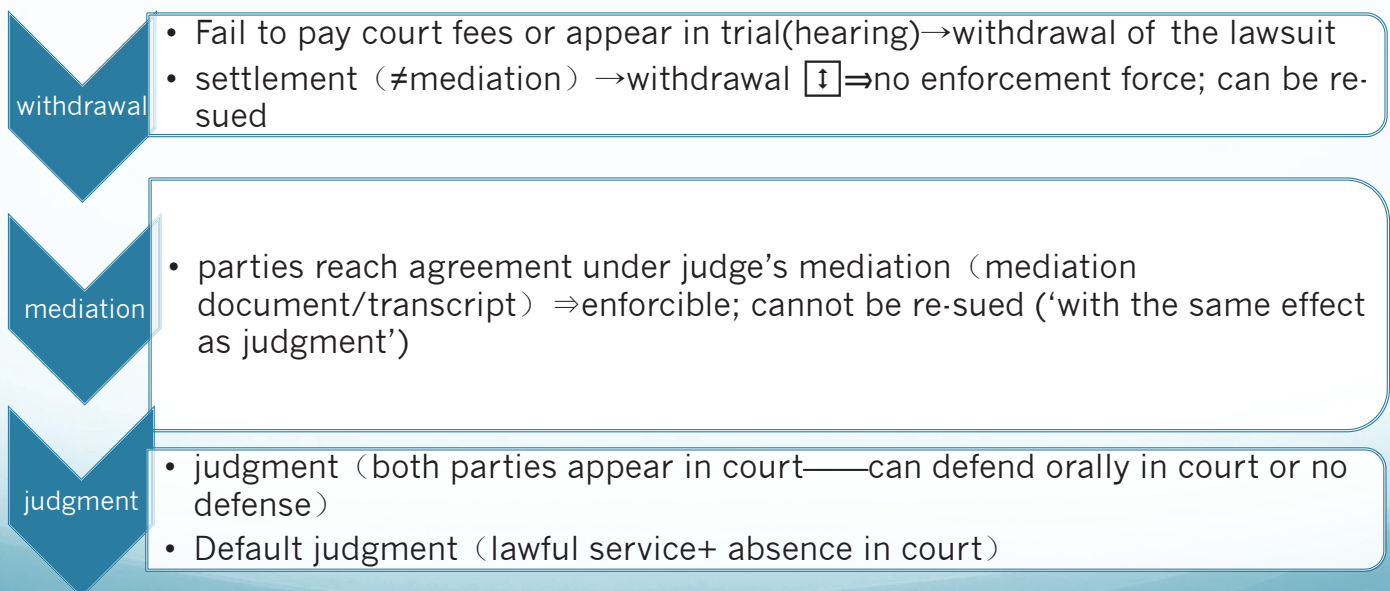
3.3 Trial (claim · proof · judgment)



4.1 settling lawsuits: withdrawal/mediation/judgment



4.2 Disposition of the lawsuit (results and effects)



5. Remedy for Judicial Errors

Attachment to judgment

parties

outsiders

Appeal
(ordinary approach)

Petition—retrial
(Special approach)

removal the relative
part of the effective
judgment

6. Enforcement

From Chinese
court

- Judgment, mediation, order of debt collection
- judicial confirmation of people's mediation
- Provisional orders (injunction)
- Property part of criminal and administrative judgment

Outside
Chinese court

- Arbitration awards or mediation document
- Effective mediation or awards by labor arb.
- Credit confirmed by notary
- Foreign judgment and arbitration award

7. Non-contentious proceeding

1. Introduction
2. Special Procedure
3. the Procedure of Supervision and Urge
4. Procedure for Announcement to Urge Declaration of Claims

The Israeli Class Action – a problematic procedure or an inspiring model?

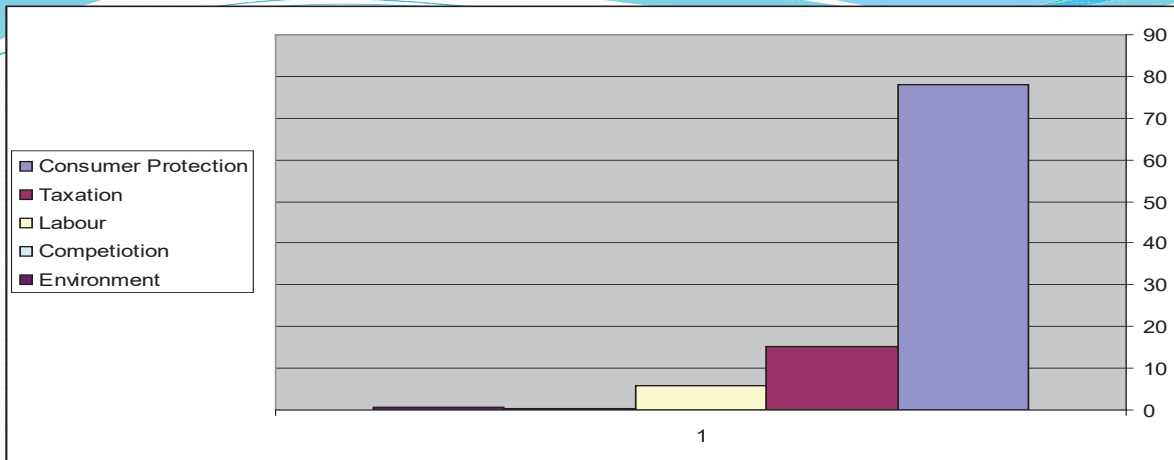
Dr Ariel Flavian
Haifa University
Herzog Fox and Neeman

Empirical data

- In recent years the numbers of claims is between 1500-1250.
- The average amount of claims is between 435,275,100 NIS to 327,442,801 NIS (without 17 actions for 10 milliards which were joined and dismissed). This is between 81,860,700 Euro to 108,818,775 Euro.
- The average outcome is around 3,786,889 NIS which is 946,000 Euro.
- Most actions are voluntary dismissed. (57%) part with little contribution and low attorney fees.
- Part of the actions are settled around (15%).

Empirical data

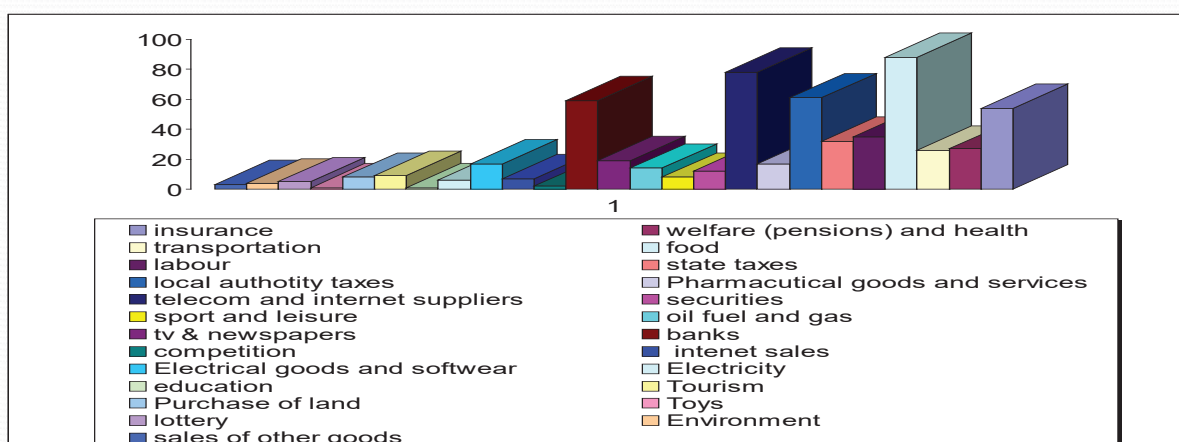
- Less than 1% of the actions are reaching judgment.
- About 25% are dismissed for various reasons.



- 78% of the Actions are – Consumer related.
- 15.3% of the actions are connected to taxation.
- 5.7 % of the actions are labour actions.
- Less than 1% of the actions are competition or Environment actions.

4

The markets subject to class actions



Food	14.4%	Insurance	8.8%
Telecom	12.8%	labour	5.7%
Local taxes	10%	State Taxes	5.2%
Banks	9.7%		

5

• Why there are so many actions in Israel.

- Wide scope
- Wide standing
- Contingency fees
- The opt out mechanism

Safeguards

- A certification procedure
- notice to class members
- online registry
- Supervision on Compromises, and voluntary dismissals.
- Representative replacement
- Subclasses
- Appointment of trustees to distribute damages
- Looser pays principle
- These safeguards do not prevent the flood. A new filter should be introduced.

In Europe

- Why there is such a general resentment from the US Model.
- The Opt in is mechanism is generally preferred of the Portuguese model UK Competition and WCAM).
- No contingency fees. (but third party funding is allowed).
- No private enforcement.
- Regulators work is very appreciated.

Regulators power

- Regulators are already providing collective redress in some European Member States, such as the powers vested in the consumer ombudsman under the Finnish Act, and those invested in the Swedish Consumer Ombudsman.
- The Italian telecoms complaints authority has the power to award damages, as well as the U.K.'s telecommunications regulator, Ofcom, and the medical regulator, the MHRA.

The Super-complaint example

- A complaint by a designated body to the Competition and Market authority (formerly OFT) may end to regulator enforcement measures.
- A finding of illegal behaviour may also lead to follow on action.

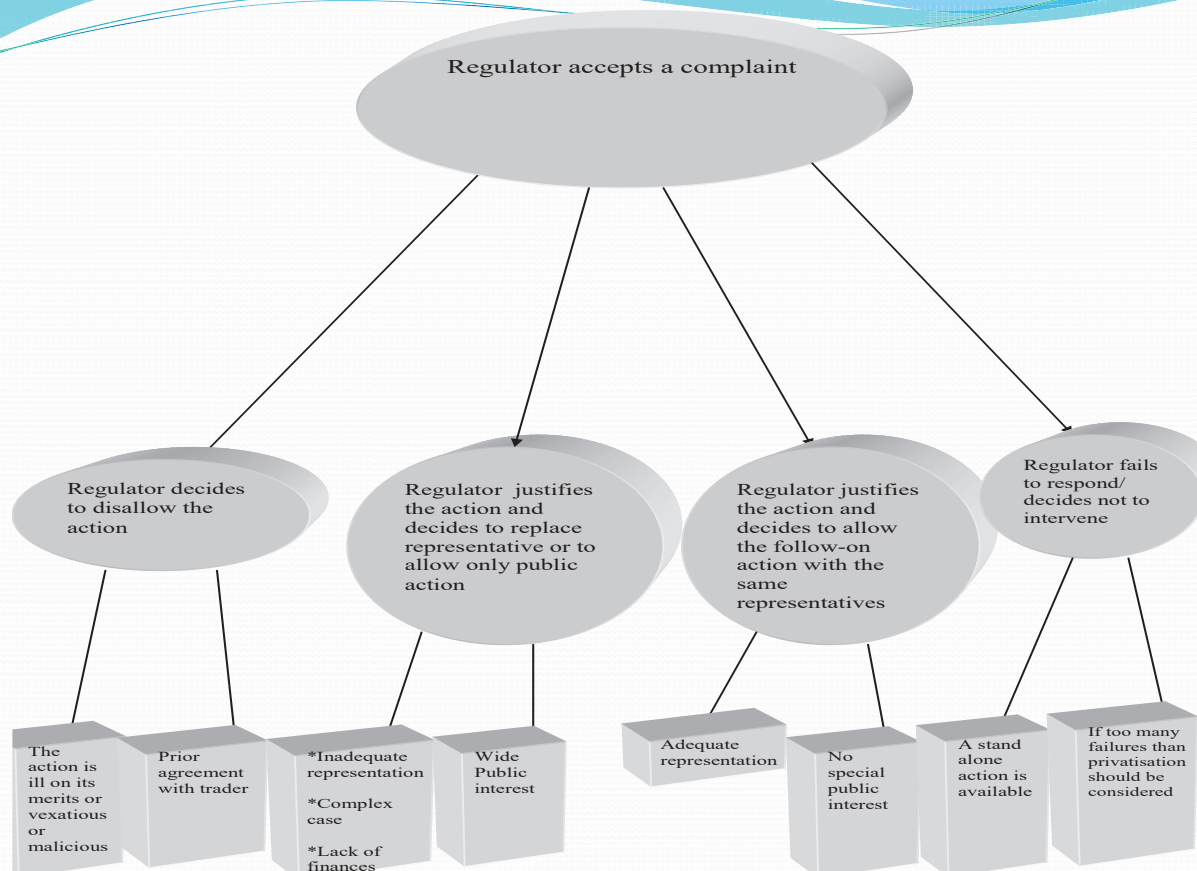
Designated bodies – under the UK's Enterprise Act 2002

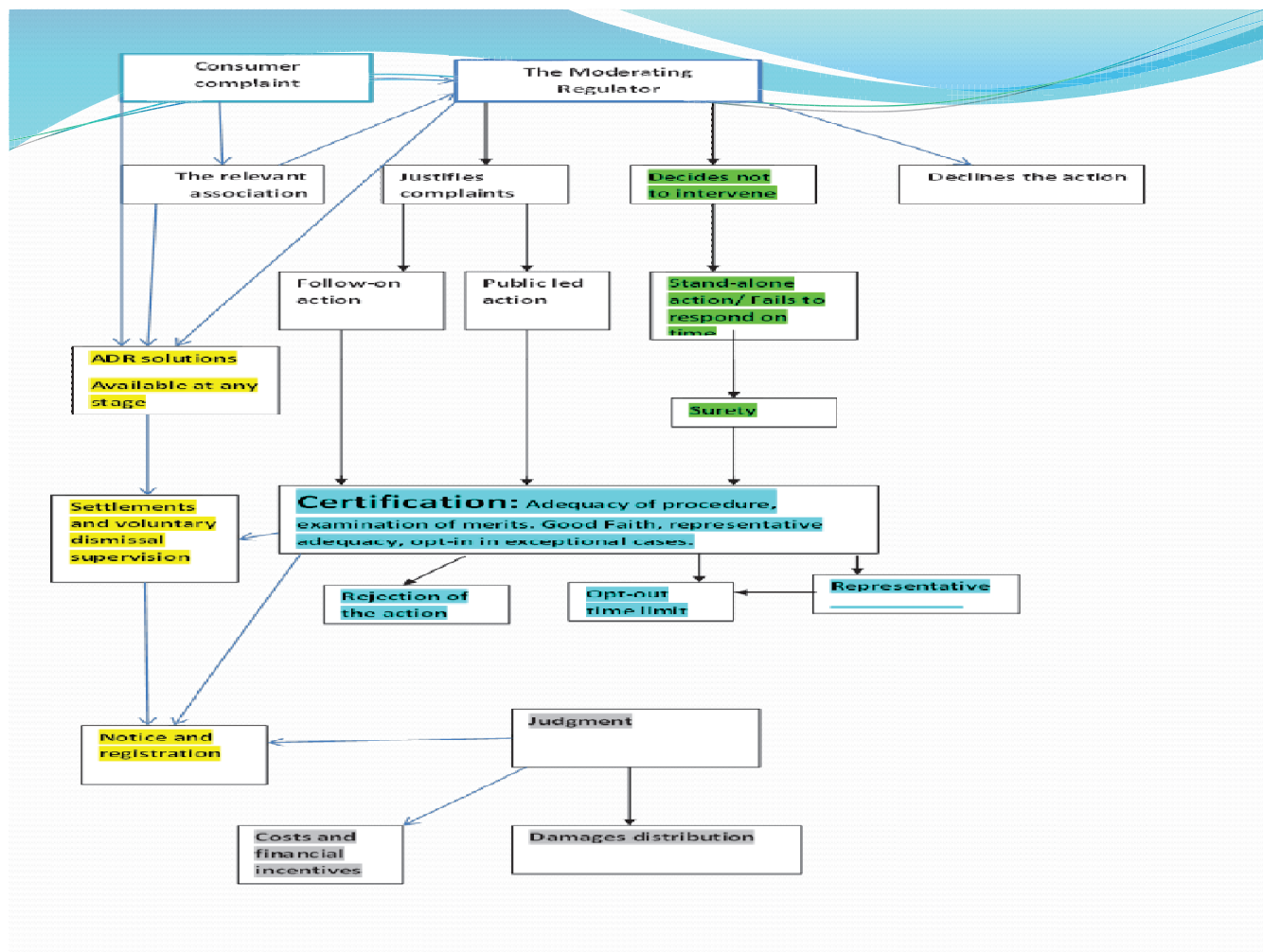
- Which?
 - National Consumer Council
 - Citizens Advice
 - Energywatch
 - Consumer Council for Water (formerly known as Watervoice)
 - Postwatch
 - CAMRA
 - General Consumer Council for Northern Ireland

Bodies designated on 25 June 2018

- Action on Elder Abuse
- Advocacy After Fatal Domestic Abuse
- Centre for Women's Justice
- Children's Commissioner for England
- Criminal Justice Alliance
- Faith Matters
- Galop
- Hestia
- Liberty
- Missing People
- Pathway Project
- Southall Black Sisters
- Suzy Lamplugh Trust
- Tees Valley Inclusion Project
- Welsh Women's Aid
- Women's Aid Federation of England

The Operation of the Regulatory Body





EXPRESSIVE ASPECTS OF COLLECTIVE REDRESS

Dr Rabeea Assy
University of Haifa

TWO (EXTREMELY) ABSTRACT MODELS

European model:

- Professionalism
- Accuracy
- Pursuit of neutrality
- Trust of state

US Model:

- Dispute resolution
- Adversarialism
- Personal autonomy, Private initiative
- Distrust of the State

OPT-OUT CLASS ACTIONS

- Private enforcement of rights
 - +Empowerment of citizens as active actors; distrust of the state; market of enforcement; more imagination?
 - High transactional costs;
- Precision
 - + Potentially more wrongdoers will pay for their wrongs; focus on long term deterrence,
 - less focus on whether right-holders get compensation
- Autonomy
 - +/- class members do not have to give express consent

OPT-IN MECHANISM

- Trust of State
- Focus on who gets compensated.

Trade, Treaties and Truces. Damage Redress in pre-modern Europe

Dubrovnik, 30 May 2019

Louis Sicking l.h.j.sicking@hum.leidenuniv.nl or l.h.j.sicking@vu.nl



Universiteit Leiden



Introduction

- Project: Maritime Conflict Management in pre-modern Europe
- Central question; related questions
- The role of reprisal: collective liability

Fuenterabía



Emperor Michael VIII Paleologus (r. 1261-1282)



Management of Conflicts: Treaties

Examples of Treaties between

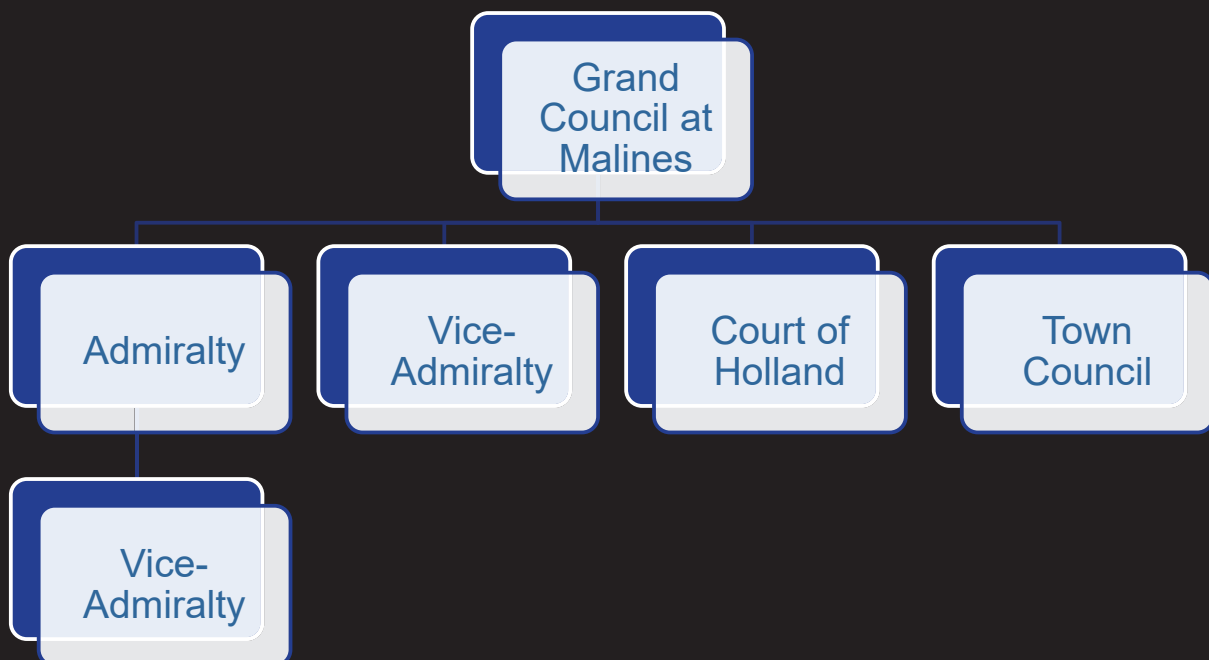
- Byzantine empire & Genoa: 1261 & 1272
- Byzantine empire & Venice: 1265, 1268, 1277
- Hafsids & Pisa: 1133-1397, 13 treaties

Bilateral commissions

Examples more in detail:

- Truce England & Castile 1311
- Truce of Bomy between France & the Netherlands, 30 July 1537

A network of legal institutions?



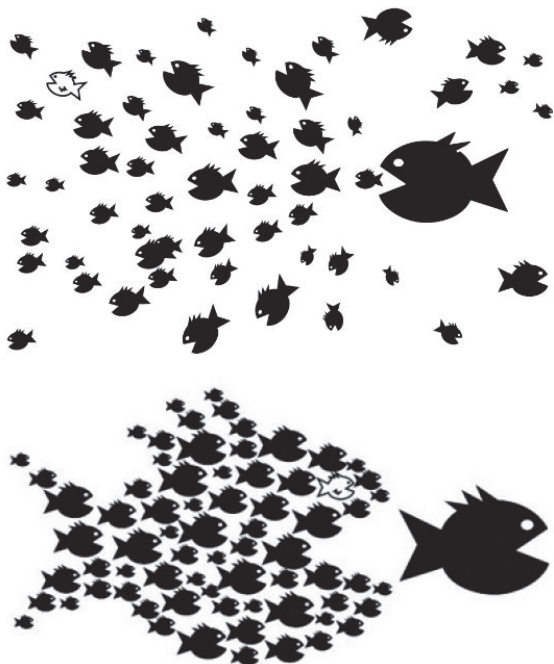
Thank you! Hvala vam! Questions?

Dubrovnik, 30 May 2019

Prof dr Louis Sicking l.h.j.sicking@hum.leidenuniv.nl or l.h.j.sicking@vu.nl



Universiteit Leiden



Challenges in drafting and application of the new Slovenian CAA

Prof. Dr. Aleš Galič & Assoc. Prof. Dr. Ana Vlahek
University of Ljubljana, Faculty of Law

Structure of the presentation

- Pre-CAA coreography available in Slovenian civil procedure
- CAA drafting process & models
- Status & structure of the CAA
- Purpose of the CAA
- Basic solutions of the CAA
- CAA in action
- Future of collective redress in Slovenia

Collective redress available before CAA of 2017

COLLECTIVE REDRESS MECHANISMS STRICTO SENSU:

- **Consumer Protection Act 1998 (impl. of Directive 98/27/EC & Directive 2009/22/EC):**
 - actions for the cessation of illegal practices & actions for a declaration of nullity
 - 0 cases initiated by representative consumer organizations / chambers
- No collective compensatory redress available (for consumers or other victims)

SUBSTITUTE MECHANISMS:

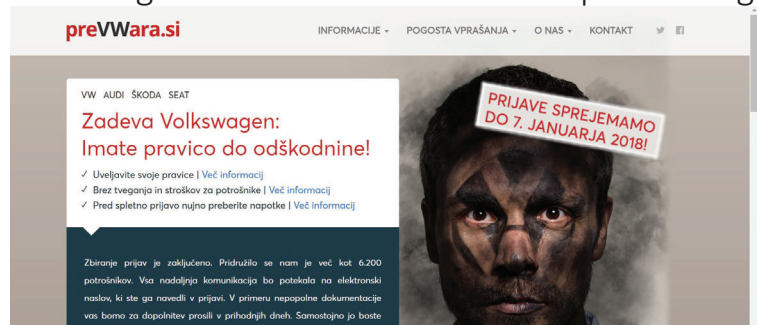
- General mechanisms of civil procedure (requiring filing of individual actions)
 - Joinder of claims
 - Joinder of actions
 - Model case procedure
- Assignment of claims („collection of claims“)

Famous Slovenian mass harm cases



- out-of-court activities of ad hoc society and its attorneys following the NCA's finding of cartel pricing in 2008/9
- est. 30 € - 300 € of overcharges (15,66 mio €)
- 73.297 powers of attorney given to represent the victims in individual cases
- outcome: voluntary repayment of all overcharges

- 45000 cars affected in Slovenia
- 6024 consumers joined the campaign (Sep 2017 – Jan 2018) = assigned their claims to a German company (Financialright GmbH)
- action against VW AG was filed with the District court in Braunschweig in March 2018
- 65% of any repayment goes to the consumers, 35% to the lawyers and Slovene Consumers' Association, Financialright bears all the costs of the proceedings



Drafting process of Slovenian CAA

2016 Draft CAA: Ministry of Justice in cooperation with law professors

more and more mass harm cases detected + Recommendation → CAA perceived as urgent piece of legislation – mostly seen as a sword for the protection of rights, not as a forced collectivisation → one of top priorities of the Gov in guaranteeing A2J



DISCLAIMER: EXPERIMENT

Drafting process of Slovenian CAA

- Basis: 2013 Commission Recommendation
- Additionally: solutions from various national legislations



1. **Initial pragmatic idea (BL):** collective compensatory actions and settlements only for a limited scope of consumer disputes ← test area, broadening later
2. **Redrafting within the working group (feedback from various interested parties):** broadening of scope of application; broadening of types of collective proceedings; redrafting of the structure of the act and its provisions
3. **Amendments in parliamentary proceedings:** application to existent cases of mass harm; jurisdiction in collective proceedings

Recommendation of 11 June 2013 on common principles for injunctive and compensatory CR mechanisms in the MSs concerning violations of rights granted under EU law

Main principles:

- Standing: representative non-profit entity (designated in advance or ad-hoc) / public authority
- Certification phase required
- National register of collective actions should be established
- Opt-in as a rule (any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice)
- Prohibition of punitive damages
- Loser pays principle applies
- TPF allowed but strictly regulated
- Contingency fees not desirable (they must not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties)

Status of Slovenian CAA

- Parliament of RS: 26 September 2017 - unanimously!
- Entry into force= 21 October 2017
- Application: **21 April 2018** – for all relevant cases irrespective of whether the damage occurred before or after the CAA's entry into force
- 2 acts of delegated legislation to be issued by the Minister of Justice
 - Decree on the Register of Collective Actions
 - Amendments to notaries' tariff (still in drafting process)
- works usually do not mention the CAA (EC Report 2018,...)

nota bene: on 11 April 2018, the European Commission published its **Proposal Directive on representative actions for the protection of the collective interests of consumers (2yrs+)**



Structure of the CAA

- 67 articles

Chapter I: General provisions

Chapter II: Collective settlement

Chapter III: Collective damages (compensatory) action

Chapter IV: Collective injunction proceedings

No self-standing declaratory action available

Subchapter I: General provisions

Subchapter II: Special rules for consumer protection cases (implementation of Directive 2009/22/EC)

Subchapter III: Special rules for discrimination cases

Chapter V: Costs of collective proceedings & third party funding

Chapter VI: Final provisions

→ Code of CP applies mutatis mutandis

→ CAA does not interfere with the rules of international private law

Purpose of the CAA

- Ease access to justice
- Enable compensation to victims
- Stop and prevent illegal activities
- At the same time guarantee proper procedural safeguards against unfair litigation

(=Rec 1 Recommendation)

- Implementation of the Injunctions Directive

Basic solutions of the CAA

- Scope of application
- Jurisdiction
- Register of CAs
- Standing & representation
- Certification criteria
- Opt-in / opt-out
- Awarding & distribution of damages
- Costs and funding

Scope of application

Collective compensatory and injunctive actions and settlements:

1. Claims of consumers arising from *contractual relationships* with businesses as they are specified by the Consumer Protection Act or another act
2. Claims arising from the *violations of other consumers' rights* granted by the Consumer Protection Act
3. Claims arising from the violations of Slovenian or European antitrust
4. Claims regarding the violations of the rules regulating the trade on organized markets and regarding the prohibited actions of market abuse under the Act Regulating the Financial Instruments Market
5. Claims of workers in individual labour disputes
6. Damages claims in cases of environmental disasters as defined in the Environmental Protection Act

Stay of collective proceedings if NCA activity

Only injunctive actions: in the field of protection against discrimination

Jurisdiction



- General jurisdiction: District courts of Ljubljana, Maribor, Celje, Koper
- Collective labour disputes: 1st instance labor courts of Ljubljana, Maribor, Celje, Koper
- Initial idea: exclusive jurisdiction of one of the district/labour courts → appeals 1 HC
- Parliamentary proceedings: extended to 4 district/labor courts → appeals 4 HCs
- Unsolved problem: specialization of district judges, judges' norms

Legal standards and court discretion

- „fair and adequate“
- „similar or connected factual or legal issues“
- „common issues prevail“
- „so numerous that“
- „not obviously unfounded“
- „the agreement with the attorney is reasonable“
- opt in **or** opt out
- individual damages **or** aggregate damages **or** ...
- personal delivery of mail **or** publication in media
- ...



Register of collective actions

- Launched and managed by the Slovenian Supreme Court
- In electronic form available freely online: www.sodisce.si
- Contains data on all types of CAA collective proceedings



Sodstvo Republike Slovenije

Zakon o najprejnejši vrstici pri delu sodnikov
Lex et exequitur iudicij fulminans duxor

SODISTVO REPUBLIKE SLOVENIJE

nasodiscu.si

splošne informacije
za udeležence
v sodnih postopkih

register KOLEKTIVNIH TOŽB

POSLOVANJE SODSTVA

kolektivne tožbe

sodišča sodišča s pravno diskretno / kolektivne tožbe

Stanje podatkov na dan: 12.05.2019 23:30:02

Uporaba filtrov:
Izberite kategorijo iz spustnega seznama ali v prazno polje vpišite niz, po katerem želite filtrirati, in potrdite s tipko Enter.

Sodišče	Opr. št.	Datum vložitve tožbe / predloga	Klasif. prejema	Vrsta zadeve	Tožena stranka / Predlagatelj	Tožena stranka
Okrožno sodišče v Ljubljani	1 Pk 2/2019	08.04.2019	Kolektivna odškodninska tožba	Varstvo trga finančnih instrumentov	ZAVOD ZA ISKANJE PRAVICE OPEHARJENIH VLAGATELJEV	BOJAN PRAVICA, HEIDELBERGER VERMOGENSVERWALTUNG GmbH, BLANKA ZALOKAR, SILVIA PRAVICA, ELEMENTUM, trgovina in posredovanje, d.o.o., ELEMENTUM - AG, trgovina s plemenitimi kovinami, d.o.o., HERALD ARNOLD MARIUS AUGUSTUS JANSSEN, GUNTHER KLAUS LUITZ, MARK HILDKOR LUITZ, GESCHKE LUITZ, PETER H. JACOBS
Delovno in socialno sodišče v Ljubljani	Pk 1/2018	23.07.2018	Kolektivna odškodninska tožba	Varstvo pravice delavcev	SINDIKAT MINISTRSTVA ZA OBRAMBO	REPUBLIKA SLOVENIJA MINISTRSTVO ZA OBRAMBO

COMPETITION APPEAL TRIBUNAL

Contact us | Register for updates | Accessibility (PDF) | Settings

You are here: Home > Cases > 1257/07/16 Dorothy Gibson

Home

Cases

Judgments

Document archive

Rules and Guidance

Frequently asked questions

About the Tribunal

Diary

Contact us

Recent research applications: out of hours contact

Links

Dorothy Gibson v Pride Mobility Products Limited

Case number: 1257/07/16 Registered: 25/5/2016

Tribunal: The Honourable Mr Justice Roth + Dermot Glynn + Joanne Ryan CBE +

Status: Application to commence collective proceedings under section 47B of the Competition Act 1998 (the "CPO Application"). The proposed collective proceedings would continue before us action for damages arising from a decision of the Office of Fair Trading of 27 March 2014 (disability scooters: C2/06/14).

A case management conference was held on 15 July 2016 at which the President gave directions for the hearing of the CPO Application. The hearing of the CPO Application has been fixed for hearing on 15 to 17 December 2016, with 14 December 2016 in event.

Any person with an interest (including any member of the proposed class) may object to the CPO Application or the authorisation of the proposed class representative by writing to the Tribunal stating their reasons for objecting by 4pm on 11 November 2016.

Diary events for this case:

View forthcoming events >

New post events >

Case documents >

View all documents >

File transcripts >

File orders >

12 Dec 2016 | 10.30am (time estimate of 2 days, with 1 day in reserve) - CPO Application hearing

View diary page for event details

Transcript (Directions hearing)

PDF 10/12/2016 17:00 >

Order of the President (Directions for hearing of CPO Application)

PDF 10/12/2016 17:00 >

Superior Court of Québec

Registry of class actions

More about class actions > Registry > Access reserved for lawyers > Links

Standing

Collective compensatory actions and settlements:

No US-style class action available

1. Non-profit private law entities with a direct connection between their main goals of action and the rights which were allegedly violated and regarding which the action is being filed (existent or ad hoc)
2. Senior state attorneys (not against the Republic of Slovenia)

Collective injunctive relief and settlements:

1. Generally: as above + any specifically designated bodies
2. In consumer injunctive cases: only listed consumer organizations / chambers or business associations of which the defendant is a member / EU listed organization or public authority from other MSs
3. In discrimination actions: only Slovenian Equal Rights Ombudsman / NGO with a recognized status of acting in the public interest in the field of protection against discrimination or protection of human rights

The criterion of „Representation“

- The claimant (who has standing) must be deemed able to represent the group adequately and fairly

↓
the court determines this in the certification phase **taking into account all circumstances of the case, in particular:**

- the existing financial means, human resources and legal knowledge for representing the group
- the activities already accomplished regarding the preparation of the collective settlement or collective action, as well as the organising of the injured persons and the communications with them
- the number of victims supporting its activities
- media involvement of the claimant and its activities in disseminating information on the intended collective proceeding
- possible prior experience in collective proceedings

Certification criteria for compensatory CA

1. The claims are of the same nature, they are filed on behalf of a determinable group of persons and they concern the same, similar or connected factual or legal issues, they concern the same case of mass damage and they are suitable for being decided in collective proceedings

↓
in determining suitability, the court takes into account: does the collective proceeding enable effective resolution of common legal and factual issues; what are the costs and benefits of advancing with collective proceedings; have any individual claims been filed; what is the size and the characteristic of the class; how can the membership be determined; is there ADR and other means for resolving the dispute available...

2. There are more common legal and factual issues for the whole group than questions relating only to individual members of the group

3. The group is so numerous that the filing of individual claims or another manner of joining its members, e.g. joinder of claims or joinder of actions, would be less efficient than the filing of a collective compensatory action

4. The plaintiff is representative

5. The collective compensatory action is not manifestly ill founded

6. The conditions regarding the agreements on costs and funding are fulfilled

7. The court deems that the eventual agreement with the lawyer on contingency fees is reasonable

Opt-in / opt-out

- **opt-in OR opt-out:**

- Intentional decision (opt-out seen as beneficial also to defendants)
- the court decides on the system on the basis of the circumstances of the case (in collective settlements the parties set that but the court can intervene)

- **opt-in only:**

- if non-pecuniary damages are requested
- if 10% or more claims are higher than 2000 eur
- for claimants without permanent address in Slovenia

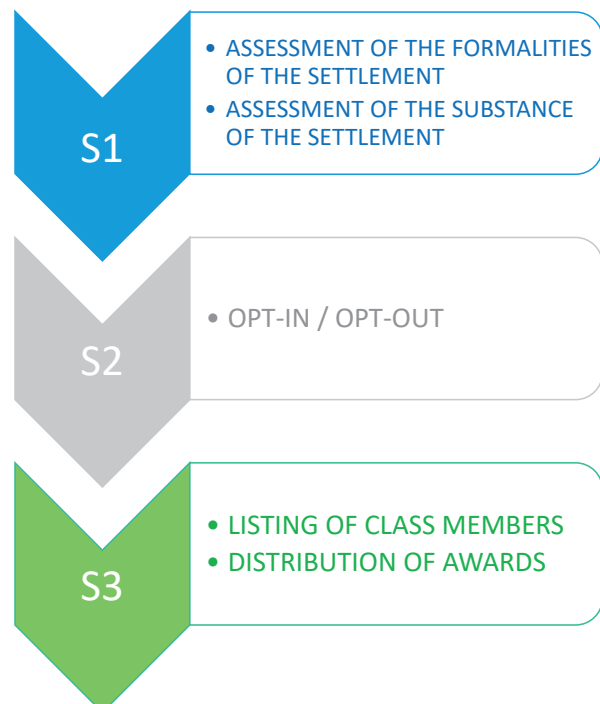
Awarding and distribution of damages

- 2 options:
 - individual (victims individually listed in the judgement)
 - non-individual (aggregate / same for each member) paid to a fiduciary bank account of the notary
- **administrator of collective damages:** notary (in case of settlements the parties determine any person)
- **any surplus returned to the defendant (!)** ← initial cautious approach favouring the compensation purpose (still some deterrent effect)

Costs and financing of collective actions

- Specific regulation of determining the value of the claim for the purposes of court fees,...
- Loser pays principle
- Contingency fees allowed and regulated
 - general rule of the Attorney's Act: max 15% of the awarded amount
 - CAA: max 15% of the awarded amount / up to 30% of the awarded amount if the attorney agrees that it will cover all the costs if not successful
(in case of opt-out, the awarded amount is the actual amount claimed by the members that cannot be lower than 30% of the attorney's fee calculated on the basis of the total awarded amount)
- TPF explicitly allowed and regulated (CAA only)
- Funds: no specific funds but RS financing consumers' organizations, project → 0 actions

COLLECTIVE DAMAGES ACTION



CAA in action

- The closer the CAA application date the more questions and fears about its application:
 - will the courts and attorneys cope with complex (and at times unclear and underregulated) provisions of the CAA deviating from the traditional framework of civil procedure?
 - will the courts cope with all the discretion given to them?
 - will the proceedings get any further than the first stage?
 - will the attorneys be willing to fund the proceedings?
 - ...
- Compensatory actions and settlements expected (we feared more intense activity due to application of CAA to „old“ mass harm cases) → education of judges and other lawyers quite intense since 2017

CAA in action

- 1 year after CAA's „toxic“ application:
 - so far 2 compensatory CA (Ministry of Justice asking the attorneys „why?“)
 - still 0 cases of injunctive relief
 - 0 collective settlements

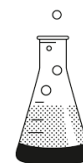
1. Ministry of Defence Union v. Republic of Slovenia (Labor Court in Ljubljana)


- non-paid overtime work & lunch breaks not guaranteed (2013-2018; est. 0,5 mio eur; 2 subclasses 200 + 50 workers)
- action filed in July 2018, certification hearing in December 2018, **action dismissed in the certification phase** in December 2018 (the plaintiff to pay 1.703,65 eur of costs of the proceedings)
- judge extremely eager in tackling it properly, gave feedback on the pitfalls of the regulation, solutions to be improved, interested in foreign models, US cases
- *Braun v Wal Mart Stores Inc 2014, Dukes v Walmart 2011*
- pending appeal

CAA in action

2. **Institute for Seeking of Justice for Cheated Investors v. multiple defendants**
(Heidelberger Vermögensverwaltung, Bojan Pravica et al.) (District Court in Ljubljana)
- > 100 investors in financial instruments market lost all their savings (min 9,3 mio eur; 2007-2010) due to alleged fraud, the police and the prosecutors are passive
 - institute established in May 2018 by 21 investors, press conference held at SLO-Chamber of Commerce in January 2019, active in media (<https://zavodipov.wixsite.com/zavodipov>)
 - action filed in April 2019, pending
 - Qs: scope of CAA, suitable for assessment under CAA, security for costs

The future of collective redress in Slovenia?



- Uncertain: still in the experimental phase waiting to see whether the formula was right
 - The cases are here, the ambiguities are here, the questions are here, the judges and the lawyers have started eagerly tackling with the CAA
 - We need time to detect the pitfalls, to introduce the improvements, to enable the practice to evolve,...
- Uncertain: chaotic EU level activities 
 - Constant changes in the approaches and solutions, lack of basic definitions, ambiguous notions, lack of research studies of regulation and practice and challenges in and outside EU, lack of understanding of how civil procedure operates in practice
 - Will the CAA have to be redrafted?

Jorg Sladič

Mechanisms of Coordination of Parallel Collective Lawsuits in Several Jurisdictions?

Air Freight Cartel

- All big shots of aviation industry
- Allegedly as a reaction to public law security requirements post 9/11
- Regulatory action: European Commission, US Department of Justice, Canada, Australia, New Zealand, Korea, Japan
- Individual action + collective redress,

- 
- A Dutch torpedo action by KLM against the German lawsuit in the air freight cartel
 - Class actions: US, Canada, Australia: fine tuning by *forum non conveniens*: European victims excluded
 - Netherlands : interplay of Dutch Rv, WCAM, European Brussels Ia Regulation and regulatory action by the European Commission (suspension of proceedings until findings of a wrongful act in EC decision become final upon exhaustion of remedies before the ECJ),



England: no group litigation for Chinese victims (Bao Xiang International Garment Centre & Ors v British Airways)

Brazilian Car Wash (lava jato)

- Petrobras, equity deals in New York, Madrid, Luxembourg,
- If equity is issued on NYSE, a US class action is not far away
- “Collective redress” in the EU : Netherlands : a class action Austrian style (i.e. assignment of claims to a special purpose vehicle, question of procedure)

Factual findings

- Every major international wrongful act will end in collective redress vehicles worldwide: negative events of massified and globalized economy like international cartels and graft cases lead to collective litigation in several countries.
- Cases where the same wrongful act is adjudicated in several countries in collective redress are more and more common.
- How to coordinate several concurrent collective actions pending in several jurisdictions?
- Canadian and Dutch experiences?

A big modern legal problem

“The lack of common system of dispute resolution at the transnational level results in uncertainty, furthers the costs of exchanges, and may even deter economic actors from entering into cross-border exchanges” (de Miguel Asensio, Cuniberti, Franzina, Heinze and Requejo Isidro 2018, 6).

Issues from a European point of view ?

Can Europeans claimants initiate legal action (individual or collective) before a European forum while there is a pending US class action litigation with an international class including the same non-resident European absent class members?
risk of irreconcilable judgements: no recognition

Can the European defendant successfully bar Europeans as absent class members from being included in a pending US class action as absent class members of an international class?

The Big Bad Wolf:

- International class: the procedural essence of any collective redress is the ultra partes effect of the judgement precluding members of the represented group in individual access to courts.
- a US “court can bind absent class members without having jurisdiction over them”, also in other common law States: e.g. real and substantial test in Canada:


- necessary jurisdictional questions in *exequatur*, see e.g. Art. 47(2) Spanish Law on International Legal Assistance in civil matters (*Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil.*): in class actions ... *la resolución extranjera no se reconocerá cuando la competencia del órgano jurisdiccional de origen **no se hubiera basado en un foro equivalente** a los previstos en la legislación española*

Is there is also [international] jurisdiction over absent class members or potential plaintiffs (Halfmeier 2012, 177)?

Case law


- it is difficult to reconcile class actions that include unidentified claimants with traditional approaches to jurisdiction (Airia Brands Inc. v. Air Canada, 2017 ONCA 792, § 69.)
- A class action format is not a procedural structure that entitles a court to entertain the litigation of matters not within the jurisdiction or competence of the certifying court (Walter v Western Hockey League, 2018 ABCA 188 (CanLII), <<http://canlii.ca/t/hs196>>, § 8.)

Due to the territorial nature of international civil procedure, problems in allocation of international jurisdiction between *fora* of several States will continue to exist,



a State of the *forum* where collective redress lawsuit is pending has a vested interest in the outcome of such a lawsuit.

The *forum* where a collective lawsuit with an international class or group of absent class members is pending will therefore export the *forum's* considerations of what correct regulation should be.

- 
- the existing framework of coordination of individual cross-border lawsuits will have to be used also in international collective redress.
 - a lack of a general definition of parallel collective proceedings (*simultaneus processus*)
 - often a very unilateral nature of rules on allocating of international judicial adjudicatory jurisdiction

Overview of mechanism of coordination

Two main techniques:

ex ante prevention of conflicts in coordination of parallel and concurrent proceedings pending before several fora in several countries (i.e. *lis pendens*)

a system of ex post resolution (anti-suit injunctions, forum non conveniens)

US legal writing

Techniques of do-nothing, transfer and consolidation, stays, dismissals and anti-suit injunctions: do not cover all major legal systems

Techniques involving major legal systems

- **do-nothing remedy (toleration),**
- **forum non conveniens doctrine,**
- **anti-suit injunctions,**
- **lis pendens and related actions doctrine,**
- **coordination by a special international body allocating International jurisdiction**
- **agreements on prorogation**

- Lis pendens and forum non conveniens are assessed in the 2008 International Law Association Resolution on Transnational Group Actions, adopted in Rio de Janeiro on 73rd conference (§§ 54 and 57) as mechanisms of coordination of parallel lawsuits in collective redress.

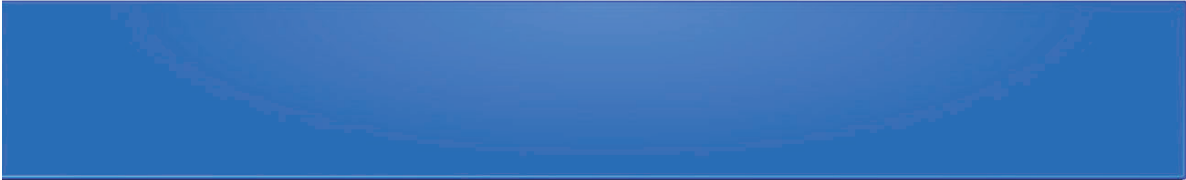
Toleration – IMAX case

- letting parallel, simultaneous or concurrent national and foreign pending proceedings involving the same cause of action and the same parties exist and continue (the do nothing approach) seems to be the US approach in cross-border collective redress (George 2002, 502 and 503).
- US lawyers suggest its application in cross-border US-Canadian class actions in order to facilitate the management of multi-jurisdictional class actions.

- ABA Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and a Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings.
- CBA Canadian Class Actions Judicial Protocols.
- All the before mentioned protocols also deal in coordination of concurrently pending “related class actions” in the US and Canada.

interdiction of parallel proceedings via an anti-suit injunction

- Really just in common law legal systems? (Germany: Klage auf Unterlassung ausländischer Prozessführung),
- Prohibited in judicial redress in the EU (ECJ cases Turner, C-159/02, West Tankers, C-185/07, Gazprom, C-536/13):
i.e. no recognition of US and Canadian anti-suit injunctions
in class actions

- 
- Very limited by international law: in other words: no jurisdiction to enforce abroad of the forum having adopted such an injunction, it is not probable that a foreign forum will accept an anti-suit injunction
 - Applied e.g. in Australia – US class actions (Jones v Treasury Wine Estates Limited)

Lis pendens and related actions

Closely connected to lis pendens is the doctrine of related actions doubled with consolidation of similar proceedings.

Applied e.g. in Quebec, Art. 3137 Civil Code of Quebec,

Basically the result will be that the first party to file a class proceeding with respect to a particular defendant and proposed class will prevail under the doctrine of prior tempore, potior iure. Any subsequent class proceedings will be suspended given the appearance of lis pendens.

Hotte v. Servier Canada Inc., [1999] R.J.Q. 2598 (C.A.),
Schmidt v. Johnson & Johnson e.a, 2012 QCCA 2132
(Schmidt).

À cette étape de la demande d'autorisation, les requérants n'ont pas le statut de représentant du groupe. C'est précisément cette reconnaissance qu'ils recherchent. C'est cependant en leur qualité de membre d'un groupe qu'ils formulent leur requête [...]. Cette qualité de «membre d'un groupe» constitue leur véritable identité juridique. Conclure autrement permettrait à chaque membre d'un groupe de présenter sa propre requête sans qu'on puisse lui opposer la litispendance ou la chose jugée pour les requêtes ou les jugements obtenus par les autres membres du groupe. Je conclus donc à l'identité des parties”

Directive 2009/22

Injunctive collective redress under Directive 2009/22/EC for the time being is not covered *ratione materiae* by the intra-EU *lis pendens* (Art. 29 of the Regulation Brussels Ia).

Does not cause any issues with *lis pendens* due to the technique of qualified entities

Carballo Piñeiro 2009, 73, “la autorización estatal implica ineludiblemente su carácter territorial”

Related actions

For instance, in the Dieselgate case, one could argue that collective actions brought against Volkswagen in two different Member States by local plaintiffs, are related actions in the sense of Art. 30 [of Brussels Ia Regulation], if a risk of irreconcilability exists” (Amaro, Azar-Baud, Corneloup, Fauvarque-Cosson and Jault-Seseke 2018, 101)

Agreements on prorogation

Prohibited area for consumer class actions in the EU since CJEU, Océano Grupo Editorial, C-240/98 to C-244/98 case, International development: Israeli Facebook class action : the same result as in Europe

Forum non conveniens

- In Lernout and Hauspie class action US courts applied the forum non conveniens doctrine for the European (i.e. Belgian) harmed share owners who had bought the shares on EASDAQ (Brussels stock exchange) (Kafi-Cherrat 2018, § 29).
- Lernout and Hauspie class action was recognised by the Court of Appeal of Ghent in Belgium in 2017

- The forum non conveniens doctrine is incompatible with the doctrine of *juge naturel* and legal judge (gesetzlicher Richter),
- Disavowed in the EU since ECJ Owuse case.

A special international body allocating jurisdiction

Judicial panel on MDL at the international level?

Requirement of a multilateral treaty in the time of reluctance towards multilateralism?

Model: the distribution of cases in the Court of Justice of the EU by the *réunion générale* ,

No coordination will be the preferred approach

It would appear that in collective redress due to the specific nature the issues of coordination of parallel lawsuits will have operate under the doctrine of toleration of parallel proceedings

The long lecture is finally finished

Thank you very much

jorg.sladic@epf.nova-uni.si