



Collective Actions in Europe

September 2013

C L I F F O R D
C H A N C E

Contents

Terminology	3
Overview	4
Table of current position	6
Belgium	7
France	8
Germany	10
Italy	12
The Netherlands	14
Poland	16
Spain	18
United Kingdom	20
Appendix - Class Actions in the United States	22
Contacts	23
Notes	23

Terminology

Outlined below is a glossary of the way in which we use certain terms in this publication - it is designed to give an idea of the different concepts rather than technical legal definitions.

Class action	This term is often used loosely to describe any form of legal action by groups of claimants. To avoid confusion, we use it here to describe true, US-style class actions. These class actions are lawyer-driven but allow a group of individuals or entities with similar grievances to seek compensation (or other relief) in a single action. The claimants need not be identified individually, only by class description. Class members are bound by the outcome unless they opt out. For further detail on US class actions, see the Appendix.
Collective action	We use this phrase as a neutral way of describing any form of collective legal action by or on behalf of a group of claimants.
Conditional fees	Fee agreements between lawyers and clients by which the lawyers receive an uplift on their normal fees but not a share of the damages or settlement sum if the claim is successful.
Consumers	End users of goods or services.
Contingency fees	Fee agreements between lawyers and clients by which the lawyers receive a share – sometimes up to 40% - of the settlement sum or damages if the claim is successful but usually no fee if the claim fails.
Group action	A group of claims with common or related issues, which are heard together. It differs from a class action in that claimants must be individually identified and will not be bound by the outcome unless they opt in to the action. See, for example, Group Litigation Orders in the UK section. Unlike representative actions, the claims are brought by the claimants themselves rather than a representative organization.
Multiple damages	Damages awards where the actual sum lost or compensation awarded is multiplied (say by two or three), as happens in some US contexts.
Opt-out/opt-in model	Two models for collective actions. In an opt-out model, like US, Canadian and Australian class actions, members of the defined group are bound by the outcome unless they opt out. In an opt-in model, like UK Group Litigation Orders, members of the group are bound only if they opt in. Claimants that are not bound are free to bring their own, separate claims.
Professional litigation funders	Commercial organizations that fund litigation (or some of the costs involved) in return for a share of the settlement sum or damages if the case is successful.
Punitive damages	Damages designed to punish the defendant rather than compensate the claimant. They are a particular feature of US litigation.
Representative action	An action where a representative body (such as a consumer organization) brings the action on behalf of a group of claimants. It differs from a class action or group action, where the claimants bring the action themselves.

Overview

This publication updates our briefing of June 2010 on Collective Actions in Europe, and looks at how the rules for "class actions" in key EU jurisdictions have changed since that briefing, current proposals to develop them further and other emerging trends. The separate country sections explain developments in each country in more detail, while this section provides an overview of the EU regime. An explanation of certain features of the US class action system appears in the Appendix.

Overall, developments mean that forms of class action have found their way to Europe. They are not US-style class actions, criticised by so many for perceived excesses and inefficiencies, but a variety of different mechanisms designed to offer more effective redress for mass claims.

The perceived benefit of collective actions

Collective actions are intended to provide redress where individual claims might not be large enough to support legal action. The aim of collective actions is to enhance access to justice for consumers. Some commentators also argue that the threat of collective action provides a form of regulation by encouraging responsible corporate behaviour.

The current scope for collective actions in the EU

The table on page 6 shows the range of collective action regimes already available in some major EU jurisdictions. It also identifies other legal features that tend to affect the popularity of collective actions.

- All the jurisdictions in the table allow representative actions for injunctions across several areas of law.
- Representative actions for damages are only available in a few jurisdictions, in relation to certain areas of law.
- Germany, Spain, Italy and the UK allow group actions for damages.
- No jurisdiction permits true US-style class actions.

EU Recommendation on collective redress mechanisms for violations of EU rights

On 11 June 2013 the European Commission published a Recommendation on collective redress mechanisms for violations of EU rights. The Recommendation, which was published with a Communication, recommends all Member States to have collective redress mechanisms for both injunctive relief and compensation caused by violations of EU rights.

In terms of the rights that are referred to, recital 7 of the Recommendation states that "Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in this Recommendation should be applied horizontally and equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant."

The Recommendation was issued jointly by the European Commissioners with responsibility for Justice, Consumer Policy and Competition. The common, (but non-binding), principles provide for the following:

Designated representative entities to bring representative actions

Such entities should be non-profit making and have objectives related to the rights which have been allegedly violated. Public authorities can be designated to bring representative actions. Representative entities should be able to disseminate information about a claim for damages or an injunction. In cross-border cases, a single collective action must be allowed.

Admissibility

Manifestly unfounded cases or cases in which the conditions for collective actions are not met must be discontinued at the earliest possible stage of litigation.

Costs

The draft Recommendation supports the "loser pays" principle such that the losing party reimburses the necessary legal costs borne by the winning party.

CLIFFORD CHANCE

Funding

The claimant party should be required to disclose its funding arrangements to the court at the outset of proceedings.

Opt-in claims

For collective claims for compensation, the claimant group must be formed on the basis of the express consent of those harmed i.e. on the opt-in principle. Any exception to this should be "duly justified by reasons of sound administration of justice". Members of the claimant party should be able to leave, or new members join, the party before final judgment or settlement of the claim.

Alternative Dispute Resolution (ADR) and settlements

The means for collective redress should be accompanied by a means for collective ADR on a consent basis, before and during the litigation.

Contingency fees

If permitted, these should not be allowed to risk creating an incentive to litigation.

Punitive damages

These are prohibited. Compensation should not exceed the amount that would have been awarded had the claim been pursued on an individual basis.

Next steps

The Recommendation states that Member States should put in place appropriate measures within two years. Two years after implementation of the Recommendation the Commission will evaluate whether further measures are needed.

How far will the new initiatives go?

It seems clear that European jurisdictions and the EU itself are keen not to import the most criticised features of the US class actions system, which include:

- The possibility of inflated damages awards by US juries keen to punish large companies. These provide overwhelming incentives for defendants to pay large settlements. Europe does not have the unpredictability of juries in most civil cases, or punitive damages - this makes risk management easier for defendants.
- An active plaintiffs' bar fed by the incentive of contingency fees. Full blown contingency fees are not available in most European countries.

- No costs shifting. In the US, the loser does not usually pay the winner's costs. This encourages speculative claims. In Europe (and particularly in the UK), the loser usually has to pay at least part of the winner's costs.
- Pre-trial witness depositions and document discovery, which are strong weapons used by US class action plaintiffs to extract settlements. Apart from the UK, document discovery is currently rare in Europe. No EU countries use pre-trial depositions.

Our Class Actions Group

To keep you ahead of these developments, Clifford Chance has established a multi-jurisdictional "Class Actions Group" that includes partners and associates from across our network, all experienced at handling some of the largest commercial disputes in their respective countries. Because developments in this area are moving rapidly, the Class Actions Group has set up a web page on class actions, providing country-specific pages tracking trends in each key jurisdiction.

Please go to the following link to find out more:

http://www.cliffordchance.com/legal_area/litigation_and_dispute_resolution/Class_actions.html

CLIFFORD CHANCE

Table of current position

Type of collective action/ legal feature	Country/ area of law ¹							
	Belgium	France	Germany	Italy	Netherlands	Poland	Spain	UK
Class actions?	X	X	X	✓	X	X	X	X
Representative actions: Injunctions etc?	commercial practices (e.g. unlawful clauses in credit agreements) unauthorised issues of securities environmental protection human rights	consumer rights contractual terms commercial practices	commercial practices consumer rights competition	consumer rights contractual terms unlawful act competition	all areas	consumer rights product liability acts in tort	consumer contracts	consumer contracts competition
Representative actions: Damages?	human rights otherwise not formally but via powers of attorney	consumer rights environmental protection securities investment	X	consumer rights contractual terms unlawful act competition	not formally but via powers of attorney	consumer rights product liability acts in tort	consumer rights	competition
Group actions (injunctions and/ or damages)?	X	X	securities investment	✓	X	X	consumer rights (damages only)	all areas
Other collective actions?	X	X	X	✓	collective settlement agreements	X	X	X
Contingency fees?²	X	X	X	✓	X	✓	✓	X
Conditional fees?	✓	✓	✓	✓	✓	✓	✓	✓
Juries in civil cases?	X	X	X	X	X	X	X	X
Punitive damages?	X	X	X	X	X	X	X	X
Loser usually pays winner's costs?³	✓	✓	✓	✓	✓	✓	✓	✓
General document discovery?	X	X	X	X	X	X	X	✓
Pre-trial witness depositions?	X	X	X	X	X	X	X	X

¹ This table is intended to give only a general idea of the current features of each country's system. Please see the separate country sections for further details. A tick (✓) means that the legal feature exists in the relevant country; a cross (X) means that it does not.

² Details of the fee arrangements allowed in each country vary significantly - see the separate country sections. This table provides an indication only.

³ The proportion of the winner's actual costs payable by the loser varies. See the separate country sections.

Belgium

Introduction

Up until now, Belgian law has not provided for class actions. While in the last two decades, several provisions have been introduced to allow a degree of collective action in a limited number of areas, they have not created the possibility for true class actions. However, change could finally be on its way.

Current position

Some degree of collective action is allowed in relation to certain areas of Belgian law:

- The Commercial Practices and Consumer Credit legislation allows specific organizations to seek injunctions to stop prohibited commercial practices, such as unlawful clauses in credit agreements.
- The Law on Financial Transactions and Financial Markets allows consumer organizations to seek injunctions to stop unlawful practices, such as selling securities publicly without the prior approval of the FSMA. However, those consumer organizations cannot not claim damages.
- Environmental organizations are entitled to seek injunctions against practices that breach Belgian environmental laws.
- Human rights organizations can bring actions for violations of certain Belgian human rights laws, such as on the basis of anti-discrimination.

Other features of Belgian litigation

In Belgium:

- "no win no fee" agreements are not allowed but a mark-up may be agreed for successful claims (including a percentage of the damages or settlement sum);
- there are no juries in civil cases;
- there are no punitive damages;
- the loser is required to make a contribution to the winner's costs determined in accordance with a legally fixed scale; and
- there is no general discovery, nor pre-trial witness depositions.

Future developments

As various recent cases (*Lernout & Hauspie*, *Citibank*, *Fortis*) have shown that the existing legal system is not equipped to deal efficiently and within a reasonable time period with cases involving a large number of claimants, Belgium has become aware of the need to allow class actions with respect to mass damage, i.e. damage suffered by a large number of people.

During recent years, various draft Bills have been prepared at the request of the government or by Members of Parliament. The Flemish Bar Association has also drafted a proposal for the introduction of class actions under Belgian law. Various (consumer) organizations have also argued in favor of the introduction of a class actions system in Belgium.

So far, none of these initiatives has led to the adoption of class action, or collective action, legislation, due to a lack of political consensus.

A new draft Bill was approved by the Federal Government on 5 July 2013. It will, if adopted, increase the judicial system's efficiency and strengthen law enforcement by allowing many small claims to be combined into a single class action. The key aspects of the current draft are the choice for an "opt-out" system for Belgian residents and for an "opt-in" system for foreign residents and the fact that the right to bring a class action and to act as representative for the group is limited to companies or associations whose activities are related to the nature of the damage. The draft also provides for a procedure for the court's approval of collective settlements.

The adoption procedure of the draft Bill is now pending before the Federal Parliament. It remains to be seen whether a majority can be found to adopt the new proposal. The common view is that it is likely that the proposal will eventually be adopted, but the timing of the adoption procedure is still uncertain and the possibility of amendments to the current draft cannot be excluded.

C L I F F O R D C H A N C E

France

Introduction

A number of principles of French law, as it now stands, prohibit US-style class actions in France.

In France, the right to bring a legal action is vested in individual parties who claim enforcement of their rights; French judges cannot issue judgments binding third parties that are not part of the proceedings. Their decisions are only binding on the parties to the proceedings and claimants may only claim for their personal loss.

Other differences between the US and French judicial systems also play a role in precluding the introduction of US-style litigation in France; for instance civil juries, punitive damages, discovery, cross-examination, contingency fees or "ambulance-chasing", do not exist in the French legal system.

Certain non-profit organizations may act before civil or criminal courts to protect the collective interests of consumers. They can bring representative actions aimed at stopping wrongful behaviour or banning unlawful clauses in standard form contracts.

Since the 1990s, three categories of people have been entitled to seek compensation through non-profit organizations: consumers, victims of environmental risks and investors. These actions are very different from US-style class actions.

However, a reform of class actions is in the pipeline. A new Bill was adopted by the French Government in May 2013 and is now going before the French Parliament.

Current position

Consumers

Since 1992, non-profit, government-authorized consumer organizations have been able to seek compensation for damages suffered by consumers (article L. 422-1 of the French Consumer Code). The damage must have been caused by the same person and have a common origin. This is called an action *en représentation conjointe* (joint action).

The organization may only act on behalf of consumers (at least two) who have signed a written power of attorney (*mandat*). This is a key difference from US-style class actions. Organizations may seek potential claimants through the press but they are not allowed to advertise, send mailings or make public announcements on the TV or radio.

The organizations may file their actions before civil or criminal courts and any damages awarded are paid to the affected consumers. As a matter of practice, very few actions of this kind have been brought before French courts.

Consumer organizations are also entitled to seek the annulment of unfair contractual terms (*clauses abusives*) or injunctions to restrain unlawful conduct (article L. 421-6 of the French Consumer Code).

Victims of Environmental Risks

Since 1995, victims of environmental risks have been able to be represented by non-profit organizations in claims for damages (article L. 142-3 of the French Environmental Code).

Any association the purpose of which is the protection of nature and the environment may institute proceedings and seek redress on behalf of identified persons who have suffered individual damage caused by the act of a single person and with a common origin (e.g. pollution of water, air, soils, sites and landscapes, violation of town planning rules).

The rules governing commencement of such an action are similar to those governing actions on behalf of consumers.

Investors

Since 1994, securities investors have been able to act jointly through authorized, non-profit investor organizations (article L. 452-2 of the French Financial and Monetary Code).

As in consumer cases, the organization must have a written power of attorney (*mandat*) from at least two investors. It may then seek remedies for losses suffered by these investors under a single head of claim.

Future developments

The introduction of class actions in France is a long-running story and despite several political commitments and proposals, no legislation has been approved up to now.

However, at the end of 2012, Benoît Hamon, Minister for Social Economy and Consumption, announced the

C L I F F O R D C H A N C E

introduction of a collective consumer action (*action de groupe*) in France, included in the Bill "*Consumption*", and launched a public consultation in relation to the proposals.

A first proposal, prepared by the General Direction for Fair Competition, Consumer Affairs and Fraud Control (DGCCRF/Ministry of Economy) was submitted in April 2013. The proposed class action procedure was complex and a simplified procedure, based on the DGCCRF's project, was adopted by the Council of Ministers on 2 May 2013.

The aim of this Bill is to establish a French-style collective action for consumers, by entitling a few nationally accredited consumer associations (17 for the time being) to bring legal proceedings in order to obtain compensation for the individual damages caused by the same professional person or body to at least two consumers placed in an identical or similar situation.

The Bill would limit the scope of the collective action to compensation for damages resulting from the sale of goods or the provision of services, or from a competition law infringement which has first been recognized by French competition authorities or the European Commission.

The Bill is currently before the French Parliament and should be adopted by the end of 2013.

Germany

Introduction

The German Capital Investors' Model Proceedings Law (*Kapitalanleger-Musterverfahrensgesetz* or *KapMuG* – referred to as the Model Proceedings Law in this section) came into force on 1 November 2005, seeking to address the German courts' difficulties with administering large numbers of similar securities actions. The law implemented a unique process to aggregate investor actions that allege the publication of false or misleading information or the forbearance to publish material information concerning securities.

Recently, the German legislature has amended the law, permitting claimants to register similar claims without opting into the model proceedings but delaying any statute of limitation and introducing an opt-out settlement procedure for investor actions aggregated by the model proceedings.

Current position

Securities Investors

The Model Proceedings Law permits claimants to aggregate common issues of law or fact that arise in multiple individual securities actions. Originally, the law only applied to damages claims directly based on public information concerning securities and claims for specific performance under the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* or *WpÜG*). However, the recent amendment has broadened the scope of the law to include certain misselling claims where the seller or distributor of the financial product passed on public information concerning securities to the potential investor.

The issuer's place of incorporation is the exclusive venue for all damages claims against domestic issuers, their board members and their underwriters. In the case of a takeover bid, the venue is the place of incorporation of the domestic target. A seller or distributor of financial products may be sued at his place of business as long as the action does not name the issuer as a defendant. Foreign issuers may be sued in German courts under the Model Proceedings Law. However, in such cases jurisdiction is governed by EU Council Regulation no. 44/2001 or – in the case of defendants outside the EU – the general German rules on jurisdiction.

A model proceeding may be sought in any securities action involving at least some amount, or lack thereof, of public information concerning securities. The petition must demonstrate common issues of fact or law in parallel cases that can be decided collectively. If the petition is granted by the court, a public announcement is issued on an internet-based litigation register (*Klageregister*) and the underlying action is automatically stayed.

If nine further similar petitions are filed within six months, the first court to receive a petition for a model proceeding will then submit the common issues of fact or law to the Higher Regional Court (*Oberlandesgericht*) for determination in a model proceeding. At this point, all actions affected by the model proceedings are stayed.

The Higher Regional Court then selects a lead petitioner who, except for the defendant(s), is the only party to the model proceedings. The other claimants are permitted to join the model proceedings as third party petitioners only. The resulting judgment is binding on all claimants in the parallel cases – there is no opt-out provision.

This method to determine common questions aims to avoid duplication of work and costs, such as expert evidence. Once the common questions have been decided, the individual actions are resumed. Even where the common questions have been determined in the claimants' favour in the model proceedings, the individual actions may fail for other reasons.

The decision of the Higher Regional Court (the *Musterentscheid*) may be appealed to the German Federal Supreme Court (*Bundesgerichtshof*).

Claimants who have chosen not to file a lawsuit may for the time being register their claims with the Higher Regional Court responsible for the model proceedings within a period of six months from their public announcement. Such claimants have no role in the model proceedings and the effect of the registration is limited to a tolling of the statute of the limitations until the final resolution of the model proceedings. Hence, registrants do not receive direct legal benefits from a model decision.

The amendment has introduced important new features to the collective settlement mechanism. The parties to the model proceedings may now agree on a settlement that is subject to approval by the court and the right of third-party petitioners to opt out of the settlement within one month of the service of the settlement proposal. As in the past, and

CLIFFORD CHANCE

unlike the Dutch collective settlement law, the binding effects of a collective settlement under the Model Proceedings Law remain limited to those claimants that have actually filed individual actions. Hence, registrants may not directly participate.

Other “Collective” Remedies

Collective interests are enforceable through representative actions in a number of legal areas. For example, consumer protection, general commercial and competition laws give certain non-profit organizations the right to sue. These organizations may enforce collective interests and petition courts to stop a defendant conducting unlawful business practices or enjoin him from using "unfair" standard business terms. Generally, they may not sue for damages.

Other features of German litigation

In Germany:

- contingency or conditional fees are only permitted under very limited circumstances;
- there are no juries in civil cases;
- there are no punitive damages;
- the loser pays the winner's costs according to a statutory fee schedule; and
- there is no discovery of documents or pre-trial witness depositions (however, access to investigators' or regulators' files can be obtained by plaintiffs under certain circumstances).

Future developments

The Model Proceedings Law will remain in force until 1 November 2020. The amendment has been critically acclaimed by legal commentators (see Schneider/Heppner, *KapMuG Reloaded – das neue Kapitalanleger-Musterverfahrensgesetz*, Betriebsberater 2012, 2703 et seq.). A relatively low number of model proceedings have been registered since the inception of this dispute resolution mechanism in 2005 and less than a handful of substantive decisions have been issued. Some cases have been pending for more than ten years now and have seen numerous appeals only to be remanded repeatedly. Institutional investors with much larger aggregated amounts in dispute have entered the stage since, and they apparently have a preference to avoid the Model Proceedings Law by assigning their claims to specially established litigation Special Purpose Vehicles.

The exclusive venue for claims against German domestic issuers may mean that securities judgments of non-EU

courts against German issuers are no longer recognised and enforced in Germany. This rule is aimed at curbing US securities class actions against German issuers.

However, there are some concerns about model proceedings.

- Unlike a US class action, the model proceeding has no opt-out for claimants unless they withdraw their individual actions entirely. Whether or not claimants take an active part in the model proceeding (as third party petitioners), they will be bound by its outcome.
- Due to the usual length of court proceedings and the ensuing risk of a running of the statute of limitations, investors usually cannot avoid filing their claims early on and are therefore drawn into a model proceeding.
- The proposed cost regime may not be entirely successful in encouraging small investors to bring claims as it still requires the advance payment of substantial court fees. Moreover, the statutory lawyer compensation scheme still fails to adequately incentivize the use of model proceedings.
- The model procedure so far has proven to be slow and cumbersome. Only very few cases have been decided and in most of these appeals are still pending.

The above concerns may encourage alternative fee agreements – either with specialist securities litigation lawyers or through professional litigation funders.

Despite the concerns mentioned above, many observers expect the latest amendments to increase the number of model proceedings that are brought.

It remains to be seen whether the recent efforts of the EU Commission will ultimately lead to the creation of pan-European collective redress mechanisms which will then likely take priority over the relatively cumbersome German model proceeding.

Italy

Introduction

Class actions were introduced in Italy in 2010 with the entry into force on 1 January 2010 of the new and better worded section 140-bis of the Italian Consumer Code (entitled "Class Action")².

Since the application of the new legal framework was particularly restrictive, the class action could not be brought easily and, therefore, it was not widely used.

For this reason, on 24 March 2012, section 140-bis of the Italian Consumer Code has been amended through Law Decree No. 1 of 24 January 2012, converted into Law No. 27 of 24 March 2012, which had the purpose, *inter alia*, of facilitating class actions. In fact, among the main novelties introduced, it should be noted, among other things, that the rights for which redress is sought can be similar rather than identical, as previously provided by section 140-bis.

Current position

Art. 140-bis of the Consumer Code

The legal framework provides that similar individual rights and collective interests may also be protected through a class action.

In particular, the class action, which aims to ascertain liability in order to compensate damages and give restitution, may be used in all cases in which harm is caused in connection with: (i) contracts entered into by many different claimants with the same company, in a similar situation, including rights pertaining to contracts entered into in accordance with sections 1341 and 1342 of the Italian Civil Code; (ii) similar rights belong to the final consumers of a given product or service, against the manufacturer regardless of whether or not there exists a direct contractual relationship between the manufacturer and the claimants; and (iii) similar rights to compensation

for damages caused by unfair business practices or conduct in breach of principles of fair competition.

Under section 140-bis, first sub-section, each member of the class, individually, or indirectly through associations to which such member may grant a mandate or committees to which he/she belongs, may take action for the determination of liability and for a court order for compensation for damages and restitution of amounts already paid. Standing to take legal action, which rests with a person who claims to be the holder of a legal relationship under dispute, does not belong only to associations and committees (as provided under the previous version of the provisions), but also to the individual member of the class who may take action independently for the purpose of initiating a class action or may use associations or committees to which he/she belongs.

Opt-in Rule

Unlike the US, Italy has adopted the opt-in rule. The benefits of the class action and the consequent right to compensation cover only those persons who have expressly stated their intention to take part in the class action or who have become party to the proceedings by raising claims having a subject matter which is similar to the main claim.

Claimants can join the class, and therefore the class action, also via certified electronic mail (*PEC*) or fax.

The proceedings

The claim is raised before an ordinary court located in the capital of the region where the defendant company has its registered office; ad hoc courts are also envisaged for certain regions.

In order to prevent the commencement of lawsuits based upon claims that are clearly specious and unsubstantiated, a "filter" is envisaged, to be used by the court in question, which prior to entering into the merits of the lawsuit, issues a decision on its admissibility. The lawsuit would be deemed inadmissible where (i) it is manifestly unfounded; (ii) there exists a conflict of interests; (iii) the rights subject to protection are not homogeneous; and (iv) the proponent of the class action is not capable of adequately acting in the interests of the class.

If the court decides that the class action is admissible, it sets out the terms and arrangements for the announcement of the lawsuit by way of a court order to allow the members of the class to join the lawsuit, and commences the proceedings. The court order admitting the class action is

² The class action (initially called the "collective action for compensation") was supposed to have entered into force at the end of June 2008. This new legal framework, however, was extremely complex and certain vague aspects of the provisions raised doubts as to the effectiveness of the new form of legal action, even before its entry into force.

C L I F F O R D

C H A N C E

broad in scope, governing both procedural and substantive aspects, and constitutes the expression of the broad power of organizational management of the class action which the new legal framework grants to the court (known as the "case management" of the lawsuit).

If the court finds in favour of the claimants, it issues a decision against the defendant which is not limited to the determination of the existence of individual rights, but also orders the defeated company to effect performance, or in other words to make payment of compensation to each consumer/user participating in the lawsuit. If a specific amount of damages cannot be determined, the court must indicate the calculation criteria. In this case, an agreement on the extent of damages to be paid must be reached by the parties within a term fixed by the judge which cannot exceed 90 days. The written minutes of the negotiations signed by the parties and by the court constitutes an enforceable obligation. Where no agreement is reached within the 90-day term, then, upon the request of a party, the court will itself determine the amount of damages.

Other features of Italian litigation

In Italy:

- contingency or conditional fees are allowed: this possibility exists in practice in Italy as a result of law 223/2006 which repealed the regulations providing for "the setting of obligatory fixed rate or minimum tariffs", i.e. the prohibition on agreeing on fees linked to the attainment of the objectives pursued. Law Decree No. 1 of 24 January 2012 converted into Law No. 27 of 24 March 2012 has repealed the professional tariffs for lawyers;³
- there are no juries in civil cases;
- there are no punitive damages;
- the loser usually pays the winner's costs according to a fixed scale; and
- there is no discovery of documents or pre-trial witness depositions.

Future developments

Forms of aggregate claims and legal proceedings will allow for the reduction of costs thanks to the sharing of litigation expenses among numerous parties. Moreover, the repeal of the professional tariffs for lawyers will probably permit claimants to arrange lower fees linked to the attainment of the objectives pursued. Secondly, the mechanism of protection seeks to reduce the number of lawsuits, by concentrating many claims under a single lawsuit, thus reducing congestion in the courts and furthering the principle of procedural economy.

The recent amendments to article 140-*bis* will probably facilitate the exercise of the class action but the first effects of this new form of protection and the use made of it by its beneficiaries is not likely to be evident until a considerable period of time has passed from its implementation and its actual modification. It should also be recalled that this is an instrument alien to Italian civil procedure and, like all novelties, will inevitably be subject to an initial testing period and will take on its definitive legal form only through its concrete interpretation and application.

³ This novelty has just been introduced. Therefore, its concrete application is subject to the implementation process which started with the introduction of the parameters mentioned in article 9 of the Law Decree No.1 of 24 January 2012. Such parameters will be followed by the courts when deciding the amount owed to the counsel of the party who won the proceedings.

The Netherlands

Introduction

The Dutch Civil Code allows representative organizations to bring actions to protect the interests of others. Although no damages may be claimed in representative actions, damages are often claimed for each individual in the group through a power of attorney.

On 27 July 2005 a new Act came into force facilitating the collective settlement of mass damages. The Act was amended on 1 July 2013.

Current position

Representative Actions

The Dutch Civil Code allows representative actions under article 3:305a. A representative organization may file a claim to protect the interests of others, if the organization's objective, as defined in its articles of association, is to act for the benefit of those interests.

On 1 July 2013, article 3:305a was amended to avoid the promoting of interests of aggrieved parties by representative organizations for mainly commercial reasons. To this end, representative organizations must show that the interests of parties represented by them are sufficiently safeguarded.

The interests of parties must be sufficiently similar to be dealt with in one action and claims must include common questions of law or fact. The representative organization brings the proceedings in its own name - the affected parties are not party to the claim. Before filing a claim, the representative organization must attempt settlement with the defendant.

Damages claims are not permitted. The claim may, however, seek to enforce or terminate a contract or the publication of certain information about the defendant's products or services.

The judgment is binding between the representative organization and the defendant, but does not bind the individuals.

Although damages claims may not be brought by the representative organization under article 3:305a, affected individuals may grant a representative organization a power

of attorney to represent them and claim damages on their behalf.

All types of actions may be brought under article 3:305a, including securities, competition and product liability claims. Securities actions of this kind are becoming more frequent. There have been for example cases against Dexia Bank (the "Legiolease" case) and ABN AMRO (regarding the IPO of World Online).

Collective Settlement Agreements

On 27 July 2005, the Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*) came into force, facilitating the collective settlement of mass damages. The Act was amended on 1 July 2013. The Act was originally created for "mass disaster accidents" where many people suffer similar damages at the same time.

Under the settlement agreement, one or more parties agrees to pay damages to all those affected. Damages are settled on the basis of "damage classes". The settlement agreement is entered into between a representative organization which, according to its articles of association, acts in the interests of the parties affected, and the party or parties that will pay the damages.

The Court of Appeal in Amsterdam may declare such a settlement collectively binding on all parties affected. A joint request must first be made by a representative organization acting on behalf of those affected and the party that agrees to pay damages.

The settlement agreement must contain:

- the occurrence which the settlement agreement relates to;
- a description of the class of persons affected;
- the compensation that will be paid;
- the requirements needed to be eligible for compensation; and
- details of how the compensation has been calculated.

An affected person may choose to "opt out" within three months after approval of the settlement agreement and thus avoid being bound by its terms. Those who have not opted out may collect their compensation within a timeframe specified in the settlement agreement (up to one year). Those who do not collect their compensation in time will lose their rights.

A collective settlement under this Act was entered into by Dexia with regard to its duty of care towards individuals in

C L I F F O R D C H A N C E

respect of certain share lease products. Shell entered into a settlement regarding a class action initiated in the US with regard to the re-categorisation of its proved petroleum reserves and this settlement has been declared collectively binding on the non-US aggrieved parties. Settlements that have been declared collectively binding have also been entered into in relation to affected policyholders of a bankrupt insurance company (Vie d'Or) and in relation to investor claims for late disclosures by Vedior.

A collective settlement was declared binding that was reached between Converium and ZFS and their non-US investors with regard to Converium's shares declining in value because its loss reserves increased after a class settlement had already been reached in the US (with US investors and investors purchasing American Depository receipts). The Court of Appeal held it had jurisdiction even though Converium and ZFS were neither domiciled in the Netherlands nor had shares listed on the Dutch stock exchange, and the vast majority of the investors was also based outside the Netherlands. The Court of Appeal appears to require for jurisdiction no other connection to the Netherlands than the setting up of a Dutch foundation or association that will enter into the settlement on behalf of potential claimants.

Amendment of the Act

The Ministry of Justice reviewed the experiences with the Act and came to the conclusion that this law provided for an effective and efficient method for collective dispute resolution, but only in case where there was a willingness to negotiate. The disadvantage of the system was that parties were often only willing to enter into a settlement after essential legal and factual questions had been judged by the highest court, which would take considerable time. To this end, on 1 July 2013, the Act was amended to improve the system by, *inter alia*:

- introducing a pre-trial hearing during which the court may be instrumental in the parties reaching an agreement;
- introducing the class settlement system in bankruptcy: by declaring a collective settlement between the trustee and the company's creditors binding, lengthy and costly procedures for validation of claims by the trustee are avoided.

Corporate Governance Representative Organizations

There has been considerable debate on the corporate governance of the various organizations that wish to represent the affected parties and the compensation for the persons involved in these organizations. This debate led to a private initiative for a code for the corporate governance of such representative organizations (a "Claimcode"). The Claimcode is a form of voluntary self-regulation and has been in force since 1 July 2011.

Other features of Dutch litigation

In the Netherlands:

- "no win no fee" agreements are not allowed but a success fee may be agreed for successful claims (including a percentage of the damages or settlement sum, unless this would be excessive);
- there are no juries in civil cases;
- there are no punitive damages;
- the loser usually pays the winner's costs according to a fixed scale;
- there is no general discovery but specific documents may be requested;
- there are no pre-trial witness depositions but preliminary witness hearings are possible; and
- it is possible to submit a direct request to the Supreme Court in relation to prejudicial questions of law.

Future developments

Over the years there has been an increase in collective action activity. This trend will likely continue.

C L I F F O R D C H A N C E

Poland

Introduction

Representative actions were introduced in Poland by means of the Act on the Pursuit of Claims in Multi-party Proceedings which came into force on 19 July 2010. This legal remedy allows a number of similar cases being brought by different entities to be examined in single civil proceedings.

Current position

Scope of application of the Act

The Act applies to civil proceedings instituted by at least ten persons pursuing claims of the same type, based on the same or similar situation in fact.

The scope of application of the Act is limited exclusively to claims in the following cases:

- consumer rights;
- product liability; and
- acts in tort.

Claims for the protection of personal rights have been excluded from the possibility of being pursued in multi-party proceedings.

Members of the Multi-party Group - "Opt-in" Model

Under the Act, multi-party proceedings cover the claims of persons who join the proceedings in the time-frame specified by the court. Therefore, Poland has adopted the so-called "opt-in" model (unlike the US).

Furthermore, persons who leave the group or decide not to join the group in the first place, may pursue their claims in separate proceedings. The court decision issued in the multi-party proceedings is effective only vis-a-vis the persons who participated in such proceedings as members of the group.

Representative of Members of the Multi-party Group

Multi-party proceedings may be instituted by a representative, who is one of the parties or a municipal (city) consumer spokesman. Multi-party proceedings are conducted by the representative in its own name, but for the benefit of all the parties in the group.

Under the Act, each party in the multi-party proceedings must be represented by an advocate or a legal adviser.

Multi-party Proceedings

Cases in multi-party proceedings will be examined by three professional regional court judges, which is an exception to the general rule that cases are heard by one district or regional court judge. This should ensure a higher degree of professionalism in court judgments in multi-party proceedings.

First, the court will decide whether multi-party proceedings are admissible in the given case. If so, a decision will be issued for the case to be examined in multi-party proceedings.

Secondly, the court will order the institution of the proceedings to be announced in the national, popular press, so that each person injured by the given event may join in as a participant. Pursuant to the provisions of the Act, the announcement should indicate the deadline by which the injured parties may join the proceedings. If a party breaches the deadline, its claims cannot be pursued in multi-party proceedings, but they may be pursued in separate proceedings.

The Act does not preclude an amicable resolution of the dispute that is the subject-matter of multi-party proceedings. The court may, at each stage of the proceedings, refer the parties to mediation.

The Act does not modify the currently applicable rules of assessing the damages owed to the injured party. In particular, the Act does not provide for punitive damages.

The relevant provisions of the Code of Civil Procedure apply to multi-party proceedings in matters not regulated by the Act.

Costs of Multi-party Proceedings

In Poland the losing party to multi-party proceedings will be obliged to reimburse the winning party for the costs of the proceedings in statutory amounts prescribed by Polish law.

Moreover, pursuant to the Act, a claimant may be ordered to pay a deposit as security for the costs of the proceedings, to prevent multi-party proceedings from being abused. However, the deposit may not exceed 20% of the value of the claim in question.

Pursuant to the Act, the attorney-in-fact may be remunerated *pro rata* to the amount awarded to the claimant, but not exceeding 20% of that amount. This rule is similar to American contingency fees, according to which the claimant's attorney's fees are usually a percentage of the damages awarded to the claimant.

C L I F F O R D C H A N C E

Other features of Polish litigation

In Poland:

- contingency or conditional fees are allowed;
- there are no juries in civil cases;
- there are no punitive damages;
- the loser pays the winner's costs according to a statutory fee scale; and
- there is no discovery of documents or pre-trial witness depositions.

Future developments

The Act came into force three years ago and primary conclusions regarding its future development can already be drawn.

First case examples show that the courts seem to be rather strict about applying the exclusion of pursuing personal rights from the scope of the Act. In the highly debated case concerning the collapse of a pavilion at an international fair in Katowice in 2006, the court dismissed the case arguing that the plaintiffs sought compensation for a violation of personal rights and not for an act in tort. Therefore, both academics and practitioners have called for amendments to the Act.

There has also been considerable debate on the definition and understanding of the term "acts in tort". It remains arguable whether, e.g. a violation of labour rights, unlawful termination of an agreement or negligence in performing an agreement may be seen as "acts in tort".

Awareness among the groups of interest is increasing since more and more class action cases are being filed with the courts. The most recent cases have been filed against banks and other financial institutions, travel agencies, property developers, e-services providers and the State Treasury.

Spain

Introduction

Spanish law allows representative actions to defend the interests of consumers. The system was established by the current Procedural Law (which came into force in 2001) and raised several problems of interpretation that have not been clarified by the courts as there has not been a consistent approach to these cases by them. It is also necessary to consider the Legislative Royal Decree 1/2007, dated 16 November 2007, which comprises the various regulations on the multiple sides of the protection of consumers and users.

Current position

Consumers under Spanish Law

Spanish Law uses a broad concept of "consumer": consumers are those who in the case at hand do not act as an entrepreneur or as a professional. So:

- consumers may be individuals or legal entities;
- the products in question may be goods (moveable or immovable), products, services, activities or functions; and
- the producer or service provider may be public or private, individual or collective.

This includes, therefore, purchasers of defective products and users of financial and health services, if they are the end users.

Claims Aimed at Protecting Consumers' Interests

The interests of consumers that are protected may be "collective" or "diffuse".

- The interests are "collective" when the affected consumers are easily identifiable. Both consumer organizations and groups of consumers themselves may bring an action, if the group includes a majority of affected consumers.
- The interests are "diffuse" when the affected consumers are not easily identifiable. Only certain consumer organizations are entitled to file these claims.

The claims may require the defendant to pay damages or take specific action. They may also seek a declaration that the defendant's conduct is illegal.

Preliminary enquiries may be undertaken before the process starts, although this is more limited than US discovery.

All affected consumers must be notified of the actions (through the media) so that they may assert their individual rights in the case.

Evidence is governed by the usual rules: each party may seek to introduce evidence, and sometimes the court may itself ask for specific evidence.

If the claim is brought by a group of affected consumers, only those included in the group may benefit from the judgment. Consumers who do not participate will be neither bound by nor able to enforce the judgment. If the claim is brought by a consumer organization, any affected consumer (including those who do not participate) may benefit from the judgment.

There are rules about the content of judgments and their enforcement in the case of claims by consumer organizations.

- If the defendant is ordered to take specific action, the judge must identify the consumers who are to benefit from the action. The judgment must at least describe the criteria for determining whether an individual is intended to benefit.
- If the judgment declares conduct illegal, it must determine whether this declaration affects people not party to the proceedings.
- If individual consumers take part in the proceedings, then the decision must address their specific claims.

Injunctions

The entitlement to seek an injunction (or "cessation action") depends on the specific sector and law in question. Consumer organizations may seek injunctions, but groups of affected consumers may not.

Other features of Spanish litigation

There are other features of the Spanish legal system that affect representative actions.

- There is no trial by jury in civil proceedings.
- The Supreme Court (Civil section) has acknowledged the validity of contingency fee agreements ("*pactum de quota litis*") between lawyers and clients, although the scope of permissible agreements needs clarification.
- The burden of proof is reversed in consumer protection cases: the product or service provider is liable for any

C L I F F O R D C H A N C E

damage, unless they prove that they fulfilled all legal requirements and took all other necessary measures.

- An "objective liability" system applies to particular products and services (such as foodstuffs, pharmaceuticals, health services and motor vehicles) where certain standards and quality controls are required. This means that the defendant may seek to avoid liability by proving that the damage was caused by an act of nature or the victim's negligence. But proof of its own diligence is not enough for the defendant to avoid paying damages.
- Spanish law does not acknowledge punitive damages.
- In most cases the losing party must pay the legal expenses of the successful party. This means paying the actual legal expenses up to a third of the amount in dispute.
- There is increasing awareness among consumers of this type of litigation and several recent cases have applied the new law. For example, the Consumers and Users Organization has taken action against some companies acting in the telecommunication and financial services sectors and some of the contractual terms used by such firms were found to be abusive by the courts. With regard to financing contracts, there has been a significant increase in the number of collective actions brought regarding general terms and conditions due to the adoption of the Act 2/2009, dated 31 March, regulating the contracting with consumers of mortgage loans or mortgage-backed facilities and brokering services for loan or credit facility agreements.
- Another relevant innovation in this field is that the Spanish Public Prosecutor has appeared for the first time on behalf of the consumers in a class action proceeding that was brought by an association against financial entities regarding the inclusion of unfair terms in financing contracts (Civil Proceeding no. 177/2011 brought to the Madrid Mercantile Court number 9). The intervention of the Spanish Prosecutor is a direct consequence of the approval by the State Prosecutor's office of the Circular 2/2010 which refers to the intervention of Public Prosecutors in civil proceedings for the protection of consumers and end users regarding the inclusion of unfair terms in contracts. The appearance of the Public Prosecutor may mean that the ruling will apply to similar contractual terms and conditions of other entities apart from the ones involved in the procedure, which would imply setting a precedent for future cases.

Future developments

It is likely that the number of collective actions will continue to increase in the future, which poses a significant risk to manufacturing, financial and service businesses.

United Kingdom

Introduction

There is no direct UK equivalent of a US "class action". There are, however, various forms of collective action and other mechanisms for pursuing "group complaints".

Current position

Collective Actions In General

No procedural mechanism is required for claimants with similar grievances to bring a collective action, although several mechanisms do exist for bringing collective actions.

GLOs - General Application

A Group Litigation Order (GLO) is made under the Civil Procedure Rules (CPR 19.11) for claims which "give rise to common or related issues of fact or law" (GLO issues). The claims are brought as a group, usually with at least 10 claimants and often using the same lawyers.

Unlike US class actions (where all potential claimants are bound unless they opt out of the class), all claimants wishing to join the group litigation must apply to be entered onto the group register ("opt in") by a date specified by the court. Judgment on one or more of the GLO issues will bind all of the claimants on the group register; any non-GLO issues (such as compensation) will be determined in each individual case.

GLOs have been issued in a range of areas, including product liability (McDonalds Hot Drinks, Sabril Group Litigation) and the compatibility of UK tax provisions with EU law (Thin Cap Group Litigation). A list of ongoing GLOs is published on the court website at <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>. So far there have been no antitrust or securities GLOs. Take-up of GLOs has so far been modest.

Representative Actions - General Application

Representative actions may be made by (or against) one or more persons who have the "same interest" in every part of a claim (CPR 19). The "same interest" requirement is restrictive and a GLO (which only requires common or related issues) will usually be a preferable route for claimants.

Representative Actions - Competition Law

Sections 47A and 47B of the Competition Act 1998 allow representative actions to be brought by a "specified body" on behalf of consumers in claims for damages for breach of UK or EU competition law, following findings of anti-competitive conduct by the Office of Fair Trading ("OFT") and/or the European Commission. Unlike GLOs, these claims are made by consumer organizations on behalf of claimants. The only claim to be made under section 47B to date was brought by Which? (the Consumers' Association) in relation to price-fixed football shirts. It was settled.

"Super-Complaints" - Competition Law

Section 11 of the Enterprise Act 2002 enables consumer organizations designated by the Secretary of State (such as the Consumers' Association) to submit "super-complaints" to the OFT. The organization must consider that there is a market feature or combination of features (such as the structure of a market or the conduct of those operating within it) that significantly harms consumer interests. The OFT may take enforcement action, launch a market study or refer the complaint to the Competition Commission or a sector regulator.

Injunctions - Consumer Contracts

A representative organization may complain to the OFT (or other qualifying body) that a contract term drawn up for general use is unfair under the Unfair Terms in Consumer Contracts Regulations 1999. The OFT will decide whether to bring proceedings for an injunction. This procedure does not allow damages claims.

Other features of UK litigation

The modest take-up of collective actions in the UK has probably historically been due to a combination of:

- no opt-out collective actions;
- no contingency fees; and
- the "loser pays" principle in respect of costs.

Although these features have probably curbed any US-style class action explosion, the UK can expect to see an increase in collective actions if reforms are made.

Future developments

The wisdom of introducing a collective actions regime into the UK has been much debated over the last few years, but the Government has decided to introduce a limited opt-out collective actions regime, with purported safeguards, for competition law. The regime would apply to both follow-on

C L I F F O R D C H A N C E

cases (which rely on an infringement decision of the OFT or the European Commission) and standalone cases, with cases to be heard only in the Competition Appeal Tribunal ("CAT").

Perhaps because of the controversy about importing US-style "class actions" into the country, the new plans have several purported safeguards against the perceived disadvantages of US actions. The CAT will be required to certify whether a collective action brought under the new regime should proceed on an opt-in or opt-out basis. The underlying claimants in such a case will be able to be either consumers or businesses, or a combination of the two. Claims will be able to be brought either by claimants or by genuine representatives of claimants such as trade associations or consumer associations but not by law firms, third party funders or special-purpose vehicles.

There will also be safeguards including a process of judicial certification (including a preliminary merits test), the opt-out aspect of a claim only applying to UK-domiciled claimants, a prohibition on treble or exemplary damages (one of the most-criticised aspects of US class actions), the application of the loser-pays rule in the assessment of costs and expenses (also unknown in the US, where class action defendants often face frivolous claims from claimants who have only their own costs to bear), a prohibition on contingency fees and the payment of any unclaimed sums to the Access to Justice Foundation.

There is also to be a new opt-out collective settlement regime for competition law in the CAT, similar to the system in the Netherlands, to allow businesses to quickly and easily settle cases on a voluntary basis. Any opt-out settlement will have to be judicially approved.

Appendix - Class Actions in the United States

Introduction

Class actions permit a group of similarly situated individuals or entities to bring their claims in a single collective action. This provides a vehicle for redressing wrongs that may be too small to support individual cases. Class actions also offer defendants the benefit of resolving complex questions of liability and damages in a single action that binds the entire class apart from those class members who opt out.

Class action law in the United States is well-developed. Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") outlines the procedures for filing and maintaining a class action in federal court. US states also have procedural rules for bringing class actions within state courts.

Under the federal rule, one or more plaintiffs (a "class representative") may file an action on behalf of a proposed class. The burden of proving that a proposed class satisfies Rule 23 rests with the class representative. The parties are permitted discovery to assess whether Rule 23 is satisfied.

The trial court will decide whether a proposed class may be certified. Rule 23 requires the court to conduct a "rigorous analysis" of the facts before certifying a class, which may entail some analysis of the merits of the claim if they overlap with issues related to certification. A proposed class may be certified as sub-classes, but each sub-class must independently satisfy every requirement of Rule 23.

Specific requirements of Rule 23

The court must consider the following elements in deciding whether to certify a class:

- Ascertainable class: class members must be ascertainable under objective criteria.
- Numerosity: A class must be so "numerous that joinder of all parties is impracticable."
- Typicality: the class representative's claim must be typical of the class members' claims. Class certification is often opposed on the basis that the class

representative is subject to "unique defences" inapplicable to the proposed class members.

- Adequacy: the class representative must be able to pursue the claims of class members "fairly and adequately". This often requires evaluation of conflicts of interest between the class representative and the class members, or among class members.
- Commonality: there must be "questions of law or fact common to the class." This requirement is designed to ensure fairness and efficiency but is not usually a rigorous standard for plaintiffs to meet. Most class certification motions are instead opposed by defendants on "predominance" grounds. However, there is an increasing focus on the need for class members' to establish the "same injury" to satisfy the commonality requirement.
- Predominance: the class representative must show that common issues of fact and law predominate over individual ones.

After a class is certified, notice must be provided to the class members. This may be done through direct mailing or advertising in national media, and the notice must be given "in plain, easily understood language." A class member may then elect to "opt out" of the class action and thereby would be permitted to bring an individual case on the same facts and circumstances. It has become more routine for plaintiffs with large claims to opt out of a class action, often commencing independent actions before the class has been certified and notice has been given. Those not opting-out may not bring their own individual cases and will be bound by the outcome of the class action.

Often, a class may be certified in conjunction with settlement between the parties, which provides for the award of fees to class counsel. The court must find that both the settlement and the fees awarded to class counsel—which can be as high as 35% of the settlement—are fair. Members of the class who do not opt out are bound by the settlement and are deemed to release all claims related to the case.

If class certification is denied, a court may prevent class members from seeking class certification in another forum. The class members may still bring individual cases.

Rule 23 was recently amended to allow a defendant to seek an immediate appeal of a trial court's decision to certify a class. In addition, the Class Action Fairness Act of 2005 and the Securities Litigation Uniform Standards Act of 1998 were enacted to address procedural flaws in class action

C L I F F O R D C H A N C E

litigation. The primary purpose of this legislation was to streamline and "federalise" class actions, ensuring that most class actions are litigated in the federal courts.

Securities Litigation

Courts frequently find class issues to predominate in cases alleging securities fraud, because plaintiffs often can cite to a uniform misrepresentation and a "fraud on the market" that removes the need to show individual reliance.

Antitrust/Competition

Provided that the proposed class consists of direct (rather than indirect) purchasers who suffered the same injury, courts regularly find antitrust issues to predominate over individual ones. For example, the impact of alleged price fixing and tying will usually be common to all class members, and the impact of monopolization will usually be common to class members within a particular market.

Product Liability

Courts usually distinguish between single-event cases and longer-term ones. In single-event cases, the class-wide common causation issues posed by a single disaster will often predominate. Longer-term cases involve class members exposed to an allegedly harmful product over a long period of time; they are seldom certified because of complex individual issues around causation and contributory negligence.

Other features of US litigation

In the US:

- contingency fees are allowed and, in fact, the norm for plaintiffs in class actions;
- most civil trials involve juries;
- punitive damages are allowed;
- the losing party does not usually pay the winner's costs; and
- there is extensive expensive pre-trial discovery and witness depositions. However, in securities class actions, discovery is stayed during the pendency of a motion to dismiss.

Class actions will continue to be the primary method for resolving large-scale disputes in the United States, particularly given the lucrative incentives to plaintiffs' lawyers to bring class actions on a contingency fee basis. Potential defendants are likely to continue to face

increasingly substantial exposure to class actions in the United States.

C L I F F O R D C H A N C E

Contacts

Jose Antonio Caínzos

Partner, Madrid

T: +34 91590 9405

E: joseantonio.cainzos
@cliffordchance.com

Marcin Cieminski

Partner, Warsaw

T: +48 22429 9515

E: marcin.cieminski
@cliffordchance.com

Diego de Lammerville

Partner, Paris

T: +33 14405 2448

E: diego.deLammerville
@cliffordchance.com

Fabio Guastadisegni

Partner, Milan

T: +39 028063 4353

E: fabio.guastadisegni
@cliffordchance.com

Robert G. Houck

Partner, New York

T: +1 212878 3224

E: robert.houck
@cliffordchance.com

Gail Orton

Director of Public Policy, Paris

T: +33 14405 5140

E: gail.orton
@cliffordchance.com

Jeroen Ouwehand

Partner, Amsterdam

T: +31 20711 9130

E: jeroen.ouwehand
@cliffordchance.com

Sébastien Ryelandt

Partner, Brussels

T: +32 2533 5988

E: sebastien.ryelandt
@cliffordchance.com

Burkhard Schneider

Partner, Frankfurt

T: +49 697199 1442

E: burkhard.schneider
@cliffordchance.com

Luke Tolaini

Partner, London

T: +44 20 7006 4666

E: luke.tolaini
@cliffordchance.com

James B. Weidner

Partner, New York

T: +1 212878 8235

E: james.weidner
@cliffordchance.com

C L I F F O R D
C H A N C E

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2013

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.