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Collective actions across the globe – a review
2011

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Terminology

In this review, the following terminology has been adopted:

Class action – court proceedings whereby a number of individual claimants sue the same defendant(s) for similar or related loss or damage in a single action. Individuals usually have to "opt out" of the action to avoid being bound by the court's decision. The most obvious example is class action litigation in the US.

Group action – court proceedings that are brought by a number of individual claimants concerning related or common issues, and that are heard together for case management reasons. Individuals usually have to "opt into" the action if they wish to take advantage of the court's decision. This type of proceeding is now permissible in the UK, although it remains infrequently used.

Representative action – court proceedings that are brought on behalf of a number of individual claimants by a representative body, most frequently a consumer organisation. Usually, the consumer organisation has first to be approved by the relevant authority in the jurisdiction. These actions are permissible in a number of European jurisdictions.

Collective action – a generic term to mean any one of the above types of proceedings or, indeed, any other type of proceeding which may be brought by or on behalf of a group of claimants.

Law stated as at February 2011.

Introduction

A review of the availability and operation of collective actions in 13 jurisdictions across Europe, the US and the Far East.

Collective actions – court proceedings in which a number of claimants with similar or related interests group together to bring a combined action against a defendant or group of defendants – are becoming increasingly important in civil litigation. The availability and operation of the procedure differs widely between jurisdictions. It is therefore vital that businesses with cross-border operations are aware of the potential actions they may face in other jurisdictions, brought by way of procedures with which they may be unfamiliar.

The best known example of collective actions in practice is probably the US class actions procedure. These sophisticated and highly developed proceedings are a regular occurrence in US litigation, with claims being brought by potentially a single class representative on behalf of a large number of claimants in a wide variety of circumstances. Although none of the other jurisdictions featured in our Review is currently planning to import US-style class actions into their own civil litigation procedures, the "long arm" of US jurisdiction is well known.

While no other jurisdiction yet has such a developed procedure as the US, all of those featured in this Review have one or more mechanisms by which claimants can group together either before or after proceedings have been issued, the court hearing their claims together in a single set of related proceedings. Sometimes the power to do this is restricted to certain types of action, such as the *KapMug* in Germany, which operates in the context of capital markets disputes only. In other jurisdictions, the ability to join additional claimants is limited to matters of consumer redress. Often, the power to bring a collective action on behalf of many claimants is restricted to particular representative bodies, such as consumer protection groups and environmental organisations. This is the case in France, for example where the organisation bringing the claim must be authorised under relevant legislation. Similarly, in the UK, the power to bring an action for damages to compensate consumers under competition legislation is currently limited to one specific body.

Whether a collective action procedure should be "opt in" or "opt out" is another area of divergence between jurisdictions. The majority of jurisdictions favour "opt in" procedures, but there are signs that "opt out" proceedings may be becoming more common. For example, the judgment in Portuguese *acção popular* proceedings, brought by a representative claimant to protect a public interest, will generally bind all potential claimants except those who have formally opted out. In Spain, would-be claimants have the opportunity to opt into collective proceedings and take an active part in them, although the result of the case will ultimately bind all those affected by the decision whether they opted in or not. In the UK, while current proceedings are all opt in, recent proposals have suggested that a new generic form of collective action should be developed, which could be either opt in or opt out, the court deciding on the most appropriate procedure in the circumstances.

The introduction of a collective action procedure, specifically in the areas of both consumer and competition law, has been mooted at EU level for some years. A recent consultation paper published by the European Commission seeks to identify common legal principles on collective redress, with a view eventually to establishing a coherent approach across the EU. However, it is likely to be some years before any proposals are implemented in practice.

This comparative review is intended to highlight issues rather than to provide comprehensive advice. If you have any particular questions about collective proceedings, please contact the Linklaters LLP lawyers with whom you work.

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Belgium

What forms of collective actions are permitted in this jurisdiction and under what authority?

Under Belgian procedural law, the claimant must have a direct, personal and actual interest to institute legal proceedings. This prevents a claimant from bringing claims in a single action on behalf of others. Class actions are therefore not permitted in Belgium.

Group actions, on the contrary, are permitted in Belgium. Indeed, pursuant to Article 30 of the Belgian Judicial Code, multiple claimants may, in certain circumstances, be allowed to join their individual claims into one action. The claims must be so closely connected that it is appropriate to try them together in order to avoid possible incompatible decisions. In these circumstances, the claims will be heard and tried together. Each claimant must, however, be identified and have an immediate, personal and actual interest in the claim.

In some specific cases, Belgian law allows for other types of collective action:

> actions by multiple claimants (ranging in the hundreds), represented through a power of attorney, have been commenced in the area of investors' litigation and recently in other areas as well. Such actions may be initiated by public interest associations representing small investors, who obtain powers of attorney from affected investors to file a damages claim in their name. However, each claimant must (i) be named and identified individually in the action, (ii) have a direct, personal and actual interest in the claim and (iii) still provide evidence of the existence and extent of the damage it has suffered because of the alleged wrongful act;
> certain specified entities or representative organisations (i.e. consumer protection organisations, environmental organisations and human rights organisations) may, in accordance with their statutory purpose, bring a representative action on behalf of an unidentified group of people to defend collective interests, such as consumer and investor interests, the environment and human rights (e.g. anti-discrimination).

Who may bring them?

See above.

Opt in or opt out?

Not applicable. This is a case management tool only.

Judge or jury?

Judge – there are no juries in civil cases.

What relief may be obtained?

Specific performance and/or damages may be obtained. However, representative organisations are usually only entitled to seek injunctions to stop unlawful practices that harm the collective interests they represent, and may not claim damages for breach of these interests. Human rights organisations may in principle claim damages in addition to injunctions.

There are no punitive damages.

How are such actions funded?

In principle, each party will be responsible for its own costs. However, further to the Act of 21 April 2007 on the recoverability of legal fees and costs, the successful party may now obtain reimbursement of a proportion of its fees on a fixed scale from the unsuccessful party in certain circumstances (capped at €30,000 per instance). Contingency fees or "no win no fee" agreements are not permitted (although a success fee may be agreed).

Is pre-trial disclosure available?

Belgian law does not have a procedure corresponding to that of disclosure. There is no general discovery, nor pre-trial witness deposition.

As a general rule, each party must be given access to the documents relied upon by the opposing party. In some cases, i.e. when there are serious indications that a party is withholding a relevant document, the judge may order the production of that document.

Likely future scope and development?

Recently, several proposals have been launched to introduce class actions in Belgium. Notably, there is a well-advanced draft bill prepared on behalf of the federal government under the auspices of the University of Brussels, as well as an alternative draft bill prepared by the Flemish Bar Association. A third draft bill has been prepared by a committee of Belgian MPs. While all three proposals provide for a relatively elaborate system of class actions, their key features differ substantially. Currently, none of the three proposals seems to be high on the list of priorities of the Belgian legislator. Consequently, while it can be expected that a collective action procedure will eventually be introduced, the time frame for such legislation is unclear.

European Union

What forms of collective actions are permitted in this jurisdiction and under what authority?

To date, no binding legislation providing for collective redress regimes has been adopted by the EU, although draft proposals have been made. It is necessary to distinguish between collective redress for consumers in general, and collective redress in the field of competition law. Specific measures are considered appropriate in the area of competition law because of its particular nature and the wider range of potential claimants, which may include, in addition to individuals, small and medium-sized businesses.

General consumer law

The Commission is currently considering four options to improve and develop mechanisms for consumer redress in the EU, entailing a progressively greater degree of EU involvement:

> developing no new EU actions, relying instead on existing national and EU measures to achieve adequate redress for consumers;
> developing co-operation between Member States in order to ensure that consumers throughout the EU are able to use the collective redress mechanisms that are available in the different jurisdictions;
> developing a mix of policy tools, both non-binding and binding, that can together enhance consumer redress, including improving alternative dispute resolution mechanisms;
> adopting non-binding or binding EU measures to ensure that a judicial collective redress mechanism exists in all Member States. Such a mechanism would ensure that every consumer throughout the EU would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases.

Of these proposals, it is the last which would provide the most advanced collective redress mechanism.

Competition law

The Commission has proposed a combination of two complementary mechanisms for collective redress in the field of competition law: representative actions and opt-in collective actions.

The representative action procedure would allow organisations with a legitimate interest in pursuing the action (so-called "qualified entities") to bring an action on behalf of a group of injured parties who are not themselves party to the action, without the need to identify all injured parties in advance. Any injured party can opt out. There would be two kinds of such qualified entities: those officially designated in advance by a Member State and those certified on an ad hoc basis by a Member State for a particular antitrust infringement. Entities having standing in one Member State would automatically be granted standing in all other Member States.

The second mechanism comprises an opt-in collective action. This would be an action in which potential claimants would expressly decide to combine their individual claims for the loss they had suffered into one single action.

Under both type of actions, claimants would not be deprived of their right to bring an individual action for damages if they wished to do so.

Who may bring them?

General consumer law

The Commission has proposed a number of different procedures: group actions, brought by claimants who combine their individual claims; representative actions, brought by qualified entities such as consumer organisations or ombudsmen; and test cases, brought by individual consumers (where the result of the test case would be extended to all consumers affected).

Competition law

Representative actions would be brought by qualified entities (see above). Opt-in collective actions would be brought by individuals combining their separate claims (see above).

Opt in or opt out?

General consumer law

Although the Commission does not conclude definitively what procedure should be adopted, it does indicate a slight preference for an opt-in procedure.

Competition law

Claims brought under competition law could be "opt in" or "opt out", depending on the type of action. Representative actions would be run as controlled "opt out" procedures. The term "controlled" refers to the fact that the qualified entities would have to demonstrate that they had taken sufficient steps to inform all potential members of the group of the action, and the court would be involved in the conduct of the case. An "opt in" collective action brought by individual claimants would be conducted pursuant to an "opt in" procedure.

Judge or jury?

The Commission makes no recommendation in this respect. Consequently, this will depend on the law of each Member State.

What relief may be obtained?

General consumer law

Probably (although this is not explicitly stated by the Commission), compensation amounting to the real value of the loss suffered by those included or represented in the action (i.e. actual loss + loss of profit), together with interest, would be recoverable. While the EU does not advocate the award of punitive damages, it would probably not exclude them where national law provided for their recovery.

In an opt-out procedure, consumer organisations would have to identify individual claimants and distribute the compensation appropriately. In an opt-in procedure, on the other hand, the court would distribute the compensation to the individually identified claimants. It is also being considered whether a share of the compensation should be allocated to the representative organisation to cover its costs.

Competition law

The relief that might be recoverable would probably amount to the real value of the loss suffered by those included or represented in the action (i.e. actual loss + loss of profit), and interest. Again, although not proposing punitive damages, the Commission would probably not disallow them where the national law provided for them.

In a representative action, damages would be awarded to the representative entity, which would then directly compensate, as far as possible, those represented in the action. Member States could permit part of the damages to be used to reimburse the qualified entity for expenses reasonably incurred in connection with the representative action. In opt-in collective actions, damages would be distributed directly to the individually identified claimants.

How are such actions funded?

General consumer law

Possible funding options that are currently being considered include:

> allocating a share of the potentially recoverable compensation to the organisation to cover its costs;
> a loan by a third party or public body to cover the financing of court proceedings;
> litigation funding by private third parties; or
> public funding by Member States.

A combination of these funding options is also being considered.

Competition law

The Commission does not propose any specific changes with regard to national cost regimes, but does encourage Member States to consider how their own costs rules might be reviewed to encourage and facilitate the bringing of worthwhile claims.

Collective actions could be funded by the claimants bringing the action themselves, or by the entity representing them (which could, for instance, be financed by the fees paid by their members, public subsidies and/or proceeds from commercial activities), by legal aid mechanisms or other publicly or privately administered funds, by insurance companies or other players in the market, or by the claimants' lawyers working under a contingency fee agreement.

Is pre-trial disclosure available?

General consumer law

The availability and extent of disclosure in court proceedings is a matter for the national law of each Member State; the Commission does not express a view on this.

Competition law

The Commission considers that in EU antitrust damages cases, there should be a minimum level of disclosure *inter partes* across the EU. National courts would be obliged to order the disclosure of evidence by relevant parties, provided certain conditions are fulfilled, such as the evidence being necessary to substantiate a party's claim or defence, sufficiently identifiable, relevant and not otherwise obtainable, and that production of the documents sought is both necessary and proportionate taking into account the parties' legitimate interests. An exception would be made for corporate statements (in leniency submissions), settlement submissions (in settlement applications) and for disclosure that would undermine an ongoing investigation. Member States could maintain or introduce rules which provide for wider disclosure of evidence.

Likely future scope and development?

General consumer law

After the Green Paper was published in November 2008, consultations with stakeholders were held and the replies summarised and published. Subsequently, the Commission published a formal Consultation Paper listing five options for discussion:

1. taking no action at EU level at all;

2. introducing two non-legislative measures: the development of a standard model of collective ADR, and a self-regulatory measure for businesses to establish an internal complaint handling system;

3. establishing a non-binding procedure for setting up collective ADR schemes and judicial collective redress systems, including benchmarks, or standards, that such judicial collective redress systems should respect. It is complemented by giving the competent authorities additional powers;

4. developing the same procedures as option three, but with the important difference in that the measure setting up collective ADR and the judicial collective redress system would be binding. The measure defining the standards that judicial collective redress systems would have to respect would be non-binding. Therefore, this option would oblige Member States to set up a judicial collective redress system if one does not already exist, or complete or adapt existing schemes to comply with relevant standards where necessary; and

5. introducing a binding instrument establishing a detailed and harmonised EU-wide judicial collective redress mechanism, including a collective ADR procedure. The Commission would prefer a test case procedure, where a test case could be brought by a consumer, a consumer organisation or a competent authority such as an ombudsman on behalf of a number of harmed consumers. The judgment in that case could be extended to all other consumers in the EU who had been harmed by the same practice and who identified themselves after the judgment.

The consultation exercise was completed in June 2009, following which the written replies and a feedback statement summarising the results of these replies were published. Recently, in February 2011, the Commission published a further consultation paper entitled "Towards a Coherent European Approach to Collective Redress". This paper seeks views on how a coherent framework for collective redress across Europe could be established. It identifies a first set of six common legal principles which it suggests should apply to any new initiative in this area: the need for effective and efficient redress (injunctions and/or compensation); the importance of information and the role of representative bodies; the need to take account of collective consensual resolution as a means of alternative dispute resolution; the need for strong safeguards to avoid abusive litigation; the availability of appropriate funding mechanisms, in particular for individuals and small/medium enterprises; and the importance of effective enforcement across the EU.

The consultation closes at the end of April 2011. It is anticipated that the results of the consultation will guide the Commission in any possible initiative for collective redress in EU legislation.

Competition law

The previous Commission went as far as drafting a Directive on Damages Actions for Breach of EC antitrust rules, but this draft was withdrawn in October 2009. Development of a specific procedure for breaches of competition law has been put on hold while the wider consultation on general principles referred to above takes place. Competition Commissioner Almunia has indicated that, following the agreement of a common legal framework and principles for collective redress across the EU, a specific proposal on antitrust damages actions will be presented. The timing of this proposal will very much depend upon when a common legal framework and principles for collective redress are established.

Regarding implementation, it is most likely that any EU measure will take the form of a Directive which would have to be transposed into national law. However, it would remain open for Member States to go beyond the minimum level of protection deemed necessary by the EU if they so wished.

France

What forms of collective actions are permitted in this jurisdiction and under what authority?

It is not possible to bring a "class action" in France.

However, French law provides five types of "collective actions":

> representative actions, in which an authorised association represents the interests of at least two individuals who have suffered damage resulting from the same cause. Such actions are permissible in the areas of consumer law (*Action en représentation conjointe des consommateurs*) pursuant to article 422-1 of the Consumer Code; investment law under Article L.452-2 of the Monetary and Financial Code; and environmental law under Article L.142-3 of the Environmental Code;
> actions brought in the collective interests of consumers (*action exercée dans l'intérêt collectif des consommateurs*). Under article 421-1 of the Consumer Code, an authorised consumer association may exercise the "rights given to a civil party relating to facts which cause direct or indirect harm to the collective interests of consumers". These actions seem to be relatively frequent because, in practice, criminal offences are often committed to the detriment of consumers, such as false information on prices and contractual conditions and misleading advertising;
> Defence Leagues (*Ligues de défense*). Case law has recognised that, in certain circumstances, an association may defend the collective interests of its members in the context of a civil action if they have concrete individual interests and could have acted either on their own or are acting together in the proceedings;
> in defence of "important causes". Specific regulations allow several associations to bring an action in order to obtain damages before civil or criminal courts where a criminal offence has been committed;
> with regard to competition offences, such as price fixing and unfair competition, article L.470-7 of the French Commercial Code permits professional organisations to instigate proceedings in a civil or commercial court for harm caused directly or indirectly to the collective interests of the profession or sector which it represents. To our knowledge, very few decisions have been rendered on the basis of this provision.

Who may bring them?

The various actions may be brought by different parties:

> actions for the joint representation of consumers – the authorised association commences the action for the joint representation on behalf and for the benefit of each claimant. In order to commence an action, the association must receive written instructions from each claimant. Each claimant must be known and identified. A claimant can revoke his instructions at any time and pursue the action on his own account, as long as he informs the Court, the defendant and any other party to the proceedings;
> action brought in the collective interest of consumers – where the loss suffered is related to the commission of a criminal offence, the association may commence the action itself. In other cases, it may only intervene in a civil action which has already been commenced by one or more consumers with respect to losses related to goods or services received by them;
> defence leagues and cases brought in defence of important causes – the relevant association brings the action on its own behalf.

Opt in or opt out?

This is not relevant. The general rule under French law is that the effects of a judgment cannot extend to persons who have not been a party to the action, and judges are in any event not permitted to render decisions that extend beyond the claims of the parties.

Limitations?

According to French case law, for an association to bring a collective action, its constitutive documents must provide for the possibility of it undertaking an action to defend the collective interests of its members, even if the harm was caused before the association was set up, and at least one of its members must have suffered relevant loss or damage.

Associations cannot advertise for potential claimants on the radio or television, nor by means of posters, flyers or personal letters, but only in the newspapers. An exception to this rule is that, under the action for the joint representative concerning investors, associations can be authorised by the President of the Court to use the media in order to seek participants.

Lawyers may never invite potential claimants to join a collective action.

Judge or jury?

One to three judges. There is no jury in civil cases in France.

What relief may be obtained?

The relief available depends on the type of action:

> actions for the joint representation of consumers – damages may be awarded to the individual claimants;
> an action brought in the collective interests of consumers – the association may seek an injunction restraining the defendant from engaging in illegal activities since this action is designed to seek relief which is in the interests of the group as a whole.

An association may also seek damages for losses suffered as a result of the defendant's product, services or conduct, but such losses must have been suffered by the group as a whole. Since losses suffered by the group of consumers as a whole are difficult to evaluate, French Courts have tended to award nominal or symbolic amounts:

> defence leagues – damages are allocated to the association. In addition, individual members may seek damages on their own behalf;
> defence of important causes – damages are allocated to the association.

There is no such concept as "punitive" damages under French law. The damages ordered are intended solely to compensate a party for the losses suffered.

How are such actions funded?

The losing party is usually obliged to contribute a specified sum (usually rather low), by way of costs to the successful party, in addition to payment of court fees.

Lawyers' professional ethics rules prohibit lawyers from handling cases on a "no win, no fee" basis; any fixing of fees purely on the basis of the outcome of the judgment is forbidden. However, it is permissible to agree to a supplementary fee payable upon the outcome of the case (i.e. a "success" fee) or for the services rendered.

Legal aid may be available to qualifying claimants.

Is pre-trial disclosure available?

There is no general discovery or pre-trial witness depositions in France. As a general rule, each party must voluntarily produce any relevant documents to support its claim. If a party has reason to believe that the other party is withholding relevant documents, it may request the Court to order the filing of such documents by the other party. In addition, any party can ask the Court to appoint a judicial expert to give evidence on technical issues and under certain conditions.

Likely future scope and development?

Several proposals and draft regulations proposing that a collective action procedure be introduced into French law, focusing in particular on claims brought by authorised associations in consumer matters, have been made since January 2005. However, all have been rejected by Parliament.

Two reports, the first entitled "Freedom of the French Economic Growth", presented to President Sarkozy in January 2008 and the second, considering the decriminalisation of corporate offences and presented to the Minister of Justice in February 2009, advocated the introduction of a collective action procedure into French law. A special working group within the French Parliament was also appointed at the end of 2009 to examine the terms and conditions of a possible collective action in France. It presented its report in May 2010, which supported the introduction of a collective action in France, limited to specific claims (consumer, competition, banking and regulatory) and brought only by authorised associations. Damages would be capped. However, these reports are for information purposes only and have no binding legal force.

On 25 January 2011, the French Regulator (the AMF) published a report on redress for damages suffered by investors. This report also has no binding force and is for information purposes only. However, it does consider how some form of collective action might be adapted to the investment and financial spheres if a specific procedure to this effect were to be introduced into French law. Currently the working group has limited its contribution on this issue to "lines of thinking" only, the issue of collective redress being still controversial in France. A public consultation on all the proposals in the report closed at the end of February.

The need for a definitive procedure under which to bring collective actions is increasing. On 6 December 2007, claims for compensation brought by a consumer association on behalf of more than 12,000 individual consumers who suffered loss due to the anti-competitive behaviour of three French mobile phone providers were dismissed by the Paris Commercial Court on the basis that the claimants had not complied with the rules governing the joint representative action. Even though the Paris Court of Appeal upheld the Commercial Court's decision on 22 January 2010, it confirmed the first instance court's reasoning that the rules applicable to the joint representative action had been breached and, in particular, that the instructions given by the claimants were null and void as they had been collected through public advertising by the consumer association. The consumer association argued that it had commenced proceedings in the collective interest of the consumers and not as a joint representative action. The result of this decision is that, in practice, the consumer association may only bring a claim under the joint representative action procedure, including obtaining instructions from each claimant individually without being authorised to advertise for potential claimants. Alternatively, actions brought in the collective interests of consumers would in practice require that each consumer file a claim individually. It appears, therefore, very difficult to obtain collective relief under current French law.

Although a French "class" action is eventually likely, it appears still to be some way off. The Minister for Commerce recently said that the current economic crisis must first be over and consumers' organisations better organised before any collective action regime could be introduced in France. He said that out of court settlements of consumers' disputes should instead be encouraged.

Germany

What forms of collective actions are permitted in this jurisdiction and under what authority?

German Procedural Law does not permit the bringing of a claim in the name of a more or less unknown group of claimants in the form of a class action akin to that available in the US. There is, however, a recognised procedure (*Streitgenossenschaft*, under sections 59 – 62 of the German Code of Civil Procedure) by which individual proceedings initiated by multiple claimants against the same defendant are heard at the same time at the same court. The various claims will be run as a joint trial and one ruling given.

In 2002, a procedure was introduced whereby individual claimants with claims relating to breaches of consumer law may assign their claims to a consumer protection association which may then bring an action in its own name (a collective action). Such a law suit, concerning misuse of debit cards, was declared admissible by the German Federal Supreme Court. This type of collective action has been further facilitated by the Legal Services Act (*Rechtsdienstleistungsgesetz*) enacted in July 2008.

Representative actions are permissible under statute in certain specific areas of law:

> under the German Act on Actions for Injunctions 2002 (*Unterlassungsklagengesetz* or "*UKlaG*"), certain qualified representative organisations, such as consumer protection associations and chambers of commerce, may commence proceedings for injunctions preventing breaches of consumer law or statutory restrictions on the use of standard business terms (which also apply in a b2b-context). Individual claimants are not entitled to bring an action under this procedure;

> in 2004, a new kind of representative action in the area of competition law was introduced (section 10 of the German Act against Unfair Competition (*Gesetz gegen Unlauteren Wettbewerb*) ("UWG")). Under this provision, certain qualified representative organisations, such as consumer protection associations and chambers of commerce, can claim recovery of improper gains (*Gewinnabschöpfungsklage*) from companies which benefitted financially by intentionally violating the UWG. However, successfully recovered funds are not paid to the entities bringing the action, but to the German Federal department as a fine.

Arguably the most important development in German civil procedure was the introduction of the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrens-Gesetz* ("*KapMuG*")) in 2005. This is a procedural tool for handling multi-party proceedings in the field of capital market disputes. Parties to an appropriate dispute may request that their case be handled as a lead or model case. If at least nine further applications are filed, the Higher Regional Court selects such a lead case. While the lead case is heard, all other pending proceedings in which the court's decision depends on the results of the lead case are stayed, regardless of whether the parties to the stayed proceedings have applied for a *KapMuG* proceeding or not. The Higher Regional Court defines which claims are affected by the lead case and decides on fundamental questions of fact or law relevant to all pending lawsuits. The judgment reached in the lead case is binding on all other pending cases, which will then resume hearing in their respective courts, but not as regards further claims which are filed after the decision in the lead case. Since the *KapMuG* became effective in 2005, lead cases have been selected in 12 matters, of which four have been brought to an end thus far.

Who may bring them?

As a rule, all claims have to be brought individually. This includes cases under the *KapMuG*, which must be commenced by individual claimants who are then bound by the ruling in the lead case.

Collective actions may be brought by consumer protection associations under section 79 paragraph 1 Code of Civil Procedure (*Zivilprozessordnung*) in certain circumstances.

Specified qualified representative organisations may bring claims for injunctions under the *UKLaG* or under the *UWG*.

Opt in or opt out?

German law of civil procedure does not permit claims to be brought in the name of an uncertain group of claimants. All collective actions are therefore subject to the "opting in" of each claimant.

This also applies to cases brought under the *KapMuG* where the lead case is selected from those in which a party has applied for a *KapMuG* proceeding. In contrast, there is no "opt out" mechanism under the *KapMuG*, as all other pending proceedings in which the court's decision depends on the results of the lead case are stayed, regardless of whether the parties to the those proceedings have applied for a *KapMuG* proceeding or not.

Limitations?

The *KapMuG* applies to certain disputes under capital markets law, in particular to claims for damages caused by allegedly inaccurate public investment information, e.g. in cases of prospectus liability. It does not apply to cases of inaccurate individual investment advice, nor to civil law proceedings in general.

Test cases are not limited to any specific fields of law. The same applies to *Streitgenossenschaften*.

Actions commenced under the *UKlaG* are limited – as their name indicates – to injunctions and do not apply to employment matters (section 15 *UKlaG*).

Actions commenced under the *UWG* are limited to the recovery of improper gains obtained by intentionally violating competition law.

Judge or jury?

Civil actions are tried by one or more judges in Germany.

What relief may be obtained?

See above. Punitive damages are not obtainable under German law.

How are such actions funded?

The usual rule is that the losing party bears the costs of the law suit, including the costs of the successful party.

Contingency fees were introduced into German law on 1 July 2008. They are, however, only permissible in individual cases and only where the client would, due to his economic situation and from a reasonable perspective, be deterred from pursuing his rights without a contingency fee agreement. In addition, in the case of court proceedings, attorneys may only agree on no/lower remuneration for losing a case if they are entitled to higher remuneration than the statutory fees should they be successful (Section 4a Attorney Remuneration Act) (*Rechtsanwaltsvergütungsgesetz*).

Legal protection insurance is available to finance litigation, and professional third party funding organisations are becoming more popular.

A claimant can apply for legal aid under section 114 Code of Procedural Law. This will only be granted if the claim appears likely to succeed.

Is pre-trial disclosure available?

There is no procedure for pre-trial disclosure of documents.

Pre-trial witness depositions may be taken, provided that the other party consents or there is a threat that the evidence would be lost or unobtainable at trial (Section 485 Code of Civil Procedure).

Likely future scope and development?

The previous German government had proposed US-style class actions in competition, consumer protection and shareholder protection cases. However, this project appears to have stalled and we understand that it is not being taken further by the current government. The proposal met with significant criticism because class actions do not fit into the established system of German procedural law. Moreover, the Federal Ministry of Justice has opposed EU proposals to introduce collective actions with an opt-out mechanism into European anti-trust law.

A private enterprise, Cartel Damage Claims SA ("CDC") has emerged to take action on behalf of two or more claimants in private damage claims based on the infringement of national or international anti-trust law. Under this model, several claimants sell their claims to CDC, which then brings the case in its own name. The first action on this basis is currently pending and has already been declared admissible by the German courts.

Initially, the *KapMuG* was to remain in force until November 2010. This period has recently been extended until November 2012 in order to allow more time for reform. In addition, the Federal Ministry of Justice requested the Frankfurt School of Finance and Management to undertake a study to provide a basis for potential amendments to the *KapMuG*. The authors of this study consider the *KapMuG* to be a success and propose its extension while also suggesting several amendments, the most prominent being the introduction of an "opt out" mechanism. In addition, they propose to extend the *KapMuG* model to civil law claims in general.

However, there is currently no general expectation that collective actions will develop further.

Hong Kong

What forms of collective actions are permitted in this jurisdiction and under what authority?

The only type of collective action permitted in Hong Kong is representative proceedings under Order 15 rule 12 in the Rules of the High Court ("RHC") introduced on 1 May 1988.

Order 15 rule 12 RHC provides that, where numerous persons have the same interest in any proceedings, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing any or all of them. This has been held to mean that all the members of the alleged class should have a common interest and a common grievance, and that the relief is in its nature beneficial to all (*Pan Atlantic Insurance Co. and Republic Insurance v Pine Top Insurance Co* [1989] 1 Lloyd's Rep 568).

In addition, under this rule the Court may, at any stage of proceedings, on the application of the plaintiff and on terms as appropriate, appoint any one or more of the defendants or other persons to represent the defendants.

Who may bring them?

In a representative action begun in the name of one person, every person represented is a party to the action within the meaning of section 2 of the High Court Ordinance, even if not named on the record, and the court has the power to add him as a necessary party under Order 15 rule 6 or to amend the proceedings by substituting the unnamed person for the named plaintiff so as to bring him in as at the date of the issue of the original writ.

It is not necessary to name every plaintiff or defendant in the group. It is essential, however, to define the group represented with sufficient clarity so that the Court can determine whether they have the requisite common interest and whether the relief claimed is for the benefit of all members of the group.

The writ of summons must state that the person is suing or being sued in a representative capacity (Order 6 rule 3 RHC), and this should also be specifically pleaded in the body of the statement of claim and in the prayers.

Opt in or opt out?

In effect, actions in Hong Kong are "opt in", although they are not expressly characterised as such. Order 15 rule 12(3) RHC provides that a judgment or order given in representative proceedings shall be binding on all persons represented as being those represented by the plaintiffs or defendants, but shall not be enforced against any person not a party to the proceeding except with the leave of the court.

If a representative action is properly constituted, any person represented in, but not a party to, the action is bound by any judgment given in the action.

No leave is required to enforce the judgment in representative proceedings as against the parties actually before the court. However, the judgment can only be enforced with the leave of the court against a person represented in, but not a party to, the proceedings.

Limitations?

The representative proceedings procedure governed by Order 15 rule 12 applies to all causes and matters. However, the action must satisfy the necessary criteria imposed by the rules. For example, the mere existence of a common wrong will not necessarily suffice if there is no common right or common purpose.

A representative action may be begun by a person or persons claiming to represent numerous other persons having the same interest. No leave or representation order is necessary either before or after the action is begun. There would appear to be no limitation on who may bring an action in representative proceedings, provided that the representative plaintiff seeks to represent others having the same interest.

Judge or jury?

Civil actions in Hong Kong, apart from cases involving defamation, are heard by a single judge.

What relief may be obtained?

The usual remedies sought in civil proceedings, including damages, are available. As a matter of Hong Kong law, punitive damages of the type awarded in US proceedings are not available. However, in rare exceptions, the courts in Hong Kong can grant exemplary damages.

How are such actions funded?

The represented parties are not liable for costs. However, the court has jurisdiction to order that costs incurred in a group action will be borne by all the members of the group equally and not only by those members bringing the lead action (*Ward v Guinness Mahon & Co Ltd* [1996] 4 All ER 112).

Contingency fees are not permissible.

There is no provision that requires government funding to be available to parties in a representative proceeding. To be eligible for legal aid, the applicant must first satisfy a means test, to establish that he meets the financial eligibility requirements, and also a merits test to show that he has reasonable grounds for bringing or defending a civil proceeding.

It is possible that legal aid may be available to applicants who are not actually acting as "representative parties". Section 9(e) of the Legal Aid Ordinance provides that where an application for legal aid is made, the Director of Legal Aid may "take or cause to be taken such steps as may be necessary to conserve the interests of the applicant or of any person on whose behalf the applicant is acting pending determination of his application". This provision empowers the Director to act in respect of legal aid applicants who are not chosen as representative parties for the purpose of conserving their interests while their applications are being determined.

In addition, section 10(1) of the Legal Aid Ordinance gives the Director of Legal Aid discretion to grant a certificate that a person is entitled to legal aid in connection with certain proceedings, which may include representative actions.

Is pre-trial disclosure available?

Since the Civil Justice Reform (effective 1 April 2009), section 42 of the High Court Ordinance allows a party to representative proceedings to apply to the court to exercise its discretion to order a person who is not a party to give discovery of documents if it appears to the court that such person has or is likely to have documents in his/her possession, custody or power which are relevant to issues arising out of the claim. This may apply to a represented person who is not also a party. There is no provision in the RHC that provides for specific pre-trial witness depositions in representative proceedings.

Likely future scope and development?

Order 15 of the RHC is the only machinery for dealing with multi-party proceedings in Hong Kong. The Chief Justice's Working Party on Civil Justice Reform has criticised this provision as being too restrictive and an inadequate framework for dealing with large-scale multi-party situations.

The Law Reform Commission of Hong Kong therefore established a Commission sub-committee in November 2006 to consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to devise a suitable scheme. The sub-committee published a consultation paper in November 2009 in which it proposes to establish a general procedural framework for class actions in Hong Kong by adopting an "opt out" regime. The "opt out" regime would not be applicable to collective members residing outside Hong Kong, who would instead be required to "opt into" the collective action proceedings commenced in Hong Kong in order to be bound by, or to benefit from, such proceedings. Procedural safeguards are proposed to deter unmeritorious claims. These include the requirement for certification by the court before the commencement of a collective action and a general power of the court to order the plaintiffs to provide security for costs. This public consultation is still in progress.

Contrary to earlier expectations, the Competition Bill introduced by the Hong Kong government on 2 July 2010 does not presently provide for collective actions.

Luxembourg

What forms of collective actions are permitted in this jurisdiction and under what authority?

The New Code of Civil Procedure, introduced in 1998, (*Nouveau Code de Procédure Code*) (the "NCPC") does not permit plaintiffs to bring a general class action in court.

It is, however, possible for plaintiffs who have similar but separate claims against the same defendant(s) to bring an action on a "group" basis by way of a joint action. The individual claims may be brought before the same court and heard together by the same judge, even if the claims are not considered to be closely related.

It is also possible to ask the court to join claims which are closely related under article 206 NCPC and to rule on them together. Luxembourg courts have adopted a liberal view in order to join different cases. Courts usually tend to join cases in order to simplify the pleadings, to avoid conflicting judgments or even to save procedural costs. The connection between different claims may result from the fact that all the claims share the same facts, the same objective, or the likelihood of a common solution.

Alternatively, proceedings may be commenced against one or more defendant(s) by the service of a single application at the request of a large number of claimants. Each claimant still has to be individually identified in the application.

Under article 483 NCPC, it is also possible for a claimant with a direct or indirect material or moral interest in doing so, to intervene in pending proceedings on a voluntarily basis (*intervention volontaire*). Similarly, a third party may be obliged to intervene in pending proceedings (*intervention forcée*), if the upcoming court decision may affect its rights.

Under article 23 of the law of 30 July 2002 on unfair competition practices (the "Unfair Competition Law"), an individual, professional group or qualified consumer association may commence summary proceedings in order to request an injunction for the cessation of any infringement to the law without having to prove any damage. However, it is not possible to claim damages on behalf of individuals affected by the infringement.

The only association so far authorised to bring such proceedings is the ULC (*Union Luxembourgeoise des Consommateurs*), a non-profit making organisation.

Where criminal proceedings have been commenced against a defendant for breach of competition rules, article 25 of the Unfair Competition Law permits authorised associations to bring proceedings for damages where the relevant anti-competitive behaviour has caused prejudice to their individual or collective interests. However, as there is no power to obtain compensation for the benefit of individual members, such "civil" actions are not true representative actions. Neither are they full collective claims, as any damages will be awarded to the association itself and will not be shared among the individual members.

Similar "civil" actions may also be brought by environment protection associations, trade unions and professional bodies authorised under relevant statutes.

Who may bring them?

In general, each claimant has to commence individual proceedings against one or more defendants in court.

Pursuant to article 50 NCPC regarding the provisions common to all courts, only claimants with sufficient standing (*qualité à agir*) and a legitimate and direct interest (*intérêt à agir*) may bring an action in court, except as specifically set out by law (the principle of *nul ne plaide par procureur*).

A representative action may be brought in the name of a duly qualified organisation and on behalf of its members, but only for the defence of their collective interests, not individual interests. At present, such actions are limited to consumer claims, but this may be extended in the future to professions such as architects and doctors.

A joint action has to be brought by all the claimants individually, albeit that this may be done by means of a single writ of summons.

A representative action may only be brought by an entity authorised to do so by statute.

Opt in or opt out?

The judgment will only bind those claimants that are a party to the proceedings. Collective actions in Luxembourg can therefore be considered to be "opt in" actions.

Limitations?

There are no specific legal provisions limiting the ability of an entity to publicise a proposed joint action. However, the possibility and the extent of such a publication would have to be analysed on a case-by-case basis with regard to, for example, press law, etc.

Furthermore, it is prohibited for lawyers in Luxembourg to actively promote specific services beyond offering simple information.

Judge or jury?

Actions are tried by one or three judges, depending on the jurisdiction hearing the case. There are no juries in Luxembourg.

What relief may be obtained?

A joint action may result in both damages and/or injunctive relief. A representative action will generally result in injunctive relief.

Punitive damages are not permitted. Damages awarded by the courts are only compensatory.

How are such actions funded?

Generally, each party bears its own legal costs. A successful party's fees and expenses are not usually recoverable from the unsuccessful party. However, under article 240 NCPC, the successful party may recover a lump sum of money from the losing party by way of a procedural indemnity (*indemnité de procedure*). The amount of the indemnity is determined by the judge and typically varies between €1,500 and €10,000, depending on the complexity of the case and the amount at stake.

Judicial costs (i.e. bailiff's costs) are paid by the unsuccessful party, or proportionally by all the parties involved, depending on the outcome of the matter and the decision of the court.

Article 2.4.5.3 of the Internal Regulation of the Luxembourg Bar Association (*Règlement intérieur de l'ordre des Avocats du Barreau de Luxembourg*) prohibits lawyers from setting their fees by reference to the outcome of a matter before the outcome is known. However, an agreement which not only provides for fees that are determined by reference to the services rendered, but also by reference to the result obtained, would be permitted.

State-funded legal aid may be available for persons with an income lower than the minimum wage (currently €1,757.56).

Is pre-trial disclosure available?

An application may be made for pre-trial disclosure where there is a legitimate reason to establish and preserve relevant evidence before the main trial.

Witness depositions are permitted under the general legal investigation measures in article 350 NCPC.

In addition, a party may ask a witness to make a written statement before trial commences.

Likely future scope and development?

We are not aware of any domestic draft legislation or governmental initiatives planning to introduce new collective actions or to change the scope and extent of existing collective actions.

Given the very limited possibilities of a collective action in Luxembourg, it is currently unlikely that the scope of actions in this area will be extended in the near future.

The Netherlands

What forms of collective actions are permitted in this jurisdiction and under what authority?

Collective claim

Where numerous parties (the "Injured Parties") have an alleged claim for compensation of damage suffered as a result of one or more similar acts by another party (the "Responsible Party"), under Article 3:305a of the Dutch Civil Code (the "DCC"), the Injured Parties may establish an association or foundation to represent their interests in one single claim against the Responsible Party before the Dutch court. In practice, several associations or foundations may bring separate claims against the Responsible Party for the same event, provided that each association meets the criteria of Article 3:305a DCC. Dutch law does not provide for a class action certification system.

Under Dutch law, the question of whether and to what extent a party suffered damage must be answered on an individual basis. The association or foundation will ask the Dutch court for a declaratory judgment regarding the liability of the Responsible Party. If the liability of the Responsible Party is established in a judgment between the Responsible Party and the association or foundation, each Injured Party must then bring its own claim for compensation. The judgment between the Responsible Party and the association or foundation and the subsequent judgments between the Responsible Party and the individual Injured Parties may both be appealed to the Court of Appeals and the Dutch Supreme Court.

Collective Settlement

The Dutch Act on Collective Settlement of Mass Damages Claims (*Wet Collectieve Afwikkeling Massaschade*) ("WCAM") facilitates the collective settlement of mass damages claims in a procedure that is very similar to the United States "damages class action" procedure. Under WCAM, a group of Injured Parties can establish an association or foundation which represents their interests by virtue of its articles of association. This may be the same entity that initiated litigation in the collective claim set out above. Should the association or foundation subsequently negotiate a settlement regarding the compensation payable to the Injured Parties with the Responsible Party, they may file a joint petition with the Amsterdam Court of Appeals to declare the settlement agreement collectively binding. Provided that the requirements under WCAM for a settlement agreement are met, the Amsterdam Court of Appeals will declare the settlement agreement collectively binding. Notification of the judgment, and of the possibility to opt out of the settlement agreement within a certain period of time (at least six months), is then sent to the Injured Parties.

The Amsterdam Court of Appeals is exclusively competent to deal with the petition to declare a settlement agreement collectively binding. Its decision may only be appealed to the Dutch Supreme Court on the joint request of the Responsible Party and the association or foundation. In the settlement agreement the Responsible Party does not necessarily have to accept liability for the damage suffered.

Who may bring them?

An association (*vereniging*) or foundation (*stichting*) established under Dutch law that is allowed to represent the interests of the injured parties, in accordance with the criteria set out in Article 3:305a DCC may bring collective proceedings.

Opt in or opt out?

The collective action is neither opt in nor opt out. Each individual party has to commence its own separate action to benefit from the court decision in the proceedings brought against the Responsible Party by the association or foundation. Individual parties may even commence separate proceedings in relation to the extent of the Responsible Party's liability, despite the decision in the collective action. The collective settlement procedure is opt out.

Limitations

There are no limitations as to the types of claims that can be brought or settled collectively, except that the Injured Parties' claim has to result from one or more similar acts by the Responsible Party. Unless the Responsible Party and association or foundation representing the Injured Parties reach a collective settlement, compensation for damages has to be claimed on an individual basis in separate proceedings.

Judge or jury?

Judge.

What relief may be obtained?

Under Dutch law, the question of whether and to what extent a party suffered damage must be answered on an individual basis. Therefore, the association or foundation cannot ask for compensation of damages in a collective claim, but can only ask the Dutch court for a declaratory judgment regarding the liability of the Responsible Party. Of course, the amount of compensation of the Injured Parties can and will form part of the proceedings following the joint petition to declare a settlement agreement between the foundation or association and the Responsible Party collectively binding.

How are such actions funded?

Under the ethical rules applicable to Dutch lawyers, a Dutch lawyer is not allowed to represent clients on the basis of "no win no fee". Therefore, they cannot be paid from the (potential) proceeds of a collective claim or collective settlement. It follows from Dutch case law, however, that the association or foundation can claim compensation for the "reasonable costs it incurred for the purpose of establishing liability and the amount of damage".

Is pre-trial disclosure available?

Dutch law is not familiar with discovery of documents. In the Netherlands, there is a limited obligation to produce exhibits. A party may request that specifically identified documents are produced (such as an email from A to B dated Y with subject Z). Also, the Dutch court may order a party to produce books, records and other documents it is legally obliged to keep. Furthermore, it is possible under Dutch law for any party with a possible claim to file a petition with the Dutch court for a preliminary hearing of witnesses or experts. This is a well-established right under Dutch law and the court will therefore usually allow such a petition.

Likely future scope and development

Collective actions are becoming increasingly popular in the Netherlands. However, an important limitation to the collective claim proceedings is that compensation for damages has to be claimed on an individual basis in separate proceedings. The European Commission recently published its White Paper on Damages Actions for Breach of the EC antitrust rules (see the section on EU law). The White Paper includes proposals for collective damages claims. Although limited to breaches of EU antitrust rules, if the White Paper becomes a directive, it may also trigger the Dutch legislator to evaluate the possibility of collective actions in which damages can be claimed.

Portugal

What forms of collective actions are permitted in this jurisdiction and under what authority?

In Portugal, class actions and representative actions are permitted under article 26A of the Code of Civil Procedure (which is itself based on article 52, paragraph 3, of the Constitution of the Portuguese Republic and Law Nr. 83/95, of 31 August 1995). This procedure is known as the *acção popular* but it is, as yet, not very common.

Under the provision, an action may be brought by any person, association or foundation (but not companies or professionals) to prevent infringements of the following: public health, environment, quality of life, goods and services consumption protection, cultural heritage and public domain. This statutory mechanism also encompasses the right for the potential plaintiff to obtain compensation for their damages.

In addition, specific statutory provisions provide for collective actions in particular areas (e.g. under the Securities Code).

Group actions are possible under Portuguese law. In this case, court proceedings are brought by a number of individual claimants concerning related or common issues, which are heard together. This is known as the *litisconsórcio voluntário*.

Joint actions are possible under Portuguese law. Article 275 of the Civil Procedure Code allows the judge to join different cases when intervention of all the interested parties is necessary to preserve the useful effect of the decision or when different claims have the same grounds or are interrelated. This is the case even when the cases are pending before different jurisdictions. However, each plaintiff must have brought his own proceedings initially.

Who may bring them?

An *acção popular* may be brought by individual claimants or by an interested organisation, such as an association, foundation or city council, as outlined above. However, in order to be eligible to bring such proceedings, Portuguese law requires that the association or foundation has certain compulsory features:

(i) it must have legal personality;
(ii) it must expressly include in its articles of association, objectives for the defence of relevant interests in these types of actions; and
(iii) it must not carry out any kind of professional activity competing with companies or independent professions.

Opt in or opt out?

The general rule is that a judgment made in an *acção popular* will bind all potential claimants, except for the ones who have formally "opted out", unless the circumstances of a particular case dictate otherwise.

Limitations?

The collective action may be brought in any of the types of actions foreseen in the Portuguese Civil Procedure Code.

Individuals, as well as associations and foundations which are defenders of the interests protected in this specific law, may bring class or representative actions.

City councils may also bring representative actions in relation to the interests of the residents in their particular area.

Claimants may obtain redress according to the type of action brought, including an injunction and damages.

Judge or jury?

Judge.

What relief may be obtained?

Punitive damages are not generally available in Portugal. Compensation for losses incurred may be obtained.

How are such actions funded?

The general rule is that the losing party is obliged to pay the court fees of the successful party, but not lawyers' expenses or fees or other costs incurred in conducting the trial. (A small amount to compensate for these costs may be available.) However, with regard to collective actions in which the claimant is unsuccessful, the judge may reduce the amount he could have had to pay in court fees by between 10% and 50% according to his economic situation and the reasons why the proceedings failed.

In Portugal, contingency fees are not permitted, although the outcome of the proceedings may be taken into account when establishing lawyers' fees.

Government funding may be available to potential claimants in collective actions from the Ministry of Justice.

Is pre-trial disclosure available?

It is not possible to obtain an order for pre-trial disclosure of documents. Nonetheless, where there are grounds to believe that any documents in the possession of a future counterparty may be destroyed or become unavailable for some reason, it is possible to apply for an injunction to gain access to those documents with a view to initiating future judicial proceedings. Where such an injunction is granted, parties are obliged to provide the information and documents requested.

Pre-trial witness depositions may be obtained as in any civil action, that is, where there is justified concern that it may subsequently become impossible or very difficult to obtain a statement from the witness in question.

Likely future scope and development?

There are presently proposals for a new law dealing with mass litigation, encompassing existing class actions. This project is still at public discussion stage.

Recent cases of interest in this regard include a representative action brought in 1999 by the Portuguese Association for Consumer Protection (*Associação Portuguesa para a Defesa do Consumidor*) ("DECO") against Portugal Telecom regarding an "activation fee" which was levied every time the consumer tried to make a call.

In 2003, Portugal Telecom was found to have breached its contract with its customers by charging this fee. By way of compensation, all potential claimants were permitted to make free calls for a certain period. Damages were calculated on a statistical basis: Portugal Telecom was obliged to deposit indemnity funds in court and each individual claimant then had to apply to court, proving its own loss. All claimants were identifiable.

Although collective actions are already recognised in public law matters, they are now also beginning to be developed in the civil jurisdiction. It is likely to be an area of growth for the defendant bar rather than for claimant litigators.

Russia

What forms of collective actions are permitted in this jurisdiction and under what authority?

Class actions, group actions and representative actions are permitted under Russian law.

Class actions were introduced in Russia in late 2009. Class actions are currently possible only in commercial cases falling within the jurisdiction of the Russian state arbitration courts and are permitted under the Arbitration Procedural Code 2002 (the "APC"), as amended by the Federal law dated 19 July 2009 No. 205-FZ. Class actions are a new concept in Russia and have not yet been tested in practice. As a result, and because of an element of ambiguity in the respective APC amendments, there is currently a significant level of uncertainty as to the practical application of the class actions concept in Russia.

Generally, a class action may be brought where there are at least six claimants participating in the same legal relationship out of which the dispute arose. Class actions are expressly permitted (without limitation) in corporate disputes (e.g. disputes concerning corporate governance of Russian legal entities and their transactions) and in disputes arising out of the activity of the professional securities market participants (banks, depositaries, traders, brokers, etc.).

The class (or the "group of persons") is determined by the court. Due to a lack of clarity in the APC amendments and the absence of any guidance as to their practical application from the Supreme Arbitration Court, it is currently unknown whether the "group of persons" would be treated as a class similar to the US-style class actions (i.e. whether the court would determine the characteristics of the class rather than identify its individual members), or whether it would be necessary to identify the individual members of the "group of persons").

Group actions are permitted by the Russian Civil Procedural Code 2003 (the "CPC") and the APC and may be brought where multiple claimants have similar claims (or similar grounds for claims) against the same defendant(s). Technically, it does not differ much from an individual claim – the claims of the various claimants are simply heard together in the same proceedings.

Group actions may be brought where:

> all co-claimants possess the rights that constitute the subject matter of the dispute (e.g. co-authors having a copyright claiming royalties for use of their work);
> the rights of the co-claimants that constitute the subject matter of the dispute have the same factual grounds; and
> the claims of the co-claimants are similar (e.g. creditors claiming the return of loans from the same debtor).

Representative actions may only be brought by those entities expressly authorised under federal law. Authorised entities can be divided into two groups:

1) state and municipal authorities; and

2) non-commercial organisations (legal entities).

State and municipal authorities are entitled to file representative lawsuits within their area of competence. These include:

> the protection of rights, freedoms and lawful interests of individuals, legal entities and the state;
> competition and consumer protection;
> the securities markets, securities regulations and investor protection;
> environmental protection and compensation for environmental harm; and
> matters relating to children.

The number of non-commercial entities entitled to file representative actions is rather narrow under Russian law. They include:

> trade unions, for the protection of employees' rights;
> consumer associations;
> citizens and non-commercial environmental protection organisations, for the compensation of environmental harm;
> investors' associations, for damages arising from securities markets matters;
> bankruptcy administrators, to protect the rights and interests of parties to a bankruptcy;
> electoral associations, to protect the electoral rights of citizens; and
> organisations for the collective management of copyrights.

A representative action will usually seek a declaration of illegality of an activity or conduct by an entity, which is contrary to individuals' rights and interests. Any individual affected by the illegal behaviour (e.g. consumers affected by anti-competitive behaviour) may then commence their own proceedings, relying on the court declarations when seeking redress. In addition, injunctive relief, specific performance and damages are also obtainable in certain types of representative actions.

Who may bring them?

A class action is brought by a person participating in the legal relationship out of which the dispute arose. At least an additional five persons with the same legal relationship with the defendant out of which the dispute arose must join the first person's claim by way of written applications. The person bringing the claim has the status and the rights of a claimant. The persons joining the class action do not become the parties to the action.

Group actions are always brought in the name of individual claimants.

A representative action is brought by the interested organisation, which becomes the procedural claimant (i.e. a claimant that has no material interest in the outcome of the proceedings). The persons on whose behalf the claim is brought do not become the parties to the action.

Opt in or opt out?

To benefit from the class action judgment a person must join, or "opt into" the existing class action. If the potential claimant does not "opt in", the consequences of him bringing an individual claim on the same subject matter against the same defendant as in the class action are as follows:

> if the class action is still ongoing when the potential claimant brings the parallel proceedings, the parallel proceedings are not considered on the merits, and the claimant is advised to join its claim to the existing class action; and
> if the class action has already ended with an effective judgment, the individual claim is dismissed with prejudice, i.e. the individual claimant is not and will not be able to bring the claim on the same subject matter against the same defendant as the one considered in the class action earlier.

The judgment in a group action will bind all parties to that action. It is not possible to "opt into" an existing group action. Since, as a general rule, only the parties to proceedings are bound by the court's decision, the individual claimants have to "opt into" the action if they want to take advantage of the judgment, by commencing one set of proceedings at the outset as co-claimants, or bringing separate proceedings subsequently, which are then consolidated with the existing action. Conversely, whilst remaining a party to the proceedings, a claimant may not "opt out" of the judgment's effect unless he revokes his claim, in which case the court will not make any binding conclusions regarding that claimant other than to declare he had revoked his claim.

Limitations?

There are limitations on the actions that may be brought as representative or group actions, beyond those noted above, which are not considered here.

Judge or jury?

Judge.

What relief may be obtained?

Generally, the relief obtainable includes: a declaration of illegality of an activity or conduct by an entity; injunctive relief; specific performance; and damages. However, punitive damages are not recoverable under Russian law.

How are such actions funded?

Normally the losing party is obliged to pay the successful party's "reasonable costs". The reasonableness of such costs is determined by the court.

Contingency fees are not permissible in Russia.

There is no specific governmental funding available for civil proceedings. However, some of the entities entitled to file representative actions are freed from paying the court fee.

Is pre-trial disclosure available?

There is no "pure" pre-trial discovery in Russia. However, a claimant may seek interim relief and ask the court to secure evidence before the trial where there is reason to believe that otherwise it will be destroyed. Accordingly, if the court has reason to believe that a witness may, for any reason, not be able to testify in court, it may rule to have his statement obtained before trial. However, this is not common practice in Russia.

Likely future scope and development?

According to the explanatory note to the draft law introducing class actions, the initial idea behind the class actions concept in Russia was to make the resolution of such disputes more convenient for the courts. As of February 2011, according to the available legal databases of court decisions, the new class action concept has been tested five times in court proceedings. However, the cases in which it has arisen have only been before the inferior courts. Judicial analysis of the concept, where it appears at all, is brief and does not reach any conclusions as to the features or trends of the practical application of the procedure. Likewise, there has been little discussion of this new concept by legal commentators. In our view, the existing provisions governing class actions give rise to the risk that the procedure may be abused by persons acting in bad faith. For example, the fact that a person who did not join the class action then loses the right to pursue his claim individually is quite unusual and may encourage a group of claimants acting in concert with the defendant to seek a class action judgment to the detriment of the remaining class.

In summary, the introduction of class actions demonstrates that there is a demand for such forms of dispute resolution in Russia. At the same time, the class actions concept in Russia is currently under-developed and requires serious further improvement before it can be considered effective.

The number of group and representative actions commenced remains low. In most cases, the collective claims of public associations are rejected by the courts on the ground that a public association is not entitled to file such claims.

Spain

What forms of collective actions are permitted in this jurisdiction and under what authority?

Class actions are permitted by the Spanish legal system, although they are slightly different from the ones that exist in the US and certainly have a more limited scope, since they are limited to consumers. The introduction of the Spanish Law of Civil Procedure (the "CPL") in 2001 provided mechanisms whereby groups and certain legal entities may bring actions on behalf of consumers where a number of individuals have all suffered loss or damage due to the same event.

There are two types of group action permitted under Spanish law: claims to defend the "collective interest" under Article 11.2 of the CPL, and actions to protect the "widespread or diffuse interest" of individuals under Article 11.3 of the CPL:

> actions to protect the collective interest ("collective actions") – these may be brought by a consumer association or other authorised legal entity when the individual claimants affected are identified or are easily identifiable, such as victims in a rail accident. The action is brought on behalf of the individual claimants by the association or legal body, or even by the group itself if its members represent a majority of the potential claimants;
> actions for the protection of "widespread or diffuse interests" of consumers (*acción para la protección de intereses difusos*) – this action may be brought by a sufficiently representative consumer association for the protection of common interests of consumers whose identity is unknown or difficult to determine. It is not necessary to identify the individual claimants.

Who may bring them?

Groups can bring collective actions whenever the members of such groups are identified or are easily identifiable, provided that its members represent a majority of the pool of consumers. Consumer associations and certain authorised legal entities can also bring collective actions in those cases.

If the members of the group are unknown or difficult to identify, only representative actions are possible and, in addition, they must be filed by a sufficiently representative consumer association. Only the members of the Spanish Council of Consumers are considered sufficiently representative for these purposes.

In addition, public prosecutors and certain qualified bodies from any EU member state are allowed to seek injunctions for the protection of consumers' interests in Spain. This special regime of representative actions was introduced in Spain in order to implement Directive 98/27/EC.

Opt in or opt out?

In Spain, individual consumers do not need to agree to participate in collective actions brought by groups, associations or legal entities. They are free to "opt in" but not to "opt out" of the proceedings, since they will be bound by the final decision no matter what they do. If they "opt in", they will be able to claim their damages in the same proceedings within a certain time, depending on the kind of collective action. If they stay out of the proceedings, they will nonetheless be bound by the decision and able to benefit from it by filing their claim for damages with the court enforcing the judgment.

Precisely for this reason, Spanish law tries to guarantee that individual consumers are aware of the proceedings and have the opportunity to join it, support the position of the claimant and seek their individual damages. This is done by (i) publicising the claim's admission to proceed in the media (usually newspapers) of the territory in which damage occurred and (ii) in cases where the members of the group are identifiable, by obliging the claimant to send a letter to all of them prior to the filing of the claim.

Once proceedings have been commenced, individual claimants can join the proceedings. In cases where the members of the group are identifiable, they can do so at any time. If they are not, the proceedings will be stayed for two months while the claim is publicised. Potential claimants will only be able to come forward and join the claim during that period.

In any case, the group or legal entity that brings the collective action can also claim damages on behalf of the individual consumers whenever it is feasible. Once these damages are awarded, the representative can even seek enforcement on behalf of the beneficiaries of the award.

If the court upholds the claim, it must decide which individuals are entitled to benefit from the award regardless of whether they joined the proceedings or stayed out of them. Therefore, the court will need to rule on the individual claims filed by affected consumers who joined the proceedings, and also state whether other members of the group of affected consumers can benefit from the relief obtained by the claimant. If it is not possible to identify the beneficiaries of the award with sufficient certainty, the court will need to establish the requirements that individuals must fulfil in order to be entitled to be included among those benefiting from the award.

If the collective action is rejected by the court, all affected consumers will be bound by that decision no matter whether they joined the proceedings or not, and they will not be able to bring new actions (e.g. for damages) against the defendant arising from the same facts.

Limitations?

Apart from the limitations stated above, it must be noted that class actions are not allowed whenever the potential claimants are mere bystanders, e.g. in environmental law cases. In such cases, group litigation is still possible because individuals can join forces and file their individual claims together provided that they arise from the same facts (e.g. asbestos contamination by a particular factory). However, the court will judge each of these claims individually and each decision will not be binding on third parties.

Collective actions are permitted in all areas of the law in which the interests or rights of consumers are involved, such as consumer fraud, misleading advertisements, antitrust and competition law, consumer credit, products liability, unfair or abusive contract terms, package travel, distance selling contracts, sale of consumer goods and guarantees, mass torts, etc.

Judge or jury?

Judge.

What relief may be obtained?

Damages may be obtained. Punitive damages are not available in Spain, but are awarded on a compensation basis.

Other kinds of relief, such as publication of the judgment in the media or an injunction, are also possible in certain cases.

How are such actions funded?

Usually, the unsuccessful party will be ordered to pay the costs of the successful party. Legal expenses of up to a third of the amount in dispute may be awarded to the successful party.

The consumer associations bringing collective actions in Spain are financed to a large extent by government subsidies and there is little risk for the individual claimant consumers.

Although contingency fees are prohibited under the General Statute of Legal Practice, such agreements may still be enforceable between client and lawyer where they have also agreed a minimum fee in advance.

Is pre-trial disclosure available?

The general rule is that the parties only disclose the documents on which they rely. Pre-trial discovery is therefore not usually permitted. However, there are two procedural instruments that allow a party to request disclosure of certain documents:

> a preliminary application that can be started by the future claimant prior to filing the claim, the specific purpose of which is to obtain disclosure of documents from the future defendant (*diligencias preliminares*). The scope of this application is rather limited because only certain documents can be requested. However, it is frequently used in collective actions because it allows the claimant to ascertain who the members of the group of consumers are that should be requested to "opt in" (e.g. buyers of a certain automobile, a financial product, a condominium, etc.);
> an application for documentary disclosure (*exhibición documental*) which allows any party to request from the other the disclosure of documents that are not at its disposal. In order to exercise this right, the petitioner must do so during the first hearing of the application (typically during the preliminary hearing) and identify clearly the contents of the documents that it requests from the other party.

Likely future scope and development?

The introduction of these two group actions is still relatively recent in Spain but consumer awareness of this type of litigation would appear to be increasing, and the new laws have been applied in several recent cases in, for example, the telecommunications and financial services sectors. The Spanish government has so far failed to indicate any intention to extend the principle beyond the realm of consumer protection, but this cannot be completely ruled out.

Sweden

What forms of collective actions are permitted in this jurisdiction and under what authority?

The following types of collective actions are permissible in Sweden:

> class actions. Class actions are permitted under the conditions set out in the Swedish Group Proceedings Act (the "Act") (*Sw. lag (2002:599) om grupprättegång*) which came into force on 1 January 2003.

A class action may only be brought if it is considered to be the most suitable form of legal action in the particular case. Under the Act (section 8), the court may accept a class action only if:

(i) the claims of the members of the group are based on circumstances that are common or of a similar nature;
(ii) the grounds on which the individual claims are based do not differ substantially;
(iii) the majority of the claims to which the action relates cannot be equally well pursued by private actions brought by individual members of the group;
(iv) the group is appropriately defined, taking into consideration its size, ambit and other factors; and
(v) the lead plaintiff is an appropriate party to represent the members of the group, taking into consideration his interest in the substantive matter, his financial capacity to bring a class action and other relevant circumstances.

> group actions. Group actions can be brought by consolidating several individual cases for case management purposes. Consolidation is made under the general Swedish procedural rules. In addition, test cases may be brought, provided that the parties agree;
> representative actions. A representative action can be brought within the Swedish class action framework. In addition, in employment-related disputes, trade and employer organisations can represent their members as well as initiate and conduct disputes on behalf of their members.

Who may bring them?

Under the Act, class action proceedings are brought in the name of a claimant (the representative of the class). The claimant can be a natural or legal person, a non-profit organisation or a public authority.

Opt in or opt out?

The Act is based on the "opt in" solution. Thus, a member of the class must actively choose to be included as a member of the class. Only clearly identified members who have chosen to "opt in" will be allowed to participate in the proceedings as members of the class. Such members are not parties to the proceedings, but are nevertheless covered by any ruling of the court.

Limitations?

Any civil claims (provided they fulfil the conditions in section 8 of the Act as set out above) can be brought by means of a class action.

Class actions can be brought by:

> a natural or legal person if the claimant itself has a claim covered by that action (a "private" action);
> a non-profit organisation that, in accordance with its rules, aims to protect consumer or wage-earner interests in disputes between consumers and a commercial enterprise regarding any goods, services or other utility that the enterprise offers to consumers (an "organisation" action); and
> an authority authorised by the government to institute certain class actions (a "public" action).

Judge or jury?

All civil actions are tried by a judge.

What relief may be obtained?

All forms of redress that are available under usual civil litigation rules are also available in class actions.

How are such actions funded?

The general rule that the losing party has to pay the successful party's legal costs also applies for class actions.

Generally, contingency fees are not permitted in Sweden. However, in class actions disputes, the claimant can enter into a so-called risk agreement with his lawyer as regards the legal fees. Provided that the court recognises the risk agreement, the fees can vary (to some extent) depending on the outcome of the dispute. A fee arrangement, based solely on the value of the dispute, will not be recognised by the court.

Government funding is only available for class actions brought by way of public actions and in other specific circumstances which do not include class actions generally.

Is pre-trial disclosure available?

On request by either party, Swedish courts can order the disclosure of specific documents.

Pre-trial witness depositions are not generally permitted.

Likely future scope and development?

Only a few class action cases have reached the courts since the Act came into force. Consumer awareness of this type of litigation would appear to have increased during this time. Still, there is an on-going discussion about whether the “opt in” solution should be changed to an “opt out” solution in order to increase the effectiveness of the legislation.

UK

What forms of collective actions are permitted in this jurisdiction and under what authority?

Class actions as understood in the US do not exist in the UK. However, there are procedures by which claimants with similar claims may group together to bring collective claims against the same defendants. Under each procedure the individual claimants have to be identified, and have to "opt into" the proceedings.

Under the Civil Procedure Rules ("CPR"), there are two main methods by which claimants may bring a collective action:

> Group Litigation Order ("GLO") under CPR Part 19 section III. This is an order made by the court to provide for the case management of claims which give rise to common or related issues of fact or law. A group register is established onto which claims issued by individual claimants can be entered. Applications for entry onto the register may be refused by the court if the court is not satisfied that the case cannot conveniently be managed as part of the GLO. Individual claimants under a GLO may decide to appoint one solicitor or firm to conduct their claims on their behalf, but this is not obligatory;

> representative actions under CPR Part 19 section II. Under CPR rule 19.6 the court may direct that where more than one person has the same interest in a claim, that claim may be begun or continued by one or more of those persons as representatives of any other person who has that interest. Any order of the court is binding on all persons represented in the claim. Where a person is represented in the claim but not a party to it, the order may only be enforced against him with the permission of the court.

  The CPR also provide for the representation of interested persons who cannot be ascertained, limited to claims concerning the estate of a deceased person, property subject to trust or the meaning of document, including a statute.

  Representative actions are comparatively rare, with GLOs commonly the more appropriate means of case management.

There are also general provisions by which parties may consolidate individual proceedings or add third parties to existing proceedings.

A third procedure for collective actions is available in the form of a representative action under the Competition Act 1998 (the "Act").

The Enterprise Act 2002 (inserting sections 47A and 47B into the Act) introduced the ability for "specified bodies" to bring representative actions on behalf of two or more individual consumers in the Competition Appeals Tribunal where those individuals had suffered loss or damage in relation to infringements affecting consumer goods or services.

The individuals concerned must all have claims arising from the same infringement of Articles 81 or 82 EC Treaty, and/or the Chapter(s) I and/or II prohibition of the Act. Relevant infringements are those applying to goods and services which an individual received, or sought to receive other than in the course of a business, and which were or would have been supplied to the individual in the course of a business. They must be identified and consent to proceedings being brought or continued on their behalf by the specified body.

The first (and so far only) action to be brought under this section was commenced in March 2007 by the Consumers' Association on behalf of consumers who had purchased certain replica football shirts. The price of these shirts had been found by the Office of Fair Trading ("OFT") to be the subject of price-fixing agreements between certain retailers. The Consumers' Association is a specified body under the relevant legislation (Specified Body (Consumer Claims) Order 2005 SI 2005/2365) and represented some 550 individual consumers. The case was eventually settled out of court, with individuals receiving up to £20 each by way of compensation from the relevant retailer.

Who may bring them?

Usually in English law, only a party with an interest in the action itself may bring a claim for damages.

GLOs – each individual claimant must commence an action in its own right. The GLO register is simply a tool for case management.

Representative actions under the Act – these may only be brought by specified bodies. Currently there is only one such body in the UK, the Consumers' Association. This procedure is unique in English law as it gives locus standi to bring a claim for damages to a body with no interest in the action itself, other than that of acting in a representative capacity. Such a procedure is not available in any other situation.

Opt in or opt out?

All collective actions in the UK procedure are opt-in.

GLO – each individual claimant has to start his own proceedings. A party joining the group register will be bound by any judgment or order made in it unless the court rules otherwise. Claimants may also apply to be removed from the register, in which case they will not be bound by the judgment.

Representative action under the Act – although it is the specified body that brings the claim, it may only do so on behalf of named individual claimants and with their consent. The claimants must be listed in the initial claim.

Limitations?

There are no limitations other than those applying to all civil proceedings.

Judge or jury?

Judge.

What relief may be obtained?

Any remedy usually available in civil proceedings may be sought by the claimants. It is for the court to decide whether the various remedies sought in the individual claims may be appropriately litigated under a GLO.

Representative actions under the Act – only damages may be awarded. Any award is made to the individual claimants and not the representative body, although the body may be authorised by the court to receive the sums on the individuals' behalf.

How are such actions funded?

In general, parties will initially fund their own actions, although the successful party will usually recover all or part of its costs from the unsuccessful party under civil procedure costs rules. Civil litigation in the UK can be very expensive and new funding models are becoming increasingly available. It has been possible since 1995 to bring an action funded under a conditional fee agreement between a party and its lawyers, also known as a "no win no fee" agreement, under which the party does not pay its lawyers' costs if it is unsuccessful in its action but pays an increased amount if it is. Contingency fees, where legal costs are calculated as a percentage of the damages recovered by a successful party, remain illegal.

Funding by third parties that have no interest in the claim itself is still relatively uncommon in the UK, although it is increasing in importance and may become particularly important and relevant in the context of collective actions. Guidelines for the conduct of third party funders are currently being developed by the Civil Justice Council, in conjunction with the Ministry of Justice.

The costs incurred by parties to a GLO are assessed by the court and may be apportioned between the group litigants or allocated to particular parties.

In representative actions brought under the Act, the court has discretion to award costs as it sees fit.

Is pre-action disclosure available?

Orders for pre-action disclosure or preservation of evidence are available to claimants bringing actions as part of a GLO under the usual procedural rules.

Under the Competition Appeal Tribunal rules, the tribunal may give orders for the disclosure of documents and preservation of evidence.

Likely future scope and development?

To date there have been a little over 70 GLOs commenced and the procedure has received some criticism. However, it continues to provide the main procedure for determining a large number of disputes together.

Recently, the topic of collective and representative actions has become more prominent in the UK. There have been proposals for the extension of representative actions akin to those under the Act to other areas of consumer protection by both the OFT and the government department responsible for business. In December 2008, the Civil Justice Council (a body which advises the Government on changes to the law) published a formal report to the Lord Chancellor recommending that procedures permitting collective actions be introduced into the UK, including the proposal that a new generic form of collective action be made available on an "opt in" or "opt out" basis. The Government rejected this proposal, instead advocating that such an action would be better considered on a sector-by-sector basis and introduced only where there was evidence of need.

In January 2010 the Civil Justice Council published a set of draft generic court rules for collective proceedings that could be used for any different model of collective proceedings that might be permitted by primary legislation. It was hoped that the first sector to benefit from a class action procedure would be the financial services sector. The Financial Services Bill, containing provisions for collective actions in respect of financial services claims, was introduced into Parliament in early 2010. If enacted, provisions in the Financial Services Bill would have facilitated collective actions against authorised persons in respect of "financial services" claims, to be brought by any person "authorised" to bring proceedings, even if that person did not have any interest in the proceedings themselves. The relevant provisions were omitted from the version of the Financial Services Act that received Royal Assent in April 2010, and so were not brought into force.

It is unlikely that proposals for collective actions will be re-introduced swiftly, particularly as much of the criticism of the proposals in the Financial Services Bill centred on the lack of detail and formal procedures to support the provisions. However, as this was seen as leading the way for future collective actions in other sectors, it is probable that revised proposals will be put forward eventually.

US

What forms of collective actions are permitted in this jurisdiction and under what authority?

The main procedure for collective actions in the US is the class action. Hundreds or thousands of claimants can be represented in one set of proceedings.

The requirements for bringing a class action in the US federal courts are:

> numerosity – that there are too many would-be claimants to join them all in practice;
> commonality – the claims must all raise similar questions of fact or law;
> adequacy – the chosen representative must be appropriate;
> typicality – the representative's claims must be typical of those of the other individuals; and
> superiority – a class action must be the most appropriate method of settling the dispute.

Class actions are also permissible in state courts; each state has its own procedural requirements, which are largely similar to the federal court requirements. An action may be maintained on behalf of a class only with the court's approval. To do this, the plaintiffs seeking to represent the class must file a motion to have the class certified. Group actions by multiple parties with similar claims are also possible, although less frequently seen than class actions.

Who may bring them?

The procedure for filing a class action is to file suit with one or several named plaintiffs on behalf of a proposed class. The proposed class must consist of a group of individuals or business entities that have suffered a common injury or injuries. Typically these cases result from an action on the part of a business, a particular product defect, a policy that applied to all proposed class members in a uniform manner, or a regulatory enforcement action. After the complaint is filed, the plaintiff must file a motion to have the class certified. In many cases class certification will require additional discovery in order to determine if the proposed class meets the standard for class certification.

Upon the motion to certify the class, the defendants may object to whether the issues are appropriately handled as a class action, to whether the named plaintiffs are sufficiently representative of the class, and to their relationship with the law firm or firms handling the case. The court will also examine the ability of the firm to prosecute the claim for the plaintiffs and its resources for dealing with class actions.

Opt in or opt out?

Class actions in the US are "opt out". Due process requires, in most cases, that notice describing the class action be sent, published or broadcast to class members. Class members must be given the opportunity to opt out of the class, i.e. if individuals wish to proceed with their own litigation they are entitled to do so, but only to the extent that they give timely notice to the class counsel or the court that they are opting out.

Pursuant to the Class Action Fairness Act 2005 ("CAFA"), defendants that enter into settlement agreements to resolve class actions in federal court are required to provide notice promptly after the filing of a proposed settlement in court to the appropriate federal or state agencies (e.g. state attorneys general) for all states in which potential class members reside. If the CAFA notice is not provided, class members are entitled to challenge the finality of the settlement.

Limitations?

None.

Judge or jury?

Most civil trials involve juries.

What relief may be obtained?

In addition to compensatory relief calculated based on damages to the class as a whole, punitive damages are obtainable if sufficiently egregious conduct on the part of defendants can be established. In recent years, the US Supreme Court has issued decisions limiting the magnitude of punitive damages awards, requiring lower federal courts to review factors, including the degree of the conduct, the disparity between the actual harm and the punitive award, and a comparison of the award to similar civil or criminal penalties. In particular, the punitive damages award must be reasonable and proportionate to the wrong committed, or it will be viewed as irrational, arbitrary and a deprivation of constitutional protections. Federal courts are unlikely to sustain punitive damages awards that exceed a 9:1 ratio as compared with compensatory damages, although the inquiry remains case-specific.

How are such actions funded?

Contingency fees are permitted and are standard for plaintiffs in class actions. However, absent statutory or contractual provisions permitting the recovery of attorneys' fees, the successful party cannot recover costs from the unsuccessful party. Typically, plaintiffs' counsel file requests for fee disbursements that are paid out of any settlement funds following court approval of a negotiated settlement with a defendant.

Is pre-trial disclosure available?

Yes, there is pre-trial disclosure, which can be extensive, and witness depositions. Disclosure of documents, as well as witness or expert depositions, is typically required prior to certifying a class, and may be separate from any disclosure related to the merits of a case. Courts have been aggressive in recent years in enforcing requirements on outside and internal counsel related to the retention, collection and review of documents, particularly electronically stored information.

Likely future scope and development?

Class actions are likely to continue to increase. They are the main procedure by which large-scale commercial disputes involving large numbers of claimants are resolved, and civil class actions often follow regulatory investigations, such as in the securities or antitrust context. Huge damages awards can be made by juries to penalise businesses, which act in part to regulate commercial activity. Many claims are driven by claimants' lawyers who stand to make large profits from contingency fees awarded as a proportion of those damages.

Recent decisions by the US Supreme Court and by several Courts of Appeals (the intermediate US federal appellate courts) have increased the burden on putative class action plaintiffs, both at the pleading stage as well as the class certification stage:

> the US Supreme Court, through decisions in *Bell Atl. Corp. v. Twombly* (2007) and *Ashcroft v Iqbal* (2009), has established that, in order to survive a motion to dismiss a complaint, plaintiffs must set forth factual allegations that state a plausible claim for relief. Formulaic recitations of the elements of a cause of action are insufficient. This is a significant change from the pleading standard in effect prior to *Twombly*. As a result, defendants have had greater success on motions to dismiss class action complaints for plaintiffs' failure to state plausible claims for relief;
> in the securities fraud context, the US Supreme Court, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* (2008), rejected scheme liability – i.e. the theory that secondary actors, such as bankers, auditors and attorneys, who do not make misleading statements themselves, could be liable for assisting a company that does make misleading statements;
> recent decisions by several Courts of Appeals have also increased the burden on plaintiffs to demonstrate that the five elements of class certification referred to above are met. Courts are required to perform a rigorous analysis in examining the evidence presented by the parties, and plaintiffs must show by a preponderance of the evidence that each of the elements is met. These developments have provided defendants with increased opportunities to dispose of a putative class action prior to trial, as plaintiffs usually do not continue to pursue a case if class certification is denied.

Recent court decisions may also result in more federal class actions. Recently, in *Shady Grove Orthopedic Assoc. v Allstate Ins. Co.* (2010), the US Supreme Court held that a federal court must apply federal procedural rules to a class action, notwithstanding any state laws that purport to limit certain types of class actions. In general terms, federal courts apply state substantive laws and federal procedural laws. This may result in federal courts entertaining class action lawsuits brought under state law in the federal court pursuant to CAFA that might have otherwise been foreclosed by state law if brought in a state court.

Thank you

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