HOUTHOFF
CLASS ACTION SURVEY

The future of class actions

Revised edition

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FOREWORD

'Class actions' is a hot topic for many of our clients.

Our clients are doing business in an arena with blurring borders and increasing global competition. They are being challenged by rapidly developing technologies, while facing other disruptive developments like climate change that older generations were able to comfortably ignore. Simultaneously, they are encountering an increase of regulation issued by governments attempting to come to grips with all these developments, while regulation is at the same time empowering consumers to enforce their rights.

When operating in such a volatile business environment, decisions or choices made may have unanticipated consequences. Consequences that may affect large groups of people in multiple jurisdictions, which could easily trigger a mass response when facilitated by modern technology.

In other words, the increasing complexity and scale of society are paired with an increasing complexity and scale of potential legal disputes. Our clients experience firsthand that this trend is challenging the traditional ways of adjudicating legal disputes, and they recognise that there is a pressing societal demand to facilitate the aggregation of litigation. This is pushed to the forefront of legal debate by NGOs, consumer organisations and other stakeholders. They are aware that new forms of aggregated litigation create various challenges, dynamics, and exposure. And furthermore, that these new forms could create new legal markets attracting different parties and service providers such as third party litigation funders.

When talking about aggregated forms of litigation, the US-class action system is often used as a point of reference. It is a jurisdiction with a long history and has a list of US class actions that sets itself apart from other jurisdictions in many ways. Although often praised, other jurisdictions are not particularly fond of possible 'American

scenarios' and 'US-style class actions'. This pushback has other jurisdictions trying to find different, perhaps even better, approaches to collective actions for themselves. Or is a more unified approach more desirable, for example within the EU? In other words: where are we headed and how will these developments affect businesses and their operations?

At Houthoff, we see that today's business climate is currently undergoing pivotal developments which present new challenges for dispute resolution. Tackling these challenges ahead means keeping up-to-date on new trends and legislation. We also believe that better insight into how class actions work in various jurisdictions holds the key to understanding, assessing, anticipating, avoiding, and, if necessary, resolving today's complex international mass claims cases. We hope that these insights provide valuable practical strategies to all involved. With this in mind, our Class Actions Team has held one-on-one interviews with various experts (claimants' lawyers, defendants' lawyers, third party litigation funders, general counsel and legal counsel) from eight different jurisdictions. In our discussions, we analysed the jurisdiction's class action history, what recent developments have proved to be important, and how we view the current situation – enabling us to anticipate potential developments still to come. The conclusions of these valuable discussions are brought together in this publication.

Without the essential input from all these experts and the efforts from our team members at Houthoff, we would not have been able to share our findings with you. We sincerely believe we can only further advance our field – more specifically, the area of class actions – together. We hope to have provided a first step in reaching that goal and want to thank everyone involved for their contribution.

Albert Knigge

SURVEY OVERVIEW

1. Introduction

1.1. The future of class actions

1.1.1. One of my favourite questions during our interviews was whether our interviewees could describe in one sentence what the future of class actions in their jurisdiction would look like. We always asked this question at the end of an interview and with a few exceptions, this proved to be a difficult question.

1.1.2. After seeing the results of this survey, I also have difficulties in predicting the future of class actions in one sentence. One thing that I can say about the future of class actions worldwide is that it is going to be an interesting time with many changes ahead. Although this statement may not be very enlightening, I think this survey's summary will raise some issues that warrant serious consideration. Therefore I hope you will forgive me for using more than one sentence to summarise our research below.

1.2. Terminology

1.2.1. Speaking with experts from eight different countries in their respective languages brought about the challenge to ensure that we were talking about the same concepts. To avoid misunderstanding, each country introduction gives an overview of the mechanisms of collective redress that are possible in that country.

1.2.2. To keep it simple, I will use the term 'class actions' in the rest of this summary to refer to all forms of collective proceedings laid down in the law for groups with similar or common interest.

1.3. A worldwide trend

1.3.1. Overall, a clear trend in all jurisdictions is the increasing usage of, albeit different, forms of collective redress in various areas. We were able to identify several factors that contribute to the increasing usage of litigation and of class actions in particular:

a. the fundamental changes of our global economy, including the massification of damages, and legal tech,[1]
b. an increasing awareness of consumers and companies of their rights,[2]
c. the role of traditional media and digital media,[3]
d. the international cooperation between national consumers and other representative organisations initiating parallel proceedings,[4]
e. the competition between jurisdictions to provide a forum for international claims;[5] and
f. a growing movement of US firms and third party funders who are mainly investing in the UK, Germany and the Netherlands.[6]

1.3.2. One of the elements missing in this list is of course changing politics that translate into changes in legislation. Countries such as the US and Israel have a high number of class actions because their laws make it is easily accessible and relatively affordable for claimants. In countries where they have recently adopted new laws, experts expect an increase in the number of class actions, with the exception of Germany. However, claimants' lawyers and third party funders do not wait for the ideal regulatory framework, and find alternative solutions to bring claims collectively. Therefore, even if changing political developments are an important factor, they are not the sole and decisive factor for the increasing number of collective redress mechanisms in a country. Additionally, even in countries where the number of official class actions will likely remain low, our experts expect an increase in alternative forms of collective redress. This will be reinforced by the current voting trends in Europe, which are leaning towards populism, and consequently strengthen consumer rights.[7]

1 Knigge, Lemstra; Karen (NL anonymous); Oldnall; Philips.
2 Nurney.
3 Calvetti; Molitoris; Mark (UK anonymous).
4 Volders.
5 The most welcoming jurisdiction for 'foreign' class actions, i.e. class actions for events that have not occurred in the country itself and do not regard claimants living in the country, is the UK for human right claims and the Netherlands for all types of claims.
6 Molitoris, Karen (NL anonymous) and Nurney. There seems to be increasing possibilities for financial gain through class actions and – as a consequence – a larger availability of capital through third party funders: Friel; Knigge; Lemstra; Nurney; Oldnall; Mark (UK anonymous).
7 Kaske.

1.4. The worldwide answer

1.4.1. Class actions seem the most dominant answer worldwide to collective damages. As class actions are often seen as a form of private enforcement to supplement or maybe even replace instruments of public enforcement, they are often met with mixed feelings. On the one hand, legislatures try to encourage private enforcement, removing the need for supervisors to take action while simultaneously empowering consumers. On the other hand, legislatures in Europe try to limit the possibilities for parties to make profit out of fear of 'American scenarios'.

1.4.2. This fear of 'American scenarios' is not unfounded as the American and Israeli interviews show.[8] Although the American and Israeli economies are strong and the relatively high number of class actions do not affect the success and prestige of their economies, class action litigation is expensive and it affects the way business is done. As a result, this influences the prices of goods. Therefore, an important question for the countries that have not yet put in place regulations to enable 'US-style' class actions is whether class actions are a real solution to the problem of collective international damages.

1.4.3. In my opinion, they are not. The costs of class action litigation and threat thereof are high.[9] Additionally, class action proceedings take a long time and disrupt businesses. Even if parties reach a settlement, this does not restore the relationship and trust between the company and its customers. I think it would therefore be worthwhile to research the possibilities for alternative forms of dispute resolution for international mass damages. Not to prevent individuals having their day in court, but to ensure the cure is not worse than the disease.

8 Cohen-David; Lebold; Weinberg.

9 On a theoretical level, the cost of class action litigation should be lower than bringing individual cases. However, this is not necessarily true if contingency fees are agreed and frivolous class actions are brought for actions that would never be brought in an individual case. As the Israeli example shows, the threat of class actions also brings about higher legal cost for a company on a day-to-day basis (Weinberg).

2. Main developments

2.1. Competition between jurisdictions

2.1.1. The US is the leading jurisdiction worldwide regarding class actions and its procedural concepts and the cases brought are a point of reference for all other jurisdictions. It is both praised[10] and frowned upon for its elaborate regulation and case law on the class certification phase, binding settlements on an opt-out basis,[11] system of contingency fees,[12] idea of third party litigation funding,[13] punitive damages,[14] discovery[15] and jury trials.[16] But as much as the US class action system is or could be a source of inspiration, both from a procedural point of view[17] as for cases that can be brought,[18] the general European sentiment seems to be that it is the example per excellence of where you do NOT want to go as a jurisdiction.[19] Not surprisingly, European jurisdictions are not of any major relevance to the US.[20] Moreover, there is a trend visible in the US to extend the scope of US class settlements to an international level.[21]

2.1.2. Nevertheless, there seems to be competition amongst European jurisdictions to become the second 'best' jurisdiction to bring international class actions and other big commercial disputes.[22] An example of this competition is the

10 Lemstra; Philips.

11 Especially foreign companies in a US class action are better off settling (Wakkie).

12 Knigge.

13 Friel; Tilp.

14 Ben Meir and Aviram; Dimitrov: this makes defendants want to avoid trial; Sterling.

15 The discovery system is considered the success factor of the US system by claimants' lawyers (see amongst others Tilp) or considered from a business perspective the reason why it is cheaper for a company to settle than to respond to the disclosure requests (Sjöbring). In any event, discovery makes class actions in the US expensive (Felderer). See also: Friel; Knigge; Lèguevaques.

16 Friel; Knigge.

17 Knigge; Weinberg. Maybe the EU could also draw inspiration from the way that the US is handling jurisdiction issues between state courts and federal courts (Clary; Sjöbring).

18 Friel; Lemstra; Lieberman; Volders; Zamir.

19 Dimitrov; Molitoris; Nurney Simon; Sjöbring: no threshold to throw mud and see if it sticks; The US system from both a cost perspective and a return perspective does not ultimately benefit the consumer (see Felderer).

20 Sterling.

21 Lieberman.

22 Seemingly like the satirical YouTube hit of Arjan Lubach "America First – The Netherlands Second – Donald Trump", on https://www.youtube.com/watch?v=ELD2AwFN9Nc. See, more

creation of English language courts in France, the Netherlands, Belgium (to a limited extent) and Germany.[23] However, competition between EU Member States seems counterproductive and instead, it seems better if they would work together to create a sensible European model.[24]

2.1.3. Moreover, continental Europe cannot seriously compete with the primary market for commercial disputes in Europe: the UK. This is unlikely to change if Brexit takes place: the UK has sufficient domestic mass, big corporates will always need access to the UK capital markets and UK courts do not rule directly in favour of consumers when a company is involved. It will therefore remain a popular jurisdiction for businesses.[25] Also, the decisive factors for funders in choosing the appropriate jurisdiction in large cross-border cases, is familiarity with the legal system and culture.[26] Considering the fact that funders are still mainly coming from the US and UK, this influences the choice of jurisdiction.

2.1.4. However, this does not stop the Netherlands from trying to increase its attractiveness by being welcoming towards international claims.[27] Its collective redress mechanisms are rather easily accessible, Dutch courts assume jurisdiction in many cross-border cases and apply foreign legislation if needed. This has not gone unnoticed by funders.[28] This is different from France and Germany where judges are less keen on applying legislation from other countries.[29] The recent legislative developments must also be seen in this light, with the seemingly ongoing competition between the various jurisdictions.

2.2. Most recent legislation

2.2.1. The European jurisdictions that we took into account in our research have all adopted legislation to make class actions possible for, at least, consumers. In the past year, important initiatives have taken place in the Netherlands, Germany, Italy and the European Union to broaden the possibilities for bringing class actions.

2.2.2. In **the Netherlands**, the existing collective redress mechanisms grew on 1 January 2020 when new legislation was enacted which enables representative entities to claim monetary damages on behalf of the class members they state to represent.[30] The scope of class actions and class settlements was and will not be restricted to consumer cases. The new legislation is intended to force parties into a settlement.[31] This further growth, the Dutch courts' quick acceptance of jurisdiction and the vast opportunities to use alternative methods, puts the Netherlands far ahead in international collective redress options compared to other continental European jurisdictions.[32] The Netherlands will therefore likely continue to develop as 'a paradise for class actions',[33] or described in a more neutral way, as 'a hub for international class actions'.[34]

2.2.3. On 1 November 2018, the Model Declaratory Action (MFK), also called the 'Lex Diesel' or 'Lex Volkswagen'[35] came into force in **Germany**. It enables qualified consumer organisations to start a collective action to obtain a declaratory judgment on questions regarding consumer issues. The action is admissible if at least 50 consumers file a claim concerning the same event. Although this law opened the door for consumer redress for the first time,[36] the expectations are that it will rarely be used in practice as the proceedings take a lot of time, carry with it a huge administrative burden and damages will still have to be claimed on an individual level.[37] To date there are only a handful of public cases.

seriously: Schreiber; Volders.
23 Nurney.
24 Molitoris.
25 Friel; Oldnall; Mark (UK anonymous).
26 Friel.
27 Schreiber; Van der Burg.
28 Clary; Hausfeld; Lèguevaques; Oldnall; Schreiber.
29 Molitoris; Simon.
30 Knigge; See overview of the Netherlands, p. 41.
31 Knigge; Wakkie.
32 Knigge; Lemstra; Oldnall; Wakkie.
33 Karen (NL anonymous).
34 Philips.
35 Molitoris; See overview of Germany, p. 121.
36 Hausfeld.
37 Lingen; Tilp.

2.2.4. Another important development in Germany for the coming year is the development of the second class action mechanism: the Capital Markets Model Proceedings Act (KapMug). This act came into force on 1 November 2005 and enables investors to obtain a declaratory judgment collectively. However, it contains a sunset clause and its effect will end on 1 November 2020 if the legislature undertakes no action.[38]

2.2.5. **Italy** introduced the possibility for class actions in 2010 but there were only 48 cases, four of which ended in damages being awarded.[39] It therefore extended the possibilities for claiming damages collectively in the last year. The new class actions law will enter into force on 19 April 2020. As of that date, anyone can file a class action claiming damages with a specialised court on a wide range of contractual or tort rights if these concern homogeneous rights. Class actions filed on the same topic are consolidated under one class representative who receives a contingency fee. There are no safeguards to prevent abuse[40] apart from the time limit set for obtaining a judgment to prevent abuse of this system through the 'Italian Torpedo'.[41]

2.2.6. In the **European Union**, the European Commission issued the 'New Deal for Consumers', a package of consumer protection measures, on 11 April 2018. This includes a proposal for a directive on representative actions to protect the collective interests of consumers (COM (2018)184 final, hereinafter referred to as 'the draft directive'). It introduces the possibility for qualified entities to start redress actions against traders that have breached EU consumer protection law. The qualified entity must be a non-profit organisation. The adoption of the draft directive would create, after implementation, a national legal basis for collective redress within the EU.[42]

2.2.7. The interviewed experts openly criticised the draft directive. The main concern seems to be that it lacks a legal basis since procedural law is the prerogative of each Member State itself.[43] Also, this proposal does not respond to the zeitgeist that 'Europe' is already taking too much power.[44] The proposal is also encountering criticism since it is considered (i) not to be a real solution; (ii) not to add anything to the existing systems; and (iii) obstructing the national systems.[45] In addition, some experts fear that their governments will consider it unnecessary to implement the draft directive.[46] Lastly, the fact that ad hoc organisations are not qualified to start class actions is criticised, because it might monopolise the possibility to initiate class actions to the consumer organisations.[47]

2.2.8. European jurisdictions where no recent substantial legislative changes took place and no substantial changes are to be expected are France,[48] the UK (even after Brexit),[49] and Belgium.[50]

2.2.9. In **Israel**, the law of 8 April 2018 introduced court fees for certain class actions to prevent abuse.[51] In the US, there are no big changes to be expected.[52]

2.3. Trends in numbers of cases brought

2.3.1. The researched jurisdictions can be grouped by the number of class actions that will likely remain relatively low, although the claimed amounts can sometimes be substantial (Belgium, France and Germany); those jurisdictions where the number of class actions will likely remain relatively high (Israel and the US) and those where the number of class actions will likely increase (Italy, the Netherlands and the UK).

Number of class actions will remain relatively low

2.3.2. To date, less than ten class actions have been initiated in **Belgium.**[53] It is likely that the absolute number of class actions remains low.[54] The main

38 Tilp.
39 Geronzi; See overview of Italy, p. 197.
40 Geronzi.
41 Benzoni; Geronzi.
42 De Jong; See overview of European Union, p. 277.
43 Molitoris; Nurney.
44 De Bauw.
45 Dimitrov; Geronzi; Molitoris; Simon; Knigge
46 Tilp.
47 De Jong.
48 Simon.
49 Knigge; Nurney.
50 De Bauw.
51 Zamir.
52 Sterling.
53 Volders.
54 De Bauw.

reason is that only one consumer organisation is capable to initiate class actions: Test Aankoop.[55] However, some experts think that the use of alternatives might increase, which leads to a growth in the number of other forms of collective redress.[56]

2.3.3. Also in **France**, a very limited number of class actions have been initiated and growth is not expected.[57] According to one of our experts, the French class action system "is designed not to work" since it takes too much time and money to obtain a judgment.[58] Similar to Belgium, the number of other forms of collective redress will nevertheless grow due to alternatives to class actions.[59]

2.3.4. Although **Germany** has recently adopted legislation to enable class actions for consumers, the experts' expectation is that it will rarely be used outside of the 'Dieselgate' cases. The main reason is that it takes too much time and money to obtain a declaratory judgment and each individual claimant must substantiate its damages.[60] However, there are more and more commercial parties on the German litigation market, also from the US, who will likely make active use of alternatives.[61]

Number of class actions will remain relatively high

2.3.5. **Israel** has the largest number of class actions per head of population. Although, a small decrease could take place due to the introduction of court fees for certain types of class actions, the number of class actions will likely remain high.[62] A big trend will be that the instrument of class actions is more broadly used throughout all areas of law.[63] Another small trend is that courts will be less inclined to allow claimants to alter their claim after it was brought

55 De Bauw; Volders.
56 Volders.
57 Dimitrov; Simon.
58 Lèguevaques.
59 Lèguevaques.
60 Kaske; Tilp.
61 Lingen; Molitoris.
62 Ben Meir and Aviram; Weinberg; Zamir; Cohen-David.
63 Ben Meir and Aviram.

to prevent unsubstantiated claims to win the race to the court house.[64]

2.3.6. Also in the **US**, the country where the highest number of class actions are brought, no big changes are foreseen in the number of class actions.[65] Recently, the number of class actions and the type of class actions seem to have increased somewhat.[66] This might, amongst others, be due to the fact that class action litigation in the US is regarded as an industry.[67] However, the way class actions are viewed and facilitated in the US is also linked to political preferences. Democrats love them and Republicans hate them.[68] This makes developments regarding class actions somewhat difficult to predict.

2.3.7. A clear trend in the US is an increase to include non-class members in the litigation in a class settlement so that the settlement provides finality for the defendant.[69] A trend that will be discussed below is to include arbitral clauses in consumer contracts to prevent class actions. Another important trend is the large number of opt-out proceedings in which individual claimants try to negotiate a better deal for themselves, especially in antitrust and securities class actions.[70] And finally, a new trend are class actions where virtually none of the relief actually goes to the members of the class but instead goes to organisations whose interest and policies align with the interests of that specific class action.[71]

Slight increase in number of class actions

2.3.8. In **Italy**, the new law is expected to cause an increase in class actions, although this might take some time.[72] Considering the current low numbers of class actions, an increase would not be difficult to achieve.[73] Another development is that the new law introduces procedural possibilities such as

64 Zamir.
65 Clary, Lebold, Sterling.
66 Clary.
67 Lingen.
68 Sterling.
69 Clary; Lieberman; Volders.
70 Lebold; Sterling.
71 Clary.
72 Benzoni; Calvetti; Geronzi.
73 Geronzi.

disclosure, asking specific questions to witnesses in writing, and submitting a witness statement that might even be used as a test case for other civil proceedings.[74]

2.3.9. **The Netherlands** is already considered a welcoming jurisdiction for class actions and its number is expected to increase, particularly due to the increased know-how, good legal infrastructure and increasing availability of third party funding capital.[75] The new law creates new possibilities, such as claiming damages and representing Dutch inhabitants on an opt-out basis,[76] but parties might prefer using alternative systems – such as assignment – due to, amongst others, the obligations for claimants' representatives to cooperate.[77] The number of out-of-court settlements submitted to the Amsterdam Court of Appeal to be declared binding on the whole settlement class, is believed to be decreasing.[78]

2.3.10. In the **UK** the numbers of class actions is expected to grow, as the type of class actions will become more diverse.[79] Although the number of GLOs has not increased in the past, the type of proceedings have changed from mining coal to mining data.[80] The UK has a well-developed class action system, especially with regard to cartel cases on an opt-out basis (CAT proceedings).[81] This will likely lead to an increase in class actions.[82] The UK system is known for its very high litigation costs, but these costs are considered worthwhile if the case has very high prospects of success.[83] However, Brexit could have a counter effect: there will likely be less EU regulations applicable and more specifically, procurement and competition regulations will no longer apply.[84]

74 Geronzi.
75 Lemstra; Friel; Karen (NL Anonymous)
76 Lemstra; Philips
77 Knigge
78 Knigge; Wakkie
79 Nurney; Mark (UK anonymous); Friel
80 Oldnall.
81 Knigge; Nurney.
82 Nurney.
83 Lingen.
84 Mark (UK anonymous).

2.4. Trends in types of cases

2.4.1. Leaving aside the issue whether the absolute number of class actions will change, there is a clear trend regarding the types of cases that are expected to be the subject of a class action.

2.4.2. The most prominent new trend to be expected is **climate litigation.**[85] This type of class action litigation in which mainly NGOs enforce climate change laws will certainly increase worldwide. This new type of litigation will be directed in the first place against governments, e.g. if they fail to meet the agreed goals of greenhouse gas emissions. The Dutch *Urgenda* case marks the first time that a Supreme Court held a Government accountable for the consequences of climate change based on articles 2 and 8 of the European Convention on Human Rights.[86] Other jurisdictions will likely copy this.[87] This new wave of litigation will also aim at companies and their investors, directors, financers, and insurers on the basis of causing climate-related harm.[88] For now, due to the difficulties in proving a causal link between climate change and individual behaviour, this is not expected to cause a broad wave of climate litigation.[89] However, this will not stop NGOs from bringing cases since publicity is one of the main objectives of climate litigation;[90] and they claim that proof of the causal link is already available.[91] Nevertheless, there will be an increasing coordination between the various national NGOs to facilitate climate litigation.[92]

2.4.3. Another relatively new trend is **privacy claims** based on the General Data Protection Regulation and other similar legislation. The main obstacle for these type of claims is the question whether a breach has led to quantifiable damages for individuals. However, there are several cases worldwide pending

85 Benzoni; Van der Burg; Geronzi; Hausfeld; Lebold; Molitoris; Tilp; - mainly governments. Knigge; Lemstra; Philips; UK anonymous; Volders - increasingly also against companies.
86 Van der Burg.
87 Van der Burg. See for France: Lèguevaques; Simon. See for Italy: Geronzi. See for the UK: Mark (UK anonymous). See for Germany: Hausfeld.
88 Van der Burg.
89 Molitoris; Wakkie.
90 Van der Burg; UK anonymous.
91 Van der Burg.
92 Van der Burg.

to claim damages for data breaches. The landmark case currently under appeal before the UK Supreme Court is the *Morrisons Supermarket* case in which the supermarket in first instance was found vicariously liable for a data breach committed by a former employee who deliberately posted a large amount of other employees' personal data on the internet.[93] The UK seems to be a frontrunner regarding privacy claims.[94] Other examples in the UK are the *Cambridge Analytic*a case[95] and the Safari Workaround case[96]. In France,[97] Belgium,[98] the US[99] and Israel[100] these types of claims are also brought, e.g. against Google and Facebook. In Italy, enforcement against data breaches seems to be more of an issue of public enforcement rather than a subject for a class action.[101] The expectation is that these type of claims will remain in the domain of NGOs and not-for-profit consumer organisations. Even if at a certain point in time individual damages can be quantified, these figures will likely not be sufficient to interest third party funders, unless the numbers are significant enough.[102]

2.4.4. A trend that is ongoing for several years already is **competition claims**. This type of claims has already increasingly been brought in the last five to ten years due to the EU policy, which emphasises and encourages private enforcement.[103] In the market, there is an increasing awareness that damages based on cartel and other competition infringements can be recovered from the culprit. That awareness also increased due to the fact that commercial parties actively approach victims and the increase is expected to be further facilitated by ICT developments.[104] A landmark case in this field (although somewhat atypical due to its size) is the *Mastercard* case. Based on the

93 Nurney; UK anonymous (including a summary of the case).
94 UK anonymous.
95 Nurney.
96 Oldnall.
97 Simon.
98 Volders
99 Lebold; Lieberman.
100 Ben Meir and Aviram; Weinberg; Zamir.
101 Benzoni.
102 Philips.
103 Knigge.
104 Ben Meir and Aviram; Israel; Lingen; Philips; Schreiber; Tilp; Weinberg; Zamir.

European Commission's decision in 2007, claimants sought damages on an opt-out basis for an estimated number of 46 million class members, claiming GBP 14 billion in damages.[105] The outcome of this case will influence these type of claims in the UK and similar cases across Europe.

2.4.5. Another trend that is already ongoing for several years is **securities claims.**[106] In the US, there is currently an alarming increase of securities and shareholders litigation.[107] These claims do not necessarily only pertain to financial securities claims but can also be based on other issues that can affect shareholder value such as sexual harassment and wage/overtime claims.[108] Since claims in the US are a source of inspiration for other jurisdictions, it is probable that there will be a global rise of securities claims. In Germany, this will also depend on the future development of the Capital Markets Model Proceedings Act.[109]

2.4.6. I cannot leave out a type of claim in this section that is based on **medical matters**.[110] The majority of our experts believe that personal injury cases are unfit for class actions due to a lack of commonality between the individual claims.[111] Asbestos claims could be an exception to this rule as the Belgium example shows.[112] However, even in Belgium, asbestos cases were solved by creating a fund by the government to compensate damage as an alternative to litigation.[113] See further on the topic of commonality below.

2.4.7. **Consumer claims** based on, for example, defective products or mis-selling are generally not expected to be an area in which the number of class actions will increase dramatically.[114] This is surprising since the class action legislation in Germany, Belgium and France is specifically enacted to enable

105 See UK anonymous for a summary of the case.
106 Friel; Nurney; Oldnall; Philips; Sterling; Tilp; Weinberg; Zamir.
107 Lieberman.
108 Lieberman.
109 Molitoris.
110 Lèguevaques.
111 Simon: Personal injury cases should be excluded from class actions. Geronzi: In Italy they have already failed.
112 Volders.
113 Volders.
114 See: for the UK Oldnall; Germany Tilp and Kaske; the Netherlands Knigge. Other for France: Lèguevaques.

consumers to obtain damages. Moreover, consumer protection is considered an important reason for enabling class actions in other countries and at EU level. The main problem is that consumer cases are not economically attractive enough for commercial parties and consumer representatives lack resources. In practice, it seems that claimants' lawyers use alternative methods to bundle consumer claims rather than to make use of the class action system available in their country.[115] In the US, there is even a trend that less consumer class actions are brought because companies are allowed to include arbitral provisions in consumer contracts impeding the possibility to bring a class action.[116] The US Supreme Court sanctions this type of provision and therefore restricts consumer class actions, except for defective product class actions.[117] This arbitral provision can obviously not prevent the increase in the US of 'consumer fraud cases', i.e. mislabelling, technical violations or breach of new statutes.[118] However, these types of cases are more vulnerable to frivolous class actions, such as the case against Starbucks over claims that it put too much ice in its iced drinks.[119]

3. Impact on business

3.1. Introduction

3.1.1. Class actions mainly target governments and businesses. As I know from my own advisory practice, it profoundly affects a company if it encounters a class action threat for the first time. The negative media exposure that usually accompanies a class action leads to further internal and external challenges for the executive board. In addition, the practical consequences of having to manage the information streams and cooperation between the company and the external lawyers and advisers are challenging.[120]

3.1.2. Although the shock of being sued in a class action will decrease if this is 'a normal part of life', as it is in the US and Israel, the constant threat of class actions is affecting how companies do business on a day-to-day basis. Companies therefore have to take into consideration whether and which class action regime applies in a certain jurisdiction when making strategic decisions. At an aggregated level, the litigation cost of a high number of class actions in a country affects prices and the availability and prices of insurance policies. Moreover, it can even profoundly influence an entire sector. The EU example of the passenger transport sector where the number of claims and claim organisations is high and carriers try their best to avoid claims to be effective shows how legislation can influence a sector negatively.[121]

115 Calvetti; Lèguevaques; Volders.
116 Lieberman; Sterling.
117 Sterling.
118 Clary.
119 Clary.
120 Felderer.

3.2. On the day-to-day business

3.2.1. The **constant threat** of class actions increases businesses' awareness of the possibility of a class action in everything that they do. Every advertisement, campaign or offer is scrutinised by class action lawyers.[122] In Israel, class actions are part of their day-to-day business and cost a lot of time.[123] The same is true for US companies, who deal with the same constant threat.

3.2.2. As stated before, there is a huge impact on business when confronted with a class action for the **first time**. This is also the case if such a class action could 'only' lead to a declaratory judgment. Not only do employees feel threatened, it is also challenging to coordinate these type of cases from a more practical point of view.[124] If class actions are **more common**, companies will get more experience in managing class actions. This will decrease the destabilising effect, although managing class actions will always remain complex and expensive.[125]

3.2.3. **In any event**, whether it is the first time or business as usual, uncertainty on the possible outcome of a class action has a negative effect on the share price of a company. After reaching a settlement, stock prices usually go up. In

121 De Jong.
122 Cohen-David; Weinberg.
123 Cohen-David; Weinberg.
124 Felderer.
125 Sjöbring; Mark (UK anonymous); Weinberg.

Europe, the outcome of a class action is less predictable than in the US due to the different legal regimes and lack of a common set of procedural and substantive rules.[126] This makes that companies sometimes prefer settlements to litigation, even if the lawyers think that the chances of winning the case are high.[127]

3.3. Strategic element

3.3.1. The risk of class actions, like all litigation risks, should not only be taken into account in IPOs but also in transactions in general.[128] This requires a careful assessment of the potential and pending claims. In the **US** and in **Israel**, a company can almost be certain to be exposed to class actions.[129] However, this certainty should not deter companies from investing.[130]

3.3.2. The uncertainty about how class action legislation will be applied and develop in **Europe**, makes it difficult to take the risk of class actions into account.[131] For companies, the level playing field is important: all companies in the relevant market should be dealing with the same level of litigation risk.[132] The frontrunner's role of the **Netherlands** in Europe could therefore have a negative effect on the business climate in the Netherlands for all companies that do business on a European level. This risk will arise if the Dutch court does not set boundaries to the type of international claims that can be brought.[133] It will also arise if the court allows that the link between the damage suffered and the damages paid disappears.[134] However, it is too early to say whether the Dutch class action system will have a deteriorating effect on doing business in the Netherlands, and it seems unlikely that such an effect will be provoked by the new law on class actions alone.[135]

126 Sjöbring.
127 Wakkie.
128 Philips, Sjöbring.
129 Sjöbring; Weinberg.
130 Weinberg.
131 Benzoni.
132 Karen (NL anonymous).
133 Knigge; Wakkie.
134 Karen (NL anonymous).
135 Karen (NL anonymous).

3.4. Price effect

3.4.1. At a commercial level, it is impossible to take class action litigation costs into account since a class action can by definition only be brought after the product has been sold on the market.[136] However, at an aggregated level the prices of all businesses and all products increase if there is a class action litigation culture. This culture will inevitably lead to an increase in litigation costs, such as the costs for managing the claim and the fees for external lawyers.[137] Legal costs of class actions are a substantial part of the costs of doing business in Israel.[138] Also in the US, class actions drive up business costs as they are easy to bring and cheap to join.[139] Another consequence of a class action litigation culture is higher insurance costs or not being able to insure the company against certain risks.[140] However, one of our interviewees mentioned that the class action mechanism has social, legal and economic benefits.[141]

4. Various universal themes

4.1. Introduction

4.1.1. Some topics and questions we discussed with our interviewees in our research are relevant to all jurisdictions and seem more or less universal:

a. Should public or private enforcement solve collective problems?
b. How should class actions be funded? Should there be restrictions to the profits that third parties can earn from funding class actions?
c. What common types of cases can class actions deal with efficiently?
d. Which is a better system: opt-out or opt-in?
e. How do we reach a global, or at least EU-wide, acknowledged settlement?
f. Are there alternative methods for solving collectively suffered damage?

4.1.2. Below you will find a summary of the points of view of the experts.

136 Lingen.
137 Felderer; Lebold; Karen (NL anonymous); Sjöbring; Mark (UK anonymous); Wakkie.
138 Cohen-David; Weinberg.
139 Lingen; Sjöbring.
140 Felderer; Sjöbring. .
141 Hausfeld.

4.2. Public/private enforcement

4.2.1. As the interviews with the various experts show, the debate in Europe provides no conclusion on what the exact relationship is between public and private enforcement. The mainstream position seems to be that class actions are seen as a way of private enforcement, and that they should be allowed in Europe. However, they must be handled at low costs and without public money. I think this position is difficult to maintain because it assumes that there are parties who are willing to take up the task of private enforcement for a remuneration that is not according to commercial standards. On one side of the spectrum, there are experts who think that class actions are not the best way to handle collective problems, but that those problems should be dealt with either by regulators or by not-for-profit consumer organisations.[142] Class actions do not change the way businesses operate, but regulations will.[143] This group finds that for-profit class actions are not the right solution for solving collective problems since such class actions inherently entail a conflict of interest.[144]

4.2.2. On the other side of the spectrum, there are those who feel regulators are not effective in protecting consumers because they are out-marched in terms of resources by the private sector.[145] Class actions are, according to them, an effective and meaningful access to justice.[146] However, even private enforcement through class actions presupposes investing in courts that are properly staffed and equipped so class actions can be conducted in the most time and cost-efficient way.[147]

4.2.3. An intermediary position was also found where experts suggested that private and public enforcement should cooperate and supplement each other.[148] The UK system where the financial regulator had companies set up a compensation scheme is an example of such 'cooperation'.[149]

142 De Jong; Van der Burg.
143 Karen (UK anonymous).
144 Clary; De Jong; Simon.
145 Oldnall.
146 Hausfeld; Lebold.
147 De Bauw; Nurney; Schreiber.
148 Aviram; Ben Meir; Calvetti; Lemstra.
149 Oldnall.

4.3. Funding

4.3.1. Another major theme in our research is litigation funding. Continental Europe still struggles with the questions of who should fund class actions, whether there is place for some kind of for-profit motive and what the place is of governmental legal aid. These questions boil down to whether litigation based on a contingency fee or third party funding is the best tool available for access to a reasonable remedy or whether companies and governments should try and find alternatives.[150] This is an urgent question, because, although there is still a lot of uncertainty, some experts note a clear movement of third party funders towards continental Europe since this is considered 'economically viable'.[151] Not all experts share this expectation.[152]

4.3.2. The answers from our various interviewees on how to approach litigation funding generally corresponded with their roles in class action litigation. Claimants, their lawyers and obviously the third party funders themselves find contingency fees and third party funding overall a good thing. The free market, in their view, will establish the right price for funding if no competition barriers are imposed.[153] Bringing class actions in a kind of a pro bono way is not considered realistic.[154] The scrutiny on third party funding is also considered unjust: it is a commercial service that should be seen as a solution, since apparently, NGOs are unwilling or unable to help and no lawyer handles a case for free.[155] Third party funding is even believed to cause defendants to settle a case earlier on if they are confident that the third party funder feels very strong on the merits and provides the funds to litigate the case up to the highest court available.[156] However, those in favour of contingency fees feel that third party funders should be barred from gaining influence in proceedings and make proceedings more expensive.[157]

150 Sjöbring.
151 Friel; Hausfeld.
152 Schreiber.
153 Friel.
154 Schreiber.
155 Lemstra; Philips.
156 Friel.
157 Lieberman.

4.3.3. The defendants and their lawyers point towards the costs of external funding and the risks of abuse if there is no regulation on contingency fees and third party funding. The percentages that claim vehicles and third party funders are allowed to cream off and the fees that individuals should pay should, in their view, be limited or subject to court approval.[158] Moreover, claimants' lawyer Lèguevaques believes that third party funding is not in the interest of the consumer (generally speaking). Some experts also qualify government funding as a better solution for class action funding.[159] Their fear is that commercialisation of class actions will lead to a class action litigation culture in which claims are driven by the commercial interests of lawyers and funders and not by the interests and needs of the harmed party.[160] In their experience, the presence of an external funder causes all sorts of difficulties in settling a claim due to the fact that a settlement will be more expensive and the funder has a say in the settlement as well.[161]

4.3.4. Lastly, it was interesting to see what the state of affairs is in the various jurisdictions and how this influenced the answers of the various experts. A distinction will be made between third party funding and contingency fees. At the end of this paragraph, I will also briefly address the question of transparency of the funding arrangement.

Third party funding

4.3.5. In the **UK**, third party funding is a widespread phenomenon. Consumers and businesses use it.[162] For example, the *Mastercard case*[163] is driven by third party funders that allegedly will receive either GBP 125 million or, if more, 20% of the unclaimed amount in case of success.[164] The popularity of third party funding with the public is partly explained by the many cutbacks that took place in governmental legal aid funding in the UK.[165] However, due to the cost shifting rules, third party funders will normally only take cases with a 70% of success or higher.[166]

4.3.6. In **Belgium** third party funding is not permitted as it would likely be qualified as in breach with the non-profit character of representative organisations.[167]

4.3.7. Third party funding seems permitted in **Germany**, although the proceeds for funders are limited.[168] The legal status is however somewhat unclear and there is a tendency to dislike and/or fear third party funding:[169] a percentage of 20% of the proceeds was ruled to be against good morals.[170] Nevertheless, various new platforms and process financing forms are popping up in **Germany**.[171]

4.3.8. **France** and **Italy** do not have any regulation regarding third party funding.[172]

4.3.9. In **Israel**, third party funding is not popular and it is still unclear whether third party funding is considered legal or not.[173]

4.3.10. In **the Netherlands**, third party funding is possible and currently not explicitly regulated, although there is some discussion on whether a claim vehicle that agrees high fees with a third party funder is able to safeguard the interests it states to represent. However, under recent new law, funding agreements may become subject to some judicial scrutiny and third party funders are in any event not allowed to have a decisive influence on the case strategy.[174] Experience shows that settlement discussions with commercial claim vehicles can sometimes be complicated because these claim vehicles do not want and are not obliged to provide proof of the number of people that they exactly represent in a specific case.[175]

158 Clary; Karen (NL anonymous).
159 Class actions are not necessary in Germany to provide access to justice due to the legal aid system (Molitoris).
160 Weinberg.
161 Mark (UK anonymous).
162 Mark (UK anonymous).
163 See UK anonymous for a summary of this case.
164 Schreiber.
165 Friel; Nurney.
166 Nurney.
167 Volders.
168 Lingen.
169 Hausfeld.
170 Lemstra; Tilp.
171 Kaske.
172 France: Dimitri; Lèguevaques; Simon. Italy: Benzoni; Calvetti; Geronzi.
173 Aviram; Ben Meir; Zamir.
174 Knigge.
175 Wakkie.

4.3.11. In the **US'** the percentages for third party funders are subject to judicial scrutiny.[176] Third party funders are trying to grow in the US class action market.[177]

Contingency fees for lawyers

4.3.12. In the **US** contingency fees for lawyers are allowed and very frequently used.[178] This might partly explain the high number of class actions as opposed to regular litigation since class actions lead to higher contingency fees.[179] While American claimants' lawyers state that contingency fees prevent irresponsible behaviour and even describe it as one of the key ingredients for a successful class action,[180] others feel that contingency fees are not in the interests of consumers and result in the class action regime to be treated more as a business rather than as a legal service.[181]

4.3.13. In **France**, contingency fees for lawyers are not allowed.[182] In **Germany**, they are not allowed either, but in practice there is the 'Hausfeld model' in which the US law firm Hausfeld allegedly cooperates with a Limited that agrees a contingency fee with the claimants to circumvent this prohibition.[183] In **Italy**, there is a mild form of a contingency fee allowed for both the lawyer and the representative of the claimant.[184] In **Israel**, contingency fees for lawyers are permitted.[185] In **the Netherlands**, they are not allowed, but that did not prevent the Amsterdam Court of Appeal to declare a settlement binding that contained a 20% contingency fee for the US principal counsel.[186]

4.3.14. In the **UK** contingency fees for lawyers are allowed but regulated.[187]

176 Clary.
177 Lingen.
178 Clary; Sterling.
179 Sterling.
180 Hausfeld; Lieberman.
181 Lèguevaques; Sjöbring.
182 Dimitrov; Simon. These are not allowed in Belgium either.
183 Molitoris.
184 Geronzi.
185 Zamir.
186 Felderer; Knigge.
187 Friel.

Liberalisation of the rules on contingency fee arrangements will likely result in an increase in the number of class actions brought.[188]

Transparency of the funding agreement?

4.3.15. Especially in jurisdictions where third party funding is regulated or in which the representative entity must be a non-profit organisation, long discussions can take place in court on whether the financial agreements between the funder and the representative entity must be disclosed to the court and/or the defendant. Obviously, if a court wants to exercise any form of control, transparency of the funding agreement is key.[189]

4.3.16. The only European jurisdiction where there is already some case law on this topic is the **UK**. It could well be possible that in the future, funding arrangements will generally have to be disclosed. [190] Surprisingly, considering his role, Steven Friel, CEO of third party litigation funder Woodsford, indicated that he thinks transparency is a good thing and very important as long as the funders and clients are protected from any negative consequences of such disclosure.[191]

4.4. Commonality

4.4.1. One important criterion in all the jurisdictions (whether explicit or implicit), is that the interests of the class members on behalf of whom a class action is brought, must be common or similar.[192] The purpose of class actions is to collectively solve a large number of disputes in an efficient way. This requires the represented interests to be sufficiently similar so that collective processing can take place efficiently and effectively. If the bundled claims lack similarity, they cannot be brought as a class action.

4.4.2. A landmark case in this regard is the ***Wal-mart*** case, which is the largest US gender discrimination class action to date.[193] The US Supreme Court found

188 Nurney.
189 Felderer.
190 Nurney; Different Oldnall.
191 Friel.
192 See the country overviews and Knigge; Benzoni; Zamir.
193 Clary; Simon (see this interview for a summary of the case).

that the class could not be certified because the commonality requirement was not met. It held that "it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question". The US Supreme Court thus emphasised that in order to meet the commonality requirement, it is required that the legal questions brought before the court can be answered collectively by the court, rather than that the members of the alleged class have a common question.

4.4.3. In the UK ***Mastercard*** ruling,[194] the CAT adopted a similar approach in its overturned first instance ruling. It ruled that due to the lack of common answers to the questions (i) to which degree the merchant passed on overcharges to its customers and the percentage impacted its prices; and (ii) the amount that the claimant spent at each of those merchants, the case was not suitable to be brought in collective proceedings.[195]

4.4.4. In Belgium, the court of appeal found a creative solution for the lack of lack of similarity in the ***Proximus*** case. The lack of similarity stemmed from the central question in these proceedings, which was whether or not individual customers had been misled. The court solved this by changing the class action proceedings from an opt-out to an opt-in system.[196] This made it possible for consumers to decide for themselves whether they felt misled or not.

4.4.5. As already mentioned above under 'trends in types of cases', one point that has found common ground, is that personal injury cases worldwide are not easily considered suitable for class actions since damage caused by an illness can only be assessed on an individual basis with the help of an expert.[197]

4.4.6. Considering the importance of the commonality requirement for an efficient and effective class action system, it is in my view a serious omission that the EU draft directive does not include this requirement. De Jong also regrets that, in the end, the commonality requirement was not included in the proposal and he stresses that in cases concerning collective monetary

194 Nurney.
195 Mark (UK anonymous); The CAT in its turn referred to the Canadian Supreme Court decision of Pro-Sys Consultants v Microsoft Corporation [2013] SCC 57.
196 De Bauw.
197 Clary; Geronzi; Knigge; Lèguevaques; Simon; Sterling. See differently: Volders, who expects that the number of personal injury cases will increase; and Calvetti.

damages commonality inevitably needs to be part of the discussion and probably of the national regulation.

4.5. Opt-out/opt-in

4.5.1. We discussed with all our experts what system is in their view in the best interest of both the claimants and the defendants: a system in which the person falling under the definition of class member is obliged to opt out, or a system in which only people who opt in are part of the class. Please see the country introductions for an overview of the systems that each country adopted.

4.5.2. The main advantage of the **opt-out system** from a defendants' perspective is that it provides certainty about the potential exposure of a claim and finality if a settlement is reached.[198] From a claimants' perspective the main advantage is that it will increase the number of class members and therefore the potential damages since people's default option is not to undertake action.[199] Mentioned disadvantages are that opt-out systems encourage bringing unmeritorious claims[200] and violate, among others, the Italian, French and German constitutions.[201]

4.5.3. An advantage of the **opt-in system** is that it makes it possible to quantify individual damages.[202] A disadvantage from the claimants' perspective is obviously that it decreases the number of class members, although technology can facilitate opt-in claims.[203]

4.6. How to reach a global (or at least EU-wide) acknowledged settlement

4.6.1. The issue of opt-out and opt-in is often believed to influence the willingness of companies to settle. As the interviews with experts from a business perspective show, there is a desire to settle meritorious homogeneous cases

198 Karen (NL anonymous); Mark (UK anonymous); Felderer; Lingen; Wakkie.
199 Lemstra; Lieberman.
200 Nurney.
201 Geronzi; Molitoris; Simon.
202 Schreiber.
203 Oldnall.

in a quick, cost-efficient and final way.[204] However, settlement options greatly differ per jurisdiction and there is no settlement method that guarantees that courts will globally recognise its finality. This leads to the unfair consequence that consumers are treated differently in different jurisdictions, even within Europe.[205] As James Oldnall put it: global settlements are "a bit like driverless cars: everybody knows it needs to happen, the technology is available, but no one knows when it is going to happen."

4.6.2. There are 'second-best' methods to global settlements. One of the options for trying to reach a global settlement is the following: let as many foreign claimants as European courts will likely allow **opt in in national class actions proceedings** and include them in the settlement.[206] The ease of joining foreign claimants could likely increase through improved technical systems.[207] However, setting aside the practical details, opting in in a class action will not ensure the finality of a settlement since claimants who have not opted in can initiate actions on their own. Past experience shows that the settlement amount is then used as starting point for new settlement negotiations.

4.6.3. In **US** settlements, it is possible to **extend a settlement class** to parties who are not a member of the class action class, as for example the Bernie Madoff class action shows.[208] This results in a settlement on an opt-out basis, and in theory, provides global peace.

4.6.4. The most efficient option to obtain **European peace** is for parties to jointly ask the Amsterdam Court of Appeal to declare a settlement binding on all class members.[209] This is in practice also done parallel to US settlements.[210] Class members who do not want to be bound can opt out. These Dutch class settlement proceedings are independent proceedings, apart from class action proceedings. This system seems the best, and to date, the only European option.[211] Some experts even state that this system makes a European

204 Benzoni; Lebolt; Lingen; Karen (NL anonymous); Simon; Sjöbring; Volders.
205 Sjöbring.
206 Geronzi; Hausfeld; Knigge.
207 Lèguevaques.
208 Clary; Lieberman; Volders.
209 Knigge.
210 See the *Shell and Converium* case; Felderer.
211 Hausfeld; Lemstra.

settlement system unnecessary.[212] However, the procedure to have the settlement approved is long-winded and laborious and the Amsterdam Court of Appeal actively tests the settlement on reasonableness.[213] The Court is also still somewhat inexperienced in dealing with this type of cases.[214]

4.6.5. The question for both the US solution and the European solution is whether a settlement class on an opt-out basis would be recognised by European courts.[215] This has not been tested yet, although Dutch, Belgium and Italian lower courts have already recognised either a US class action or a US settlement;[216] and the nine judgments of the Amsterdam Court of Appeal declaring a settlement binding have not been challenged in a European court. However, legal scholars in Italy, France and Germany are sceptical about the legal viability of the opt-out basis.[217] European legislation confirming that cross-border settlements are amenable to recognition and enforcement throughout the EU would therefore be valuable to make companies more open to settlements.[218]

4.6.6. In my experience, a more proactive approach to settle a conflict can save a company a lot of money rather than they let a conflict with a relatively small group of people grow into a full-blown class action by not settling timely. I am hoping, just as Peter Wakkie and Ekkart Kaske do, that this will change in the near future.

4.7. Alternative methods

4.7.1. Class actions are not the only possibility to solve collective damage. As a rule of thumb, in the jurisdictions that have class actions systems that have well-developed systems to claim monetary damages such as Israel, the United

212 Lemstra.
213 Knigge.
214 So far, nine class settlement agreements have been declared binding since the Act on the Collective Settlement of Mass Damage entered into force in July 2005. See: Felderer.
215 Israeli courts will likely not recognize US and European judgments: Ben Meir and Aviram.
216 Italy: Geronzi; The Netherlands: Amsterdam District C 23 June 2010, ECLI:NL:RBAMS:2010:BM9324 (Ahold); Belgium: Gent Court of Appeal 23 March 2017 (Lernhout & Hauspie).
217 Geronzi; Molitoris; Schreiber; Simon; Tilp.
218 Calvetti; Volders.

States and the UK, alternatives are not used a lot.[219] In other countries, alternatives are more popular, although claimants in Italy, France, Germany and Belgium still seem to struggle to find legal viable options. Alternatives used throughout Europe are bundling of claims through assignment and individual mandates. Another alternative is the compensation scheme. Lastly, there is an initiative promoting the use of an ombudsman system that could also provide an alternative to class actions.

4.7.2. **Assignment** is the most common alternative to class actions. However, in Belgium and France it is debated whether this is legal due to the legal maxim '*nul ne plaide par procureur*' – nobody is allowed to plead his or her case through an intermediary.[220] In Germany, assignment is possible but difficult.[221] Moreover, there is a competition going on between the assignment model run by funded claimant lawyers, bundling single cases together to a mass claim analogous to the Austrian class action model, and the qualified entities claiming via the class action law.[222] In Italy, it is possible but not much used.[223] In the Netherlands, assignment is possible and popular.[224] It is often a preferred route to avoid discussions on whether a representative entity is admissible under the current class action requirements. This will likely increase under the recent new legislation, although the disadvantage of the assignment model for claimants is that this is opt-in.[225] The expectation is that this model will be used more and more with the improvement of legal tech.[226]

4.7.3. Another alternative that I would call '**semi-collective actions**' is the model in which the lawyer bundles claims by obtaining as much powers of attorney as possible. This method has scaling advantages, but in essence, the cases remain individual. Semi-collective actions are of course possible in all jurisdictions, but I would like to specifically mention the French 'MySMARTcab' platform initiative that envisages providing an IT solution to connect consumers and lawyers in specific cases with the purpose of bringing bundled claims.[227] In Belgium and Italy, semi-collective actions seem to be more popular.[228] In Germany, there is a separate instrument available to enable this type of semi-collective actions: 'the multi-party actions'. However, this is subject to strict criteria and these cases run the risk of being split up again.[229]

4.7.4. In the UK, **compensation schemes** are regularly initiated by the financial supervisor or privately.[230] An example of such compensation scheme with an inventive two-option system is described on a no-names basis by a UK in-house counsel in the survey.[231] A compensation scheme is easier, quicker and cheaper and gives more positive media attention than when a company is forced by the court to compensate.[232] It is my experience that also in the Netherlands, the financial supervisors sometimes push companies to set up compensation schemes. Another option is regular practice in the US, but not used in Europe: the regulator who gives a company a discount on its fine if it settles. This practice is still seemingly far away for Europe and was not discussed in the New Deal context.[233]

4.7.5. An alternative to class actions that is currently being developed is the **ombudsman system.**[234] The idea is to use digitalisation to interact with consumers more directly and to solve complaints at a low cost, quickly in a transparent and objective way through a neutral party such as an ombudsman. The ombudsman could also assist companies in improving their services by identifying the areas in which they are having problems. Kaske and several of his partners hope that the confidentiality of the ombudsman

219 Israel: Weinberg; US: Clary; Sterling; Lebold, Lieberman and Sterling; UK: Nurney. The US does have a form of alternative called 'multidistrict litigation' (MDL) that can solve some common questions in complex litigation in different districts. Other 'alternatives' are test trials and bellweather trials, especially in cases that cannot be dealt with in a class action such as personal injury cases or exposure claims. See Clary and Lebold.
220 De Bauw; Dimitrov; Lèguevaques; Simon.
221 Schreiber; Tilp.
222 Kaske points to the 'Dieselgate' case as an example.
223 Benzoni.
224 Knigge.
225 Philips.
226 Lemstra.
227 Lèguevaques.
228 Belgium: Volders; Italy: Calvetti, Geronzi.
229 Tilp.
230 Mark (UK anonymous).
231 Mark (UK anonymous).
232 Mark (UK anonymous).
233 De Jong.
234 Kaske.

system makes it easier for defendants to admit liability and solve the issue. According to them, consumers want a realistic compensation for their harm and, ultimately, some kind of recognition of their situation, which they do not get in a class action.[235] As another interviewee mentioned, the social costs of class actions are high and do not necessarily provide perfect justice to the individual.[236] The challenge of this alternative is that it requires a change in culture.[237] However, maybe that is also the beauty of it.[238]

5. Conclusion

5.1.1 If you have reached the end of this summary, you will probably agree with me that class actions are undergoing a big shift. How this shift will turn out remains to be seen. Will the experts' expectations about numbers and trends come true? What jurisdiction or which jurisdictions will be the best for bringing class actions after the US? What effects will the various new legislation have for businesses and consumers? Can legal questions be answered on a more aggregated level, which might even make international settlements a secure option? Lastly, will society be ready for alternatives to class actions?

5.1.2 I am profoundly grateful to the experts who have offered their valuable time and participated in this survey. They gave us very insightful answers to the topics and questions that were covered, which allowed us to make this overview of the trends and future developments in class actions. However, nobody knows what is going to happen exactly in the future, even though it is clear times are changing. And that is what makes it so interesting.

Isabella Wijnberg
Amsterdam, 26 february 2020

235 Kaske.
236 Sjöbring.
237 Kaske.
238 Simons.

THE NETHERLANDS

Updated: 26-02-2020

The Dutch legal system has two different collective redress mechanisms: the representative collective action and the collective settlement mechanism. They can be distinguished from other mass proceedings in which claims are bundled on the basis of assignment or representation by mandate.

Representative collective actions are governed by Articles 3:305a to 3:305d of the Civil Code. They allow a representative entity to initiate proceedings to protect the similar interests of an unnamed group (the class). The representative entity is either a Dutch foundation (*stichting*) or an association (*vereniging*) with full legal capacity. A representative entity can submit a claim for a declaratory judgment, injunctive relief or specific performance. It can also claim monetary damages in collective proceedings initiated on or after 1 January 2020, for events that took place on or after 15 November 2016.The possibility of claiming monetary damages was created by the Act on redress of mass damages in a collective action (*Wet afwikkeling massaschade in collectieve actie*) (WAMCA) that entered into force on 1 January 2020. This act also has stricter requirements for the standing of a representative entity and the scope of collective actions. Furthermore, it introduced procedural changes to make proceedings more efficient and effective (Articles 1018b to 1018m of the Code of Civil Procedure), including the appointment of an exclusive representative, the consolidation of collective actions if these actions are based on the same events, and the obligation for the parties to try to negotiate a settlement agreement after an exclusive representative has been appointed. Those who don't want to be represented in this collective action can opt-out after the appointment of the exclusive representative. Foreign claimants have to opt-in, unless the court decides otherwise. After a settlement agreement is reached and declared binding, there is a second opportunity to opt-out. If no agreement is reached, the proceedings will continue. The court can order the parties to submit a proposal for settling the claim. A judgment will bind the parties and all class members. A judgment in collective proceedings that were initiated

before 1 January 2020 only has authority of res judicata between the parties in the proceedings. However, it is likely to be followed in individual damages proceedings.

Collective settlement proceedings allow the parties to a settlement agreement to jointly ask the Amsterdam Court of Appeal to declare the settlement binding on all class members. In doing this, the court assesses factors like the reasonableness of the agreed compensation. Class members who do not want to be bound can opt out. The collective settlement proceedings are independent proceedings, separate from class action proceedings. So far, nine class settlement agreements have been declared binding since the Act on the Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling Massaschade*) (WCAM) entered into force in July 2005.

Class actions | *Collectieve acties*

Scope	General
Access granted to	Representative organisation
Opt-in or opt-out	Since 1 January 2020 (WAMCA): opt-out, but opt-in for foreign claimants unless the court decides that an opt-out regime applies; before: see introduction
Declaratory relief or damages	Since 1 January 2020 (WAMCA): both: before declaratory relief
Frequently used	Yes
Regulatory framework	Article 3:305a-d Civil Code; WAMCA added Articles 1018b-m Code of Civil Procedure
Alternatives used in practice	Assignment of claims and representation by mandate

Class settlements

Binding class members after court approval	Yes, WCAM settlements; WAMCA introduced a settlement negotiation phase in class actions
Opt-in or opt-out	WCAM: opt-out; WAMCA: opt-out
Regulatory framework	WCAM: Articles 7:907-910 Civil Code, 1013-1018a Code of Civil Procedure; WAMCA: Articles 1018g-h Code of Civil Procedure

Third party funding

Regulated by law	No (some guidelines in the Claim Code 2019, a body of soft law)
Frequently used	No, but increasing

Good to know

In the *Converium* and *Shell* WCAM settlements, the Amsterdam Court of Appeal assumed jurisdiction although most potential claimants/beneficiaries were based outside of the Netherlands.

Business Perspective

The future of class actions in the Netherlands from a business perspective

PETER WAKKIE | BUSINESS PERSPECTIVE | Experienced board member and partner at Wakkie+Perrick

4 June 2019, interviewers: Eline Groen and Isabella Wijnberg

Peter Wakkie is a well-known Dutch lawyer with an impressive track record in both the legal world and the business world. He started out as a lawyer at one of the leading Dutch law firms, and rose up the ranks to become its managing partner. After taking a break from the law to focus on his role on the management board of Ahold, he founded a boutique law firm, Spinath+Wakkie (now Wakkie+Perrick). In addition to his legal work, Peter has served on the boards of many large listed companies. He was Vice-Chairman of the supervisory board of ABN AMRO, one of the biggest banks in the Netherlands and chairman of the supervisory boards of Wolters Kluwer N.V. and TomTom N.V. He is currently Vice-Chairman of Steinhoff International N.V., a board member of Stichting Preferente Aandelen B KPN and a supervisory board member of BCD Holdings. Given Peter's broad experience on the boards of companies that have dealt with mass claims, we were particularly interested to hear his thoughts on class actions from a business perspective. We met Peter at his office in one of the most elegant Amsterdam neighbourhoods to hear his views on the future of class actions. This interview was conducted in Dutch and translated into English.

Alternatives to WCAM settlements are becoming more attractive

Our conversation begins with a discussion on mass settlements. Based on his past experience, Peter anticipates that we will see a decrease in the number of WCAM settlements: "Parties will use alternative methods instead of obtaining a class settlement through WCAM proceedings, because obtaining a WCAM judgment approving the class settlement simply takes too long. Furthermore, the representative organisations involved have an agenda of their own as they are trying to get compensation as well." Peter doesn't believe that the fact that the judgment and therefore the settlement is public is a large impediment to using WCAM. There are alternatives to a WCAM settlement, for example, using a foundation to distribute damages if the group of claimants can easily be determined, or concluding an agreement after a suspension of payment.

We wonder how WAMCA will impact these dynamics. Peter thinks WAMCA might have a deterrent effect. "A WCAM settlement can easily be avoided, if you do not want to settle. Under WAMCA, defendants cannot escape the compulsory settlement negotiations. Furthermore, in this settlement process defendants will have to provide their own damages calculation. This is risky, because basically defendants will have to deliver their own verdict. This gives defendants a say, but the other party will challenge the defendants' proposal and the judge may not always go along with it."

In Peter's view, the consolidation mechanism in WAMCA, which allows one of the representative organisations to be appointed as exclusive representative, is a positive development: "In *Ahold* for example, which was a US class action, it became clear that working with one single counterparty in a collective action is actually pleasant."

International claims should not be too easily admitted

One trend that the legal press often highlights is the increasing number of cross-border class actions brought before the Dutch courts. Peter has strong views on this subject: "It is a good thing that the legal system in the Netherlands is well developed, but it should not be possible for anyone to bring a class action before a Dutch court only for this reason. It will have a negative impact on the business climate in the Netherlands if a company can be summoned before a Dutch court, simply because, for example, some

shareholders are based in the Netherlands, although there is no other connection between the damaging event and the Netherlands."

Peter expects that judges will become stricter in requiring a connection between the claims and the Netherlands. We saw a move in this direction in *BP*. In this case, the Amsterdam District Court and the Amsterdam Court of Appeal found that they did not have jurisdiction to hear claims by the VEB, the Dutch Investors' Association, against BP. As a result of this case, Peter believes that the number of Dutch class actions with international claimants will decline.

On 7 November 2017, the Amsterdam Court of Appeal upheld the Amsterdam District Court decision denying jurisdiction over the Deepwater Horizon mass claim of the Dutch Investors' Association (VEB) brought against London-based British Petroleum (BP).[1] The VEB had filed a mass claim on the basis of Article 3:305a of the DCC on behalf of investors who bought, held or sold shares – listed on the London, Frankfurt and New York stock exchanges – in the period from 16 January 2007 to 25 June 2010 through a Dutch investment account or Dutch broker, holding BP liable for the damages suffered by these investors. BP was alleged to have made misleading statements both before and after the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. The VEB lodged an appeal at the Dutch Supreme Court, which recently ruled that it will refer preliminary questions to the EU Court of Justice.[2]

The price of class actions for companies

Since Peter has had to deal with class actions in several jurisdictions as a board member, we were curious to learn if he has observed any differences in how companies handle this litigation exposure. He notes a big contrast in how US companies and Dutch companies take account of future class actions in their business model. He does not expect companies in the Netherlands to include the costs of a future claim in the prices they charge for their products. "In the United States, on the other hand, litigation is a natural risk when doing business. Every five years there is a new class action, which forces companies to take future class actions into account."

As an illustration, Peter refers to the oil spill in Alaska, caused by Exxon.

In March 1989, the oil tanker 'Exxon Valdez' struck a reef in Alaska, which led to the largest oil spill in US history at the time. The Supreme Court ruled that maritime punitive damages should not exceed the compensatory damages and reduced them from USD 2.5 billion to approximately USD 500 million.

Exxon went to the Supreme Court and did not settle.[3] "This is Exxon's business philosophy, they always litigate." The proceedings resulted in a lower amount of damages than Exxon would have had to pay if they had settled. Peter adds: "Exxon could afford not to settle in the US, because it is an American company. It had a home game advantage. There is a big difference with BP. It's based in London and it had to pay USD 60 billion. As a foreign defendant in US class actions, you're better off settling."

He feels that this might be different in the Netherlands: "If I were a company with a lot of capital, I would not settle easily. The claimants are also in it to profit so litigation can lead to a better outcome. The claimants have no interest in litigating for years. This is different if the company only has limited capital. In that case, it would be better to settle quickly because proceedings cost a lot of money." However, he notes that in the Netherlands companies also try to avoid reputational damage. "Many companies cannot afford to be in the spotlight for negative reasons for too long. Their products might become associated with these proceedings." This is, for example, one of the reasons why Ahold kept its well-known Albert Heijn brand separate.[4]

1 Amsterdam Court of Appeal 7 November 2017, ECLI:NL:GHAMS:2017:4588.
2 Dutch Supreme Court 14 June 2019, ECLI:NL:HR:2019:925 (*VEB v BP*).
3 US Supreme Court, 25 June 2008, 554 U.S. 471 (2008) (*Exxon Shipping Co v. Baker*).
4 Ahold Delhaize is one of the world's largest food retail groups. Albert Heijn is one of Ahold's brands and the leading supermarket in the Netherlands.

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"Many companies cannot afford to be in the spotlight for negative reasons for too long. Their products might become associated with these proceedings."

Peter continues by explaining that the effect of uncertainty surrounding litigation on the share price is more important. "The accountants and the CFO look at the cash flow in the future. They must make a provision for litigation in the annual accounts, even when there is a defendable case. It is difficult to quantify the damage, and therefore to determine the amount of the provision. This might be a problem for companies that are not doing so well. The uncertainty of how much money has to be paid is a sensitive issue in this respect." In short, the accountants and the CFO want to avoid this uncertainty. Peter adds: "They think differently to lawyers. Lawyers do not want to acknowledge liability, but companies sometimes prefer paying damages, if that has a positive effect on the share price."

In this respect, Peter emphasises that, from a company's point of view, finality and global stability are key. For this reason, if they are involved in a mass claim, most companies prefer a class action system in which members will have to opt out rather than have to opt in. This system offers the advantage that even if an individual remains passive, the company has contained its exposure and can rely on the case having already been decided even if new potential claimants come to light. A possible downside of this for companies is that it can create a level of uncertainty because it is not clear why class members stayed passive. Nevertheless, it still seems the most decisive option available.

US class actions versus WAMCA

We ask Peter how he feels about US class actions. "By introducing an exclusive representative in WAMCA, we are already copying some elements of that system," he says. But he also sees an important difference, when comparing WAMCA with the US class action system, and that is the role of the judge. "In a US class action, judges mainly play the role of supervisor in the process of determining compensation, although they also have a final check on the reasonableness of the amount. In the Netherlands, the court itself will have to determine the compensation." According to Peter, Dutch judges are not educated to do so, as most of them have no business experience. It will be very difficult for the court to weigh the various reports of the claimants and the defendants. "The court can of course rely on experts, but it will still be hard to make a decision since it all comes down to the underlying assumptions." Peter questions whether judges should be burdened with this.

Future trends

Our discussion moves to current and future trends in class actions in the Netherlands. Milieudefensie, a Dutch environmental organisation, recently brought a class action against Shell. We ask Peter if he anticipates an increase in the number of environmental class actions against companies. He does not: "I do not expect much from the case against Shell. For now, companies do not have to worry." However, he does expect that more fraud claims will be filed collectively. As far as privacy claims are concerned, Peter thinks that these will mainly be directed against tech giants. However, Peter doubts that the Dutch courts would be able to hear claims brought against Facebook or Google, since it is unlikely that they would be found to be sufficiently connected to the Netherlands.

Third party funding

"Third party funding is big business in the United States," says Peter, "but in the Netherlands we do not welcome it with open arms." Nevertheless, he believes that in the future, third party funding will be more common in the Netherlands. His concern is that litigation funders can abuse the class action system in the Netherlands when they pretend to represent large groups, but refuse to provide proof of that. "This is particularly difficult in negotiations," Peter adds. "They also tend to compete with each other. The advantage of court proceedings is that the judge can require transparency in order to appoint the exclusive representative." Generally speaking this will be the representative with the largest group of claimants.

The EU has a role to play

Collective actions are high on the agenda of the European Commission and of several individual Member States. We ask Peter what he thinks of these developments. "I do not

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"The Netherlands will remain the frontrunner of collective actions."

believe that European countries such as Germany and the UK will soon develop a system such as the Dutch class action system. That will take years. For the time being, the Netherlands will remain the frontrunner of collective actions." Nevertheless, he thinks that the EU could play a role in structuring the system by introducing a single 'European desk' for handling collective actions: "After all, it could be a huge burden for a company to be sued in several jurisdictions for the same type of matter. So it might be beneficial to have one central desk that handles all the incoming procedures."

Businesses will need to be proactive

Unlike businesses in the US, Dutch companies do not take a proactive approach when it comes to class actions. They are not on the top of the board's agenda. However, Peter expects that this will change in the near future and that companies will begin to look for alternatives. He gives an example: "General Electric has stipulated in its terms and conditions that mediation must take place before access to justice is possible. There are three reasons to choose mediation. First, mediation is cheaper than litigating or arbitrating. Second, it's confidential. Third, it is possible to keep a good relationship with the claimants."

Landmark case

We asked Peter what he thought was the most important development in Dutch collective actions in the past ten years, and he immediately mentioned the WCAM settlement in the *Fortis* case.[5]

Fortis/Ageas is the most recent WCAM settlement, offering compensation to investors for a total amount of EUR 1.3 billion. In 2016, entities representing the interests of investors reached a settlement with Ageas, the legal successor to Fortis, offering compensation for alleged losses due to alleged misrepresentations and mismanagement by Fortis in 2007 and 2008. The settlement was submitted to the Amsterdam Court of Appeal for approval. However, the court first denied approval, ruling that the settlement agreement could not be considered reasonable and did not sufficiently safeguard the interests of the shareholders. The court did not agree with the disparity in compensation offered to the 'free riders' on the one hand and to investors whose representatives had been actively seeking compensation on the other. The court offered Ageas an opportunity to amend the settlement to address the court's objections. Ageas increased the settlement amount and the parties to the settlement made several other adjustments. The court also asked the representative entities to disclose their funding arrangements in more detail. Finally, on 13 July 2018, the Amsterdam Court of Appeal declared the settlement agreement binding, although it found that the shareholders represented by one of the entities were invalidly favoured over the others.

Predictions for the future

We ask Peter to tell us what he thinks will be the most important development in the future of class actions. "Courts will be stricter when it comes to assessing jurisdiction and the admissibility of claims to avoid having to deal with cases that have no relationship with the Netherlands. Businesses will have a more proactive attitude to class actions and be better prepared for this option."

5 Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422.

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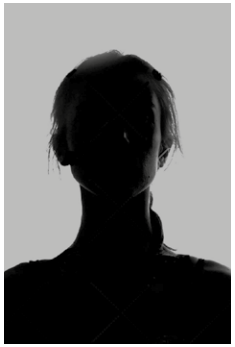


The future of class actions in the Netherlands and the US from a business perspective

KAREN | BUSINESS PERSPECTIVE | Large company in the Netherlands

3 July 2019, interviewers: Parisa Jahan and Isabella Wijnberg

When planning this project, we were very keen to know more about the way class actions are perceived from the business perspective in different jurisdictions. However, sharing a company's view on this subject can be a sensitive matter. We therefore agreed to publish this interview using a pseudonym. 'Karen' is general secretary at a large company in the Netherlands. Karen has had broad experience in past class actions, as well as being actively engaged in ongoing class actions. She also was active in the discussions around the new Dutch class action legislation. She supported arguments brought forward on why the new law should not apply to claims that were already pending or that relate to past events. This interview was conducted in Dutch and translated into English.

The Netherlands will continue to build its reputation as a paradise for class actions

We ask Karen if she expects any changes when it comes to class actions in the Netherlands. Her expectation is that the Netherlands will continue to develop as "a paradise for collective actions". This is based both on her personal experience and on the fact that more and more foreign claimant law firms are establishing themselves here. She laughs when she explains that "the international market seems enthusiastic about the Dutch class action system." She also believes that the Netherlands is an attractive jurisdiction due to the available procedural advantages. "Court fees are not that high, there is a very limited loser pays rule and the courts are professional, so I think that we will attract more of these types of claims." One of the areas where Karen particularly expects an increase is environmental claims.

Consumers pay the price in a class action paradise

We ask Karen how class actions affect prices in her company. She responds that "with everything that happens within companies, the consumer eventually pays the bill. And even though it is difficult to calculate a precise causal link between the increase in class actions and the increase in prices, these actions ultimately do raise prices." One of Karen's concerns is that the damages that have to be paid do not necessarily reflect the damage that a consumer has actually suffered. This imbalance benefits a small group of customers at the expense of the other customers who do not have a claim.

Influence on the Dutch business climate and competitiveness of Dutch companies

We continue talking about whether this imbalance has a negative influence on the competitive position of companies. Karen believes it does and that it remains important in general terms that competitiveness is not disturbed. "As long as there's a level playing field, every competitor has to cope with the same imbalances, so healthy competition is secured. The problems start if that is not the case. For example, if there is legislation that is different from one country to another, this may have an impact on the competitiveness of an industry or company. I think, however, it is still too early to say whether the Dutch class action system, especially under the new legislation, will cause the competitive position of Dutch companies to deteriorate. Time will tell. For now, I do observe that claimants always try to find a Dutch angle to be able to sue other European companies."

We ask Karen whether she has the impression that the new law is damaging the Dutch business climate. "If you say that this specific legislation could make the Netherlands not attractive anymore to establish a business then you would give it too much credit." She laughs: "However, I do admit, it does quite roll off the tongue, that the new law is

bad for business!" She continues more seriously: "For us, it was relevant that we did not get a different exposure for claims in the past, but that is prevented through the transitory provisions that make the new law apply only to events that occurred after 15 November 2016." Karen does, however, also see a risk in the new law: "I agree that there should be compensation if a company did something wrong, if the compensation relates to the actual damage suffered. What I'm afraid of is that this class action system, also because of all the attention it has received, will attract parties who want to start frivolous lawsuits and any link with actual damages will disappear."

Opt in or opt out?

We continue to discuss the new legislation in the Netherlands and especially the default opt-out regime for Dutch citizens and the opt-in regime for foreign citizens. As a starting principle, Karen is in favour of the opt-out system. "This opt-out system is probably the best system for companies, because it creates finality. You have certainty that the claim is done and you know how much the company has to pay. It contains the claim and as a company you can then make a best guess of the total exposure." According to Karen, containing a claim is not always easy. She shares one of her experiences in the US. "For a very long time, it was not clear to us how big the class was or how many people would come forward. That became clear only well after we entered into the settlement." However, it is very important for a company to know its potential exposure as soon as possible and, at least, know how big the class is.

The exposure of companies in the Netherlands to class actions is not clear either, as it seems there is an increasing appetite to start class actions in the Netherlands. In that respect, Karen says: "Because of the attention that the new legislation has received and the new possibilities it introduces, claimants are now actively looking for claims - as the establishment of new claimant law firms in the Netherlands shows. It could therefore very well be that we will see more 'American excesses' in the Netherlands like ambulance chasing and frivolous actions. I think that one of the main issues that we should regulate to try to avoid these excesses is limiting what percentages claim vehicles and third party financiers are allowed to cream off. We should also put some restrictions on the limitations of upfront fees that consumers have to pay. The ideal system in my view would be a kind of no cure no pay model with a reasonable percentage for the funder."

"This opt-out system is probably the best system for companies, because it creates finality."

The incentives to settle

One of the consequences of the US class action system is that companies try to settle as soon as possible. Karen explains: "It does happen in the US that even if the lawsuit is semi-frivolous, a company chooses to settle just to prevent a costly and lengthy procedure. In the US, you see a run on settling as quickly as possible due to the 'hierarchy' in the US settlements system: the earlier you settle, the less you have to pay. This does not happen only in the US, but also in the UK where the fear of an adverse cost order can be the sole incentive to reach a settlement. This is in my view not what a class action system should provoke." Karen believes that the higher objective of the law should be that if a company did something unacceptable, it has to compensate the damage it caused: "There should be a connection between the damage suffered and the damages paid. And in any event, the law should not contain perverse incentives that allow the professionals involved to earn more money than the individuals that have suffered the actual damage."

Litigation costs in the Netherlands are relatively low and there is no risk of being ordered to pay adverse costs awards like in the UK. The incentive for Dutch companies to settle is therefore more based on the strength of the case itself. "Would it be desirable for companies to be able to reach a settlement on a European level?" We ask. "Yes," Karen answers, "but it depends on the costs and whether we can agree to a settlement that actually compensates the damage caused and does not have an enormous amount of side costs." And with a broad grin she adds: "I would be happy to settle on a European level, but for a Dutch price."

Landmark case

As a landmark case, Karen names the *Dutch National Lottery* case as a typical example of how you do not want things to happen.

The claim against the Dutch National Lottery was based on the allegation that the Lottery did not inform lottery ticket buyers that unsold lottery tickets could also contain prizes and that the statistics on the chances of winning that it published also included the 'winning' lottery tickets that were unsold. Stichting Loterijverlies (the "Stichting") initiated a class action against the Dutch National Lottery resulting in a declaratory judgment by the Supreme Court in 2015 that the Dutch National Lottery misled its clients in its advertisements.[1]

After this judgment, there was a string of proceedings around the financial mismanagement of the Stichting. There were allegations that a private person was the ultimate beneficiary of the Stichting, who was controlling it through a limited company registered in the Cayman Islands and profiting personally from the members' subscription fees. Ultimately, the limited company was suspended as director of the Stichting[2], the Dutch National Lottery settled with another claim vehicle[3] and the limited company was found to lack standing in its attempt to initiate a class action against the Dutch National Lottery.[4] According to Karen, this is a typical case of "someone wanting to get richer from initiating a class action in a case in which it is questionable whether people actually suffered damage."

Predictions for the future

We asked Karen to sum up in one sentence what she thinks will be the most important development in the future of class actions. "The new law and legal tech will lead to an increase of class actions in the Netherlands."

1 Dutch Supreme Court 30 January 2015, ECLI:NL:HR:2015:178.
2 Amsterdam Court of Appeal, 31 January 2017, ECLI:NL:GHAMS:2017:210.
3 In May 2017, the Dutch National Lottery settled with another foundation, Stichting Staatsloterij-schadeclaim.nl and agreed to compensate the aggrieved parties by (i) organising a one-time lottery where the Dutch National Lottery raffled EUR 13.5 million as a prize, (ii) gifting EUR 500,000 to three charities, (iii) paying EUR 40 to anyone who was member of Stichting Staatsloterijschadeclaim.nl, Stichting Loterijverlies or Loterijverlies and (iv) appointing an ombudsman.
4 The Hague District Court, 13 December 2017, ECLI:NL:RBDHA:2017:14512.

The future of class actions from a business perspective

CHRISTIAN FELDERER | BUSINESS PERSPECTIVE | Independent Board Member at various companies, former General Counsel at SCOR and former General Counsel at Converium

10 July 2019, interviewers: Zeki Korkmaz and Isabella Wijnberg

Christian Felderer has some 35 years of experience in the insurance and reinsurance industry. He has served as Hub CEO and General Counsel of SCOR's Swiss-based operations. He was also General Counsel for SCOR Global P&C at the level of the SCOR Group, for all of SCOR's P&C insurance and reinsurance transactional legal matters. Christian is currently a member of the AIDA Presidential Council (*Association Internationale de Droit des Assurances*) and the Chairman of AIDA Europe (*Association Internationale de Droit des Assurances*). Christian has extensive experience with class actions through the *Converium* case, as he was General Legal Counsel for the Converium Group, at the time. We interviewed Christian by phone to hear his insights into class actions in the Netherlands, the US and beyond. This interview was conducted in English.

The Converium case

The *Converium* case concerned the Swiss reinsurer Converium Holding AG ("Converium"), a former wholly-owned subsidiary of Zurich Financial Services Ltd. ("ZFS"). Converium had shares listed on the Swiss Stock Exchange and ADRs traded on the NYSE. Converium's share price declined after it announced

substantial increases in its loss reserves, leading to a class action in the US which was later settled for USD 84,600,000. The settlement that was reached in the US excluded non-US shareholders.[1] Potential claims of non-US shareholders were settled in a parallel settlement through the involvement of a Dutch foundation, as a result of which 12,000 non-US claimants were entitled to a total of USD 58,400,000, of which the settlement with Converium amounted to a total of USD 40,000,000 and the settlement with ZFS amounted to a total of USD 18,400,000. The Amsterdam Court of Appeal was requested to declare this settlement binding on all the settlement class members, which it did.[2] This decision of the Amsterdam Court of Appeal is a landmark case for several reasons. First of all, the court assumed jurisdiction, even though the claims were not brought under Dutch law, the alleged wrongdoing took place outside the Netherlands, and none of the potentially liable parties and only a limited number of the potential claimants, namely around 200 of the 12,000 non-US claimants, were domiciled in the Netherlands. Secondly, the Amsterdam Court of Appeal approved the settlement, including a 20% contingency fee – a percentage that was also awarded in the US settlement – for the American principal counsels, as it considered this percentage to be within the bounds of reasonableness.

Personal experience

We start by asking Christian what it was like to be confronted with a class action the size of the *Converium* case. "When a big class action is filed against a company, it usually comes as quite a surprise. I was general counsel at the time and had to supply the management team and the team of lawyers with information and guidance. It was a challenge to learn about the dynamics of US class actions. These are proceedings that are very different than what I was used to from European proceedings. I learned a lot in that period."

1 Southern District Court of New York 12 December 2008, 04-CV-7897 (*Meyer et al. v. Converium Holding AG et al.*).
2 Amsterdam Court of Appeal 17 January 2012, ECLI:NL:GHAMS:2012:BV1026.

The main challenge that Christian faced was the fact that managing these types of claims requires more than simply knowing and understanding the law. "Cases like these have a huge impact on the business, not only because people feel threatened, but also from a more practical point of view there are many people involved that have to provide information and it takes a lot of effort to make sure the coordination between the company and the external lawyers goes smoothly. It is quite a demanding job and you need a plan to deal with it."

And, being Dutch lawyers, we obviously wonder how Christian perceived the Dutch system that provided the possibility of a European settlement. He explains that "the advantage of the Dutch system was the finality it offered. However, it was difficult for us to grasp the exact legal position of the claim foundation (*stichting*) that basically handled the communication. We were always wondering what the cost of the settlement would be. In one sense, the Amsterdam Court is professional, but it is still somewhat inexperienced in handling these types of settlement cases."

Impact on the business of class actions

We go back to a more hypothetical level, as we ask what the impact of an existing class action regime is on a business. Christian indicates that from an insurer's perspective, the risk of class actions should be taken into account not only in IPOs but also in transactions generally. "The risk of class actions should be part of a proper due diligence when you do an IPO." With regard to manufacturing prices, he does not feel confident to comment, but he does note that basic economic theory dictates that "any price has to reflect your true costs." "In other words, class action litigation costs will need to be taken into account in your pricing mechanism. It is a fact that doing business in the US involves higher litigation costs than in other countries that I am familiar with. Litigation costs are a dominant factor in covering US risks when determining a pricing strategy. This is also the reason for often seeing exclusions in insurance policies when it comes to exports of products or services into the US. Insurance coverage for US claims usually requires more expensive protection." One of the reasons why litigation, and class action litigation, can be so expensive in the US, according to Christian, is discovery, next to the special damages awarded by US Courts. In Europe, with the

exceptions of the UK and Ireland, this type of extensive provision of documents does not exist. He explains: "Judges control the process of exchanging documents in most European jurisdictions, as the judge has to define what is relevant for the case. This is contrary to the US system, where this is the responsibility of the parties to identify areas of attack and arguments for discovery."

European class actions regimes

When we ask what he expects will be the future of class actions in Europe, Christian responds that Europe remains close to the continental system and he hopes that it will not move in the direction of the US system. "When you open the floodgates, you lose the control systems that are currently in place in Europe. I think we should be very reflective when we choose what legislation we adopt in that regard. We cannot just switch to a US system. There would not be a good reason for this either, since the US system from both a cost perspective and a return perspective does not ultimately benefit the consumer."

Commercial use of class actions by third parties

One of the realities that could increase the number of class actions is the commercial use of claims and the rise of third party funders. Christian believes these can be compared to venture capitalists. "They simply look at a potential claim from a business perspective. Therefore transparency with regard to the commercial interest involved in any third party litigation funding is key." Apart from transparency, Christian feels it is difficult to impose exact limits on, for example, the amount of contingency fees that should be admissible since this very heavily depends on the circumstances of the case. A better solution would be to determine that fees for commercial parties should be fair and reasonable and subject to some kind of independent control by a court.

"They simply look at a potential claim from a business perspective."

Alternative dispute resolution

At the end of the interview, we ask Christian whether he thinks that alternative dispute resolution could offer a solution for some of the problems he identified. "Yes," he answers, "if the proceedings are led by an institution that is mindful of different interests and able to reach a quick and reasonable solution, then this would be a good option. I personally also had a good experience with this style of alternative dispute resolution in the US with an institution that was actually geared towards settling cases. It was essentially an institution with retired civil judges with a good understanding of the issues, including the different jurisdictions involved in the dispute at hand which facilitated settlement proposals for our case that were reasonable for both parties."

Defence Lawyer

The future of Dutch class actions according to specialist defence counsel Albert Knigge

ALBERT KNIGGE | DEFENCE LAWYER | Partner at Houthoff

7 March 2019, interviewers: Nadir Koudsi and Isabella Wijnberg

Albert Knigge has been co-managing partner at Houthoff since 2017 and specialises in handling complex international disputes. He has considerable experience in advising financial institutions and companies in different sectors confronted with cross-border mass claims. For instance, Albert is counsel for a major European truck manufacturer facing several alleged cartel damages mass claims that have been submitted by claim vehicles. Albert received his PhD from the University of Groningen and has published many legal articles. Albert is also a Dutch Supreme Court lawyer. Albert is recommended by Legal 500 as an "experienced" litigator "providing superb client care". This interview was conducted in Dutch and translated into English.

Dutch collective redress revamped under new bill

A new bill on collective redress was recently passed in the Netherlands, the *Wet afwikkeling massaschade in collectieve actie* ("WAMCA"). WAMCA is expected to come into force in Q4 2019 or Q1 2020 and will address events that took place on or after 15 November 2016. Albert believes WAMCA will professionalise the Dutch collective redress system further. Whether this will have a negative effect on the business climate in the Netherlands will mainly depend on whether the courts will set boundaries to the type of international claims that can be brought.

However, the new bill leaves certain criteria open to be further developed in case law. It is, for example, unclear how and to what extent the Claim Code 2019, a soft law code of conduct with governance and financial requirements for collective claim vehicles, will be applied by the courts to determine the standing of a claim vehicle in collective proceedings based on WAMCA. Another important open criterion relates to the new possibility under WAMCA to claim damages.[1] Collective claims must have a degree of similarity to be admissible. Over the past years, the standard for this similarity test has been further developed in case law. Under WAMCA, this similarity requirement will also apply to claims for damages, if such claims are brought in collective proceedings. It remains to be seen how this requirement will be applied to damages claims, which inherently relate to individual circumstances. Albert points out that this potential issue was not really discussed when WAMCA was being developed and drafted. "I am not sure whether the judiciary and legislature were sufficiently aware of this lack of clarity and I expect a lot of case law dealing with this issue in order to get more clarity on this point. In applying this requirement, the judiciary should also look at jurisdictions with more extensive experience in the field of class actions." In short, Albert expects the importance of the similarity requirement to increase in light of the new WAMCA system and the possibility to claim damages in collective proceedings.

WAMCA also includes the possibility for the court to order settlement negotiations between parties. The court can even force parties to make a settlement offer. Albert is critical of this aspect of WAMCA: "The main question is how this rule is going to be applied by the courts. It is unclear at what stage of the proceedings a court will expect the parties to make a settlement proposal. If this is too early, for example, before claimants have provided proof of their claim, it could be an issue to nonetheless force a defendant to make a settlement proposal. Moreover, WAMCA does not change any rules of evidence under Dutch law so a court order to make a forced settlement proposal before sufficient proof of a claim has been put forward will likely not be upheld in appeal or before the Dutch Supreme Court."

1 Under the current collective redress rules, a claim vehicle can only ask for a declaratory judgment on behalf of a group after which individuals of this group could claim for damages in follow-on proceedings.

Defence Lawyer

More public interest actions on the horizon

"One might expect an increase in the number of collective redress actions based on WAMCA but I do not necessarily agree with that prediction," says Albert. In his opinion, WAMCA is a rather complicated bill that imposes a significant number of conditions and requirements on collective claim vehicles. One of these requirements is that collective claim vehicles bringing proceedings under WAMCA must cooperate with any other competing collective claim vehicle bringing a similar collective claim. Experienced collective claim vehicles, like *Vereniging van Effectenbezitters* ("VEB"),[2] might focus on bringing collective proceedings using other methods instead of WAMCA, e.g. via assignments of claims, as they will likely prefer to serve the interest of their specific members and have autonomy over litigation strategy. He notes: "I would not be surprised if the amount of cases will not change significantly and perhaps even reduce because WAMCA makes it less accessible." However, Albert does not think that WAMCA will lead to claimants moving to other jurisdictions: "The Dutch courts have experience with collective proceedings on a wide array of different subjects and the courts have proven to be able to efficiently handle such cases. Other jurisdictions are less attractive because they do not necessarily have easily accessible collective claim regimes. A number of European jurisdictions only have rules for collective claims for specific areas of law like consumer law. Furthermore, even without WAMCA, plenty of other options remain to bring collective claims, like proceedings based on assignment of claims, litigating by mandate or starting proceedings specifically on behalf of members of an association."

"I would not be surprised if the amount of cases will not change significantly and perhaps even reduce because WAMCA makes it less accessible."

Albert does not expect the type of claims to change dramatically either: "Such a change depends heavily on social, political, and economical developments." Albert points out that there has been a considerable increase in cartel damage claims in the last five to ten years. This has been a consequence of European Union policy, which emphasises private enforcement, and the availability of funding for bringing these types of claims.

2 A Dutch association representing the interests of investors.

As there will be a need within society to clarify certain issues and to address societal changes, Albert expects an increase in class actions that serve the public interest, for example, those related to climate change. He sees a trend of public interest parties appealing to courts rather than politics to raise awareness and change government policies. He asserts: "In my view, this is just part of a functioning democracy."

WCAM procedures are laborious

Since 2005, the *Wet collectieve afwikkeling massaschade* ("WCAM") provides the rules for collective settlements under Dutch law. WCAM makes it possible to enter into court-approved settlements, binding class members on an opt-out basis. Albert appreciates WCAM as a unique mechanism in Europe. However, looking at class action settlement regimes in other jurisdictions has led Albert to draw the conclusion that the WCAM procedure is long-winded and laborious. This might be due to the fact that WCAM was implemented at a time in which the Dutch jurisdiction was less experienced with class actions and such proceedings were less common. Furthermore, in the last few WCAM procedures, the court has been taking a more active role in testing the reasonableness of the collective settlement that parties have negotiated. This creates a level of uncertainty for parties about the outcome of the proceedings in which the court needs to approve the settlement which they have negotiated. This uncertainty makes it less attractive to follow this route. WAMCA focuses strongly on trying to move parties forward to settle and that might mean that more settlements will be concluded. "But it may also mean that the court will interfere even more actively with the content of settlements," Albert adds.

Abuse by third party funders is unlikely

Another topic we discuss with Albert is the role of third party funders. As a defence lawyer, Albert has a nuanced view on third party funders: "Third party funding can be a useful tool in providing access to justice, especially for certain groups like consumers, or small investors." The alternative to giving such small parties access to justice would be government funding. Albert does not see it as inherently wrong that commercial parties take on this role and make money while doing so. We ask Albert if he sees reason to be concerned if third party funding increases, as some critics argue that this can lead

Defence Lawyer

"Third party funding can be a useful tool in providing access to justice, especially for certain groups like consumers."

to vexatious litigation or abuse of process. He is not particularly concerned about possible abuse of class actions in the Netherlands: "There is always a possibility of abuse, and it is the responsibility of the courts to filter out parties attempting to abuse the system. However, abuse is an extreme situation, for example when the interests of the claimants are not actually served or when agreements are made that only serve the commercial interests of third party funders." Dutch law does not allow the judge to inspect the agreement between the third party funder and the claim vehicle. This makes it harder to assess whether the true interests of the claimants are being served, according to Albert.

Under the Claim Code 2019, collective claim vehicles are allowed to withhold a percentage of any proceeds from cases to fund their war chests for future proceedings, which could be related to different matters entirely. Albert is critical of this: "It may be inappropriate when a professional collective claim vehicle sets aside the proceeds of a procedure for future procedures, as the future procedure is then indirectly funded by the claimants of the former procedure. Furthermore, it creates a financial incentive that is solely for the benefit of the claim vehicle, rather than the group it represents." Albert believes it is more balanced when professional collective claim vehicles attract an independent third party funder that receives a return on its investment. "This is decidedly more transparent, as long as the contracts between the claim vehicle and the third party funder are open for review and do not contain any detrimental agreements that give the third party funder improper influence over the course of the proceedings."

There are currently no specific rules on how much a third party funder may charge for its services but Albert thinks this should be regulated. That being said, he sees a trend of increasing third party funding in collective actions and competition within this market, which might mitigate third party funding prices without the need for external regulation.

To conclude, Albert points out that he thinks that the Dutch market is an interesting target for third party funding, though he adds: "Third party funding of collective actions is a Europe-wide phenomenon and market, but some jurisdictions might be less attractive."

The Netherlands and the UK are the most relevant European jurisdictions

We ask Albert for his opinion on the best jurisdiction to launch a class action. Albert thinks that the most suitable European jurisdiction for a particular class action should be determined on a case-by-case basis. He sees the UK and the Netherlands as the most relevant jurisdictions for class actions in Europe because they have the most well-developed collective redress regimes. This response raises the inevitable spectre of Brexit, so we probe this issue more. "I do not expect Brexit will change the relevance of the UK as a jurisdiction for collective proceedings, as I expect English judgments will continue to be recognised in other European jurisdictions after Brexit," Albert explains. Comparing the Dutch with the UK system, Albert says that "the Dutch system is less expensive, more efficient and has high quality judges. However, the UK has a recognised position when it comes to cartel class actions and WAMCA may implement certain thresholds for claimants in the Netherlands that would give the UK an advantage."

According to Albert, the European Commission sees the New Deal proposal, which aims to strengthen consumer protection, as a remedy for a deficit in the legal protection of consumers in Member States. "It could work, but I have the impression that the pressure comes more from the European Commission than from consumer organisations. Ultimately, it will depend on the national systems whether it actually works. It could lead to more collective consumer actions, but I find that difficult to predict." It needs to be added that the New Deal proposal stretches the limits of EU legislative power. The New Deal aims for minimum harmonisation and should not replace existing national laws if they already provide a sufficient collective redress system. Despite being presented as offering protection to consumers, the New Deal proposal addresses procedural law which Member States control themselves.

Defence Lawyer

The US and the Netherlands are vastly different

We ask whether Albert sees the Netherlands going down the same path as the US when it comes to class actions. He thinks this is unlikely. There are a number of elements in US class actions that substantiate this expectation: the use of a contingency fee system, high costs in the discovery phase and jury trials. These elements are all very foreign to the Dutch civil law system. Furthermore, there is also a difference in scale: the Netherlands has a population of only 17 million people, whereas the US has a population of 327 million, with one of the largest consumer markets in the world. This makes class actions in the US more likely than in the Netherlands.

Albert does think European collective redress systems can learn from US class actions. For issues like assessing the similarity between claims or consolidating collective proceedings on a cross-border European level, the more experienced US class action system might have useful solutions.

Landmark case

We ask Albert to conclude by sharing what he considers to be a landmark case for Dutch class actions. He sees the 2009 WCAM settlement in *Shell* as a turning point for WCAM settlement procedures.[3] This was the first WCAM settlement that also bound non-Dutch parties.

> In *Shell*, investors sought compensation for damage incurred as a result of misrepresentations made by Shell concerning its oil and gas reserves. In the US, a class settlement was reached for shareholders who bought shares on a US stock exchange between 8 April 1999 and 18 March 2004 or were residing in the US at the time of the purchase. Shell also reached a settlement with non-US investors who purchased their shares on a non-US stock exchange and agreed to pay more than USD 350 million. Shell sought to have this settlement declared binding using WCAM. The Amsterdam Court of Appeal assumed jurisdiction and declared the settlement binding on all members of the class on an opt-out basis, even though the majority were residing outside of the Netherlands and a securities class action was pending in the US.

Predictions for the future

"I expect the number of class actions will grow, although I do not think this will be boosted by WAMCA, but by the fact that the Netherlands is becoming a more interesting market for third party funders. Furthermore, I expect the number of climate change related collective actions to increase, as long as there is a general feeling that governments are failing to adequately address climate change. Lastly, the Netherlands is currently very attractive as a country of establishment for many foreign companies due to its favourable tax system. The legislature will need to stay alert if this attractiveness will be affected by the discussed upcoming changes to the Dutch collective redress system."

3 Amsterdam Court of Appeal 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (*Shell*).

Representative Organisation

Climate litigation from the perspective of an environmental organisation

LAURIE VAN DER BURG | REPRESENTATIVE ORGANISATION |
Researcher and Campaigner at Milieudefensie (Friends of the Earth NL)

31 May 2019, interviewers: Nadir Koudsi and Isabella Wijnberg

Laurie van der Burg has been working for Milieudefensie (*Friends of the Earth Netherlands*) for two years and is heavily involved in the climate case against Shell. She did not study Dutch law, but is an expert in the field of international environmental law thanks to an LLM she completed in Environmental and Climate Change Law at the University of Edinburgh. She works together closely with the lawyers that represent Milieudefensie in their proceedings. The quotes mentioned below are translations of Dutch conversations.

Worldwide increase in climate litigation

We start the interview by asking Laurie what her expectations are for the future of climate litigation, especially after the *Urgenda* case[1]. She answers firmly: "There is a worldwide increase and this will certainly continue."

Urgenda, a Dutch environmental organisation, asked the court to order the Dutch government to increase its efforts to reduce greenhouse gas emissions by at least 25% compared to 1990 levels. Urgenda's main argument was that the Netherlands, by not taking sufficient action on climate change as clarified by the United Nations Framework Convention on Climate Change and the Cancun Agreement of 2010, fails to protect its citizens, and for that reason it is breaching its duty of care or committing hazardous negligence. In first instance, the The Hague District Court ordered the Dutch government to reduce emissions by 25% relative to 1990 by 2020. The The Hague Court of Appeal confirmed the first instance judgment and in addition clarified that taking insufficient climate action also leads to human rights violations.[2] The Dutch Supreme Court upheld this judgment and stated that appropriate measures must be taken when there is a real threat to the lives and wellbeing of individuals, and that this also applies to environmental threats even if these only occur in the long term. Due to the real threat of dangerous climate change, there is a serious risk that the current generation will be confronted with loss of life or a disruption to family life or both. It therefore follows from Articles 2 and 8 ECHR that the State has a duty to protect residents from this real threat. This case has been a worldwide example for citizens and NGOs in other countries.[3]

Laurie believes that the reasons for the increase in climate litigation are "the growing urgency of the climate issue, the increasingly tangible effects of climate change, and the damage that people will suffer as a result. The fact that governments are currently doing too little is another major issue." On the other hand there are more and more guidelines (such as the OECD Guidelines for Multinational Enterprises)[4] that regulate climate policy for companies. Laurie expects that the growth and expansion of the regulatory framework of financial parties will also result in an increase of climate

1 The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145.

2 Dutch Supreme Court 20 December 2019. ECLI:NL:HR:2019:2006; Verdict in English. ECLI:NL:HR:2019:2007

3 Stichting Urgenda, https://www.urgenda.nl/themas/klimaat-en-energie/klimaatzaak/.

4 Organisation for Economic Cooperation and Development (founded in 1961). A cooperation of 35 countries with the aim to study and coordinate social and economic policies. The OECD Guidelines obliges member states to implement National Contact Points that promote the adherence to the OECD Guidelines of businesses. In the Netherlands, after a complaint has been filed, the National Contact Point tries to encourage the involved parties to settle an issue which results in a Final Statement that outlines in which way a solution to the complaint was agreed.

cases against those parties. For instance, several Dutch environmental organisations filed a complaint against ING, a major Dutch bank, to the Dutch National Contact Point for the OECD. This resulted in a Final Statement by parties that outlines that ING should align its portfolio with the climate goals of the UN Paris Agreement in order to meet the OECD guidelines.[5]

In Laurie's view, the new wave of climate cases is different because these cases are no longer brought only against governments but now also target companies for the environmental damage they have caused. This is fuelled by evolving scientific research that is finding more and more direct links between corporate conduct and environmental issues. Laurie does not believe that litigating against companies is a fad. "New research has established a causal link between historical emissions of companies and their direct share in climate change issues." She points us to Richard Heede, who was the first to investigate these historical emissions: he concluded that 66% of the historical emissions can be traced back to 99 companies worldwide.[6]

Academia is also broadening the scope of its research, for example by examining the possibility to attribute legal rights to nature. Laurie explains: "legal academics are currently investigating the legal rights of rivers".[7] Furthermore, the scope of research is now broadening to include specific environment-related financial responsibilities of big corporates and the financial parties surrounding them like banks, pension funds, and insurance companies. "Where the first wave of climate litigation only focused on

5 The UN Paris Agreement 2015 entered into force on 4 November 2016. The central aim is to strengthen the global response to the threat of climate change by undertaking ambitious efforts and assist developing countries to do so. The Agreement was signed by 195 countries. For the Final Statement, see: https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing.

6 R. Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers', *Climate Change* 2014/122, p. 229-241.

7 See e.g. Susana Borràs, New Transitions from Human Rights to the Environment to the Rights of Nature, published online by Cambridge University Press: 22 January 2016 on https://www.cambridge.org/core/journals/transnational-environmental-law/article/new-transitions-from-human-rights-to-the-environment-to-the-rights-of-nature/72C5A1F401D82EB237CED7EFDB39E48E; https://e360.yale.edu/features/should-rivers-have-rights-a-growing-movement-says-its-about-time; https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y.

governments, this new wave will aim at companies and at the investors, directors, financiers, and insurers behind these companies."

Big business is not excused by consumers' own responsibility

We ask Laurie what she thinks of the argument that companies are merely meeting market demand and that, as long as consumers drive, fly, and eat meat, it is hard to blame companies for catering to that demand. She responds that demand "creates supply, but it can also work the other way around. Energy companies decide each year how to invest billions of dollars in furthering the energy market. The energy infrastructure currently offers too few eco-friendly options and therefore to a large extent determine the choices consumers are able to make. Consumers just want to move from point A to B. Whether they do that in a vehicle that runs on fossil fuels or green energy is a secondary issue dictated by whichever of those options is more readily available. If there were more green alternatives out there, consumers would likely choose those options: so, supply can dictate demand."

"And also," she continues, "the lifelong emissions of a single person are nothing compared to, for example, Shell's yearly emissions."

Governments should take more responsibility

In a sense, the increase in climate litigation is a response to the lack of sufficient government policy to solve climate issues, according to Laurie. As long as governments do not take action, more and more groups will try to obtain justice through the courts. "Litigation is not the best way to solve environmental problems. Ideally, governments would implement stronger climate policies. Climate change is a fundamental problem that affects everyone, including generations not yet born, and it requires fundamental legislative solutions." Courts simply fill this legislative or enforcement gap. She gives us the example of Pakistan where a case was brought by a farmer who complained that the government did not implement climate policies. The court ruled that this was unlawful and appointed a committee to ensure the implementation of climate policies.[8] "Ideally,"

8 J. Bouissou, 'First the Netherlands, now Pakistan's high court comes to defence of climate', *The Guardian*, October 2015.

Laurie says "the Pakistani government should have implemented the policies in the first place, not waited for a civil court to issue a judgment."

Cross-border coordination will increase

Environmental issues are almost by definition cross border. "What about the future of international coordination?" we ask. There, Laurie predicts an increasing coordination between the various NGOs, which is already happening to some extent at the moment. Based on her own experiences, Laurie notes that the Dutch Courts are sympathetic to cross-border thinking. Examples include the *Nigerian* case[9] and the *Kiobel* case[10] against Shell, in which jurisdiction was based on the fact that the head office of Shell is located in the Netherlands.

> In the *Nigerian* case, started in 2008, Milieudefensie and four Nigerian farmers are suing Shell for damage resulting from oil spills in three Nigerian villages. The oil spills polluted drinking water, the air, and the rivers, harming the livability of the area. In the *Kiobel* case, started in 2017 in the Netherlands, four Nigerian widows are suing Shell for the deaths of their husbands. Esther Kiobel, the most prominent claimant, claims that Shell is complicit in the executions of her husband Barinem Kiobel and eight other environmental activists from the Ogoni region by the Nigerian government in 1995. Both cases are still pending in first instance before the The Hague District Court.

"Obviously," Laurie continues, "there is a risk that the entire world might try to start litigation in the Netherlands and that the courts will become inundated. However, it's the responsibility of governments and companies to take appropriate action to prevent unlawful activities and human rights abuses to prevent this."

9 The Hague Court of Appeal 18 December 2015, ECLI:NL:GHDHA:2015:3588 (*Nigerian Farmers v Shell*).
10 The Hague District Court 1 May 2019, ECLI:NL:RBDHA:2019:4233 (*Kiobel v Shell*).

The Netherlands is the best jurisdiction to bring climate cases

Not only are the Dutch courts sympathetic to cross-border cases, but more generally speaking, the Netherlands is a frontrunner in environmental matters in terms of case law, according to Laurie. She refers again to the *Urgenda* case, making the Netherlands the most obvious choice for any climate litigation. "Even if the Netherlands is not one of the 94 countries that constitutionally guarantees the right to a healthy environment."

Laurie believes that the reliability of courts in the Netherlands plays a major role in the decision to begin an environmental case here. This was also the reason why Milieudefensie started litigation for the *Nigerian* case in the Netherlands: "I find it problematic that by far the largest majority of the approximately 1,000 climate-related cases pending worldwide are brought in the global north while in the global south, the area that is impacted the hardest by climate change, so little climate litigation is taking place." After the interview Laurie provides us with an article that indeed shows that of the approximately 1,000 cases pending globally, approximately 900 are in the global north and of these 900 cases 600 are taking place in the US.[11]

Funding climate litigation

Laurie believes that the reason for this disparity between litigation in the global north and global south is due to a combination of lack of education and communication on environmental issues, corruption and courts that are less equipped to deal with cases like these. We ask whether the lack of funds could also be a reason and whether this could be resolved by third party funders. But Laurie is sceptical. "Third party funders may have different interests in funding a case. A lot of financing from large funds increases opportunities to start strategic litigation, but there is also a risk that that only reinforces current patterns that it are the funds who are richer that will have access to third party financing and not the poorer organisations in the global south." She stresses: "Financing is important for the level playing field in such matters, but it is necessary to be critical of the objectives and the terms and conditions of particular funds."

11 Sirkku K. Juhola, Responsibility for climate change adaptation, Wiley Interdisciplinary Reviews: Climate Change, e608, (2019), https://doi.org/10.1002/wcc.580|.

In her preferred jurisdiction, the Netherlands, third party funding would also not be as necessary since there is no "loser pays" rule which makes it easier to take risks in litigating cases with an uncertain outcome. Unsurprisingly, Laurie does not support a "loser pays" system in the Netherlands: "This would mean that it would be more difficult to litigate strategically as strategic cases often have more uncertain outcomes and it would also limit access to justice to richer funds that could bear the risk of being convicted to pay an adverse cost order."

Settlements are generally not an option in climate litigation

Obviously, you can avoid losing proceedings by settling at a convenient time, but we find out that this is not really an option for Laurie. "Settlements are often not beneficial for an interest group as the financial compensation provided is often insufficient to cover damages and as in that case important questions relating to liability remains unresolved. In addition, publicity is very important for raising awareness of the important issue of climate change and a settlement would end that particular case." She pauses for a moment, then says, "And yet at the same time, an agreement in the settlement about a change in behaviour could lead to desirable results, amongst which the financial justice for the aggrieved parties. This is a dilemma."

"As the climate crisis unfolds, climate litigation can only be expected to expand. Whereas the first wave of climate litigation focused on governments, the new wave will aim at companies and at the investors, directors, financiers, and insurers behind them."

The future of class actions in the Netherlands from a claimant perspective

JURJEN LEMSTRA | CLAIMANTS' LAWYER | Partner at LvdK

28 May 2019, interviewers: Nadir Koudsi and Isabella Wijnberg

Jurjen Lemstra is a very well-known class action lawyer who primarily represents claimants in the Netherlands. He has an established track record in representing shareholders and interest groups, including consumer interest groups, in large collective actions. Jurjen is also renowned for his prominent role in the creation and development of the Dutch Claim Code. The first Claim Code was published in 2011 and has been recognised by the legislature as a body of soft law that provides guidelines for the courts on how to assess the standing of representative entities. It was updated in the spring of 2019, introducing, amongst others, a principle on third party funding. We were therefore curious to learn more about his views on class actions and third party funding in particular. We visited him in his offices near the Vondelpark in Amsterdam. This interview was conducted in Dutch and translated into English.

Increasing number of collective actions

As a general trend, Jurjen expects the number of class actions in Europe and certainly in the Netherlands to grow, for several reasons: the increased know-how of claimants, a better and more experienced legal infrastructure and the increase of available funding capital. Legal tech will also be of major importance in facilitating the representation of large groups in legal actions. This will be especially helpful in

collective actions based on the mass assignment of claims. Jurjen explains: "I think Article 305a-foundations [see general overview, ed.] will likely choose more principal litigation (for example large fraud cases) that does not usually entail assignment of claims, while "bulk cases" (for example cases related to airline delays damages) usually entail a lot of administrative work related to such assignments that is very easily automated once legal tech develops further. I believe this will lead to new proceedings as well, as both the costs of and the threshold to start proceedings are lowered."

Climate litigation gaining ground

Jurjen expects the number of public interest claims such as environmental claims and climate litigation in particular to increase as well. "Over the past few years, several actions have been brought internationally that tested the waters, mainly by lawyers specialised in human rights law. These experiences have brought claimants to change litigation tactics resulting for example in the famous *Urgenda* case[1] and *Shell* cases[2]." Jurjen supports this trend, as not all jurisdictions and accompanying political systems are equipped to effectively adjudicate such cases. Collective redress can open the door to justice.

Private enforcement strengthens public enforcement and vice versa

"More in general," Jurjen continues, "a well-functioning collective action regime supplements governmental enforcement of the law, rather than suppressing it." Several collective actions and settlements in the Netherlands turned out to be successful due to public law interference beforehand and, in a sense, governmental enforcement can clear the way for follow-on private law claims.[3] But, according to Jurjen, this can also work the other way around: misconduct can become clear following a private law claim, leading to governmental intervention.

1 First instance court The Hague, ECLI:NL:RBDHA:2015:7145; Appeal court The Hague 9 October 2018 I:NL:GHDHA:2018:2591 (Urgenda). The case is now submitted to the Dutch Supreme Court

2 Amongst others District Court, S.D. New York 20 July 2018, 1:18-cv-00182 (*City of New York v. BP p.l.c. Chevron; ConocoPhillips; Exxon Mobil; Royal Dutch Shell PLC*); and District Court for the Northern District of California filed 2 February 2018, 3:18cv00732 (*City of Richmond v. Chevron Corp. et al*).

3 See for example the settlement entered into by various insurer and various claim vehicles Vereniging Woekerpolis.nl, ConsumentenClaim and Stichting Woekerpolisproces.

Claimants' Lawyer

Commercial assistance is welcome

However, collective actions not only interact with public authorities, but also with private funders. We note that a growing number of third party funders are interested in financing Dutch collective actions. "That is correct," he says, and without hesitating, "and a commercial approach for bundled claims must not be seen as a problem but as a solution." In fact, according to Jurjen, the commercial approach creates a level playing field between large corporations with deep pockets and individual claimants who are backed by well-funded professional claim vehicles.

He notices that, especially on the European level, reference is often made to an 'American litigation culture' when it comes to entrepreneurial lawyering. According to Jurjen this mindset is bound to be made obsolete by market developments. "If there are strong anti-abuse mechanisms, commercial motives for organising a collective action are not necessarily bad. In the Netherlands, the '305a-cowboys', meaning lawyers who bring frivolous collective claims, have very little chance nowadays as claims that aim to abuse the collective action system are caught early on." Jurjen continues praising the recent amendment of the law on collective actions, WAMCA. "This law shows how far ahead the Netherlands is compared to many other European jurisdictions where it concerns collective actions." In his experience, the Dutch judiciary is very qualified, efficient and increasingly experienced. And WAMCA only expands the toolbox. "Funders take notice of this and they too are increasingly aware of the Netherlands as a viable jurisdiction to start collective actions," he adds.

WAMCA: opt-out versus opt-in

Although enthusiastic about WAMCA, Jurjen regrets that as a default, it requires anyone residing outside the Netherlands to opt in if they want to join the proceedings, whereas Dutch residents must opt out if they do not want to be bound. In his opinion, there are circumstances imaginable where harmed and vulnerable parties are not aware of a collective action, fail to register, and thus receive no compensation. "Collective proceedings should

"WCAM makes a European-wide collective settlement system (for the time being) unnecessary."

Claimants' Lawyer

be on an opt-out basis." Jurjen has the view that the provision in WAMCA offering the court a possibility to nonetheless allow a class action on an opt-out basis for non-Dutch residents as well offers a way out but is still insufficient. We ask him whether an opt-out class action as a default for all class members might cause recognition issues in other jurisdictions, since the opt-out system is considered to be unconstitutional in some European countries, such as Germany. His answer is very clear: "This argument does not seem valid to me. The Dutch opt-out system provides for a simple and informal opt-out letter mechanism, is grounded in a careful process of notification to potential parties, and any settlement is subject to judicial review."

WCAM collective settlements are what Europe needs

Dutch law provides for the possibility to ask the Amsterdam Court of Appeal to approve collective settlement agreements and declare them binding on all class members (WCAM). This is a unique mechanism in Europe. Jurjen thinks that the current use of WCAM settlements will not increase drastically since it is only useful for settling the biggest issues, which only take place once or twice a year. "However," he continues "this does not reduce the importance of the WCAM for Europe." And he goes even further stating that "the WCAM makes a European-wide collective settlement system (for the time being) unnecessary." Jurjen's approach is pragmatic: northern Europe is the front-runner when it comes to collective actions and settlements, this is demonstrated by the fact that most third party funded capital is invested in the northern European countries. Whether other jurisdictions will catch up with this is still unclear, but in any case, Jurjen says, "WCAM provides for a European-wide (global even) settlement mechanism and for this reason there's no immediate need for a similar mechanism in all EU jurisdictions."

Third party funders have their eye on the Netherlands

Jurjen views the Netherlands, Germany and the UK as the best organised jurisdictions in Europe when it comes to third party funding. He notes however that there is currently a case pending in Germany that might restrict the use of third party funding.

As Jurjen already explained earlier in the interview, the Nordic countries and the Netherlands in particular are very much 'in the picture' of third party funders. Where he had not spoken to a third party funder five years ago, he now does so on a regular basis. These funders come from all over the world, the US, the UK, Australia but also from within the EU. There is a lot of exchange of knowledge taking place between the US and the rest of the world.

And according to him, there is a good base of support for third party funders, since even the legislature acknowledges that third party funders play an important role in providing access to courts. "The Claim Code plays an important role in this context too, as it provides principles that safeguard the transparency of the funding arrangements and avoid improper influence of funders." Jurjen expects that this will put the brakes on the true 'claim cowboys' and open the way for serious claim funders to test their business case in litigation.

US versus NL

As we ask him about the US system, one thing becomes clear: Jurjen admires the effectiveness of the American system. "Remarks regarding the excesses of US class actions – for example the practice of coupon settlements – are easily made," he says, "but one forgets that the US has longstanding experience with class actions and many such excesses have already been mitigated. It is a very well-balanced system." At the same time, he notes that a Dutch lawyer might feel that more commercially motivated cases are brought in the US compared to what we are used to in our own jurisdiction. Jurjen considers the Dutch system as the best of both worlds: "The Dutch system learned from US examples of excesses, while still allowing commercially motivated collective actions." In Jurjen's opinion, however, the Dutch still need to learn a bit more from the US when it comes to the preventative effect of class action suits: US defendants are very likely to settle once a class has been certified for the simple reason they want to avoid detrimental litigation. He adds, "In the Netherlands, settlements are often difficult to reach."

Collective actions in the Netherlands should be quicker

"The perfect class action," he says before pausing for a moment "should be much more streamlined than is currently the case in the Netherlands." Since collective actions are

relatively new, the preliminary phase, resolving questions of jurisdiction and standing, takes rather long. This means that it takes most large collective actions around two years before moving on to the merits. "This should be no longer than a year to be effective."

Landmark case

Jurjen considers *World Online*[4] the most significant judgment in a collective action in the Netherlands.

In the *World Online* case, VEB (an association representing Dutch investors) initiated a collective action on the basis of Article 305a Civil Code. It sought declaratory relief arguing that World Online and two banks had acted unlawfully towards the investors who bought shares in World Online. It alleged that World Online had provided unclear and incomplete information during the IPO. This was alleged to have impacted investors who bought shares during or shortly after the IPO. The Dutch Supreme Court considered that each individual investor had made their investment in different circumstances. Because of this, the extent to which each investor was misled could vary. Despite this, the Dutch Supreme Court ruled that the declaratory proceedings were suitable for bundling the claims of individual investors in a collective action. The Dutch Supreme Court found that the individual circumstances of each investor were irrelevant for assessing the unlawfulness of the conduct of World Online and the banks. These circumstances would only become relevant in individual follow-on proceedings. Although the judgment in the collective action was only binding on the parties to the proceedings, the Dutch Supreme Court believed it was likely to be followed in individual proceedings. The Dutch Supreme Court also ruled that collective Article 305a actions can be brought in the interest of non-consumers.

The *World Online* case was eventually settled out of court on the basis of the Dutch Supreme Court findings.

4 Dutch Supreme Court 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB v World Online e.a.*).

From a social perspective, Jurjen believes that the collective actions regarding millions of unit-linked insurance policies with alleged excessive charges would be the most important. "These proceedings have led to important changes throughout the insurance industry and a much better protection of consumers."

Predictions for the future

We finish the interview by asking Jurjen what he thinks will be the most important development in the future of class actions. "I can even use only two words," he laughs, "legal tech."

Third Party Funders

The future of class actions in the Netherlands from a third party funder's perspective

REIN PHILIPS | THIRD PARTY FUNDERS | Managing Director at Redbreast

24 June 2019, interviewers: Jeroen Bouma and Isabella Wijnberg

Rein Philips is the founder and managing director of Redbreast, a third party litigation funder that takes care of the full costs and management of complex legal proceedings on a 'no win no fee' basis. Redbreast operates in the top market segment, which means that the value of the claim must be at least EUR 5 million. Redbreast is a Dutch organisation that focuses mostly on the Dutch market. In contrast to other Dutch third party funders, Redbreast has the financial resources and capabilities not only to help major litigation cases on their way, but also to finance them independently all the way through. We meet Rein at Redbreast's offices near The Hague Central Station. As soon as we meet Rein, we are struck by his enthusiasm for his business. When we start our interview, he immediately emphasises that he is thrilled to be able to fund proceedings: "Individuals who would never have had the knowledge nor the means if we had not been involved, now have the opportunity to claim damages and costs from the entities responsible. Basically, we are creating a level playing field." This interview was conducted in Dutch and translated into English.

Current admissibility requirements encourage the use of alternatives

Although Redbreast currently has multiple financed cases pending, only two of them are collective actions. However, Rein explicitly decided not to bring them on the basis of the collective action regime of Article 3:305a Dutch Civil Code. Instead, they are being taken on the basis of assignment through setting up a limited liability entity. Rein explains: "The reason for this decision is that we want to make it clear that financing these two cases is commercially driven and that we have a profit motive. Additionally, we have seen admissibility issues in many '305a cases'. These stand in the way of the real conflict that made the parties go to court. The new law, WAMCA, will make this even worse due to the stricter admissibility requirements. "Although," he adds, "much depends on how courts will apply these in practice and it is therefore important that test cases will be initiated as soon as possible to set a precedent." "Will Redbreast initiate such a test case?" we ask. Rein laughs and responds that "as of yet, the cases we are involved in are not suited to becoming such a case. Maybe the US firms that are opening branches in the Netherlands will bring the first claim under WAMCA as it seems to have been at least one of the reasons for coming here."

The number and scope of class actions will increase

Now that Rein has mentioned that admissibility issues can be an obstacle to bringing class actions, we wonder if he thinks that the number of class actions will increase. His answer is clear: "Yes. I believe that more class actions will be brought, part of the reason being the possibility to represent people on an opt-out basis. However," he adds, "even claimant law firms and third party funders will not support a case if there is not already an underlying group of claimants before initiating the class action. What the growth path of class actions will look like after the entry into force of WAMCA will essentially depend on how the courts, including the Dutch Supreme Court, handle the proceedings and decide those cases. Based on the legislation itself it could go either way: it can fail, but it also contains the elements to become a huge success."

Rein also specifies which types of class actions are on their way up. He sees an increase in competition litigation, securities class actions (involving, for example, misleading IPOs, misrepresentations in annual accounts, fraud) and financial litigation, especially against banks (involving for example their duty of care) or insurers (about insurance policies with excessive charges). Recently, a fourth category has emerged: environmental and soil related cases, such as mining cases and environmental cases

like Urgenda[1]. Last but not least, there is a category of product liability cases like the *Bekkenbodemmatjes* case[2] and the *Round-up* case[3] (although this is mostly a US case).

Privacy claims do not immediately come to Rein's mind in this respect: "Right now, I do not see serious damages claims when it comes to a violation of privacy. That is necessary to take action from a commercial point of view. Currently, I observe that these cases, the Facebook claims in particular, stem more from an idealistic or consumer protection point of view than from a commercial point of view. But as soon as individuals begin to claim compensation for a breach of privacy, for example in the event of a data leak, this could just as well become a new independent branch to take into consideration for all parties involved."

Legal tech can play an important role

Will legal tech play a role in the development of class actions? "Well," Rein starts off, "if we allow ourselves to become creative and enable ourselves to explore more routes, while ensuring that the courts can go along with it, I believe legal tech can have a great impact. The use of technology and computing power, for example, already allows us to calculate, map and demonstrate damages more effectively. This might be useful under WAMCA, when the parties must submit their own damages scheduling report to the court. I think this is really interesting."

The Netherlands as an international forum

We ask Rein about the position of the Netherlands as a hub for class actions. He believes that the Netherlands will become, or actually already is, an international forum for mass damage claims, whether on the basis of Article 3:305a DCC or via assignment.

1 The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145; The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591 (Urgenda). The case is now submitted to the Dutch Supreme Court.

2 Midden-Nederland District Court 23 January 2019, ECLI:NL:RBMNE:2019:237. The case concerns Dutch proceedings regarding what is internationally known as 'Pelvic Mesh Implant proceedings'.

3 *Financial Times*, 14 May 2019: "Bayer shares hit the lowest in almost seven years on Tuesday, after a California court ordered the German group to pay more than $2bn in damages to a pair of cancer patients – the biggest setback yet in its escalating US legal battle over glyphosate."

To demonstrate this point, he refers to the *Converium* case[4] in which the Court of Appeal declared an international collective settlement binding, although none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. He notes that if the Netherlands wants to maintain this reputation, it is very important that the first 'US-style' case, in which damages are claimed, is handled well. Courts need to have an entrepreneurial spirit in this regard. In the beginning, many things will be unclear and practical decisions will have to be made. The government, for its part, must ensure that the Dutch judiciary is equipped with the means to effectively handle mass damages claims to the end. "Therefore, we will at least need to continuously invest in our judiciary's competence."

"I also believe that we should let the market chart its own course."

However, according to Rein, providing the courts with sufficient means will not be enough to maintain a leading position in handling mass claims. "I also believe that we should let the market chart its own course. It is important that funded solutions are accommodated. I am partial in this matter but any objective observer can see that the current system is heavily biased in favour of the large corporate or state tortfeasor. The biggest risk that a big corporate defendant faces in a lawsuit is having to pay what is already owed plus a historically low statutory interest rate. That creates an incentive to instruct an army of lawyers to delay the case as long as possible in the hopes of scaring off claimants and causing them to settle for less or to incur very serious year-on-year litigation expenses for a protracted period of time. Many of these cases cannot be pursued without some kind of external funding. Courts could accommodate these solutions by, among other things, generously ordering a liable defendant to pay to the claimant, as damages or as extra judicial costs, the full success fee that claimants have promised to a litigation funder. This is particularly important in funded mass claims. A claimant who has enabled mass litigation dealing with a just claim by transferring a share of their proceeds to a funder should never be worse off than so-called free-riders. It seems that WAMCA is taking a step in the right direction here."

4 Amsterdam Court of Appeal 17 January 2012, ECLI:NL:GHAMS:2012:BV1026.

Third Party Funders

Scrutiny of third party funding is unnecessary

Rein believes that WAMCA enables a cost allocation as mentioned above, since it allows for reasonable costs to be claimed. However, the word 'reasonable' does not resonate with Rein: "The reasonableness test is explicitly and, in my view, unnecessarily incorporated in WAMCA. How is the court going to decide what reasonable costs are? I think the scrutiny on third party funding is unjust. If a class accepts the terms of the third party funder, the chances are it was the best deal they could get. And although I understand that precautions might be necessary as the new legislation concerns an opt-out system, why not initially give the market the benefit of the doubt?"

Similarly, Rein believes that the fear of third party funders having too much influence is unnecessary. "Even while settling, the interests of the represented claimants as well as the third party funder are aligned. Yes, third party funding is a commercial service, and yes, the funder has its own interests, but that is not a bad thing. NGOs are apparently unwilling or unable to help, and no lawyer would handle the case free of charge. Moreover, a third party funder that represents the interests of a large group of victims and independently sets up the case will be aware that it is acting in the spotlight and that it will have to publicly defend its choices." Rein concludes: "No commercial party in its right mind would accept a settlement if it believes much more could be achieved. Again, let the market do what the market does best. This seems to work quite well in the US."

Landmark case

We asked Rein what he thought was the most important development in Dutch collective actions in the past ten years. He mentions the WCAM settlement in *Fortis/Ageas*[5], because it is the most recent one and therefore 'up to standard'.

Fortis/Ageas is the most recent WCAM settlement, offering compensation to investors for a total amount of EUR 1.3 billion. In 2016, entities representing the interests of investors reached a settlement with Ageas, the legal successor to Fortis, offering compensation for alleged losses due to alleged misrepresentations and mismanagement by Fortis in 2007 and 2008. The settlement was submitted to the Amsterdam Court of Appeal for approval. However, the court first denied approval, ruling that the settlement agreement could not be considered reasonable and did not sufficiently safeguard the interests of the shareholders. The court did not agree with the disparity in compensation offered to the 'free riders' on the one hand and to investors whose representatives had been actively seeking compensation on the other. The court offered Ageas an opportunity to amend the settlement to address the court's objections. Ageas increased the settlement amount and the parties to the settlement made several other adjustments. The court also asked the representative entities to disclose their funding arrangements in more detail. Finally, on 13 July 2018, the Amsterdam Court of Appeal declared the settlement agreement binding, although it found that the shareholders represented by one of the entities were invalidly favoured over the others.

Predictions for the future

We ask Rein to describe in one sentence what in his view will be the most important development in the future of class actions. Without a moment's hesitation and with a broad smile, Rein says: "What we can expect are beautiful American scenarios."[6]

5 Amsterdam Court of Appeal, 13 July 2018, ECLI:NL:GHAMS:2018:2422.

6 Amerikaanse toestanden' translated as 'American scenarios' refers to the enormous damages claims and frivolous litigation that are perceived to be commonplace in the US. The phrase is usually used as a negative by Dutch legal professionals who oppose the development of similar mass litigation and litigation funding in the Netherlands.

UNITED KINGDOM

In the UK, there are three different types of collective action: group litigation orders (GLOs), representative actions and Competition Appeals Tribunal (CAT) proceedings.

A GLO is a court-ordered procedure to efficiently case manage claims that have common or related issues of fact or law. It is not a genuine 'collective' action. It is based on an opt-in system. All claimants must enter their individual claim on the group register. Judgment in a GLO issue will estop all the other cases that are on the group register at the time the judgment is given. A common alternative to seeking a GLO, which has certain technical requirements and benefits, is bringing a limited number of test cases. Which test cases are going to be selected and how can be discussed with the court and the other party.

A representative action is a form of class action that allows one claimant to represent a group of unnamed persons. It follows neither an opt-in system nor an opt-out system. Those represented in the representative claim do not have to be named as parties to the proceedings.

Any relief can be sought through GLOs or representative claims, including, although rare in UK proceedings, punitive damages. GLOs and representative claims do not have a set name, but are variously called collective proceedings, mass claims and group actions.

CAT claims are follow-on claims and independent damages claims related to competition law infringements. They are generally brought on an opt-out basis under the Consumer Rights Act 2015. As of yet, no CAT class action proceedings have been concluded. Monetary damages and injunctive relief can be claimed, but exemplary damages cannot. The CAT does not have jurisdiction to grant declaratory relief.

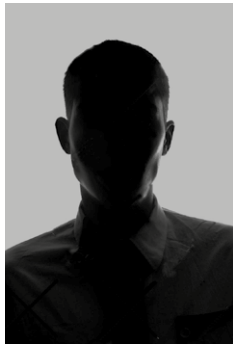
Class actions | GLOs/Representative actions/CAT proceedings	
Scope	GLO: General; RA: General; CAT: Competition law infringements
Access granted to	GLO: Individual claimants; RA: Representative claimant; CAT: Class representative
Opt-in or opt-out	GLO: Opt-in; CAT: Opt-out, unless CAT decides that an opt-in regime applies; foreign class members must opt-in
Declaratory relief or damages	GLO: Both; RA: Both; CAT: Damages
Frequently used	Yes, increasingly
Regulatory framework	Mainly CPR, Practice Directions, CAT Rules, Competition Act 1998 and Other Enactments (Amendment) Regulations 2017
Alternatives used in practice	Bringing a limited number of test cases; compensation schemes

Class settlements	
Binding class members after court approval	Yes, in class actions; CAT can also approve a settlement where a collective proceedings order has not been made
Opt-in or opt-out	CAT-approved settlements: opt-out, but opt-in for foreign class members
Regulatory framework	Civil Liability Contribution Act 1978; CAT Rules

Third party funding	
Regulated by law	No, but a voluntary Code of Conduct for litigation funders was published by the Civil Justice Council in November 2011
Frequently used	Yes

Good to know

Compensation schemes can be set up by companies, either on their own initiative or on the initiative of the regulator. They can also be set up parallel to litigation.



The future of class actions in the UK from a business perspective

MARK | BUSINESS PERSPECTIVE | International company

1 July 2019, interviewers: Elselique Hoogervorst and Isabella Wijnberg

When planning this project, we were very keen to know more about the way class actions are perceived from the business perspective. However, sharing a company's view on this subject can be a sensitive matter. We therefore agreed to publish this interview anonymously. The interview itself was not anonymous and we had a very insightful talk about the impact of class actions on large companies with a an in-house lawyer at an international company who we will call 'Mark'.

Compensation schemes as an alternative to class actions

We first ask Mark about his experience with class actions in the UK. He explains that his most recent experience was in a group litigation order with multiple claimants (around 700) and corporate defendants. The litigation lasted for years and the case has now been settled. The companies also set up a compensation scheme parallel to the GLO proceedings.

Interested, we wanted to hear more about these alternative dispute resolution mechanisms. "This kind of thing has been seen a little bit in England and Wales before. It was in particular used in the phone hacking cases," Mark explains. In the mid-2000s, the *News of the World* and *The Sun*, both UK newspapers from the News Group Newspapers, hacked the voicemail accounts of thousands of individuals, including a

number of celebrities and murder victims. The newspaper set up a scheme to compensate people without having to go to court, in parallel with the cases that ended in settlements[1].

Another example are the PPI[2] (Payment Protection Insurance) cases, concerning the mis-selling of insurance by credit card companies. Mark continues: "These two cases were not class actions, but the financial regulator had the companies set up a successful compensation scheme. We took this mechanism to the next level." The system was set up to be as streamlined as possible. There were two ways of getting compensation, depending on the claimant's preference. The first option was the quick and easy one. It provided for fixed sums that were paid if the claimant ticked the right boxes according to a damages schedule. The second option was a mini-trial. A former judge was hired who would sit and decide what a claimant would get, based on limited submissions of evidence. Part of the compensation scheme was a provision for certain extra legal costs to the claimants.

Mark explains that there are several advantages to this kind of alternative dispute resolution. "First, it is much easier, much quicker and much cheaper to access than court proceedings. These are benefits for the claimants as well as for the companies, which, in addition, also might enjoy positive public relations. Furthermore, setting up a scheme can be used as evidence that a company has accepted responsibility in a certain case, which is particularly important when it comes to doing business with public entities." Considering these benefits, Mark expects that this kind of alternative dispute resolution will increase in the future.

Several reasons for the increase of class actions

We wonder if the number of class actions is growing as well. This is indeed the case, says Mark. The UK is historically resistant to class actions. However, he sees more and more class actions, representative claims and competition cases coming through, which make courts more familiar with these kinds of actions. He detects several reasons for this trend, the first being social media: "It is easier for people to understand what is happening, come together and get the momentum going. People use social media a lot more now, so consumer class actions are probably more likely to happen."

Another reason is that third party funding and after-the-event insurance are on the rise, which allows people to start more class actions.

Lastly, the idea that businesses must be held accountable for their actions is now widespread. "This is a shift we have seen in the last ten years, maybe longer," Mark explains, "and class actions fit into that trend. In the UK, we have shareholder actions being brought. I also increasingly expect to see class actions and group litigation around the environment, data protection and privacy, particularly with the GDPR coming in."

Environmental class actions as a tool to change companies

We ask Mark whether he can elaborate on the expected environmental claims. "The number of class actions around environmental issues is growing, especially against companies." This does not necessarily come from the desire to obtain actual compensation, but instead is a tool to increase pressure and publicity. "Over the past few years, there has been a much greater desire to see companies act ethically. And obviously climate change and green issues are particularly on the agenda at the moment. It's a campaigning tool as well as a way of getting companies to change. We have not had major environmental issues in the UK yet, and often these are being dealt with by regulators, but I do see that coming in the future."

"Over the past few years, there has been a much greater desire to see companies act ethically."

Increase of class actions will affect pricing

We are curious to learn about the impact of class actions on the business, for example with regard to their conduct or pricing. "Class actions themselves will probably not change the business," Mark says. "Companies know there is a risk concerning, for

1 About 90 individuals recently settled their cases for invasion of privacy against News Group Newspapers, amongst whom Heather Mills, Elton John and Elizabeth Hurley. Cases are still ongoing. See the *Guardian* 8 July 2019: https://www.theguardian.com/media/2019/jul/08/heather-mills-receives-apology-and-payout-in-phone-hacking-case.

2 https://www.financial-ombudsman.org.uk/consumers/complaints-can-help/ppi.

example, data protection, but cover that already because of the GDPR. So, if we are changing our behaviour, it is because the law has changed, not especially because of class actions." However, the increasing likelihood that more people will bring a claim is a factor that will have an effect on price allocation on a more general level since obviously class action litigation is expensive, Mark adds.

Third party funding mitigates the loser pays rule

The UK has an adversarial legal system with a general 'loser pays' rule. Litigation in the UK is also notoriously expensive. The combination of these two can lead to considerable costs for the losing party. Mark thinks that this does prevent frivolous class actions being brought but it might also prevent genuine class actions. However, he believes that the use of third party funding and after the event insurance[3] might mitigate this problem and allow claimants to bring a collective claim. He explains: "We will probably see more use of third party funding in the future, as it is an attractive option. As an in-house lawyer, a few years ago I would not have been thinking about third party funding at all. Full stop. Now, in court, the parties have to set a budget that is being discussed in a special hearing before the judge. Once the budget is fixed, that is what you get. So there is a much greater visibility for clients in terms of costs now, and this encourages looking at alternative ways to pay for that." Mark adds that the idea of someone else paying the costs has entered popular thinking. "People as well as businesses move towards involving third party funding as long as they do not have to pay for the litigation costs and are willing to give up a part of the proceeds of the litigation for that."

"We will probably see more use of third party funding in the future, as it is an attractive option."

In Mark's experience, third party funding can cause all sorts of difficulty when settling the claim. One of them being that it is likely that a settlement agreement is more expensive, because the settlement offer must include the costs and the success fee for the funder. "Moreover," he explains, "in a group litigation, the claimants have two types of costs, common costs incurred for the litigation as a whole and individual costs made specifically for individual claimants. Sometimes it is difficult to work out what is what, in particular when you are settling some claims and not others." The fact that the funder has a say in the settlement makes settling difficult as well.

3 An after-the-event insurance insures the litigation cost that the losing party is ordered to pay to the winning party.

Courts are cautious about class actions

The increase in class actions and third party funding does not lead to abuse of the system, as far as Mark is aware. "Judges look at the cases very carefully and make sure the proper tests are fulfilled. I cannot think of any abuse going on. Cases like *Mastercard*[4] show that courts carefully assess whether the group really has a claim and if their interests are similar enough. They do not rule directly in favour of consumers when a company is involved."

Merricks issued an application to start opt-out collective proceedings against Mastercard seeking damages following the decision of the European Commission in 2007 that Mastercard's EEA multilateral interchange fees infringed EU competition law. Compensation was sought on behalf of a broad class of claimants who purchased goods or services from UK merchants that accepted Mastercard cards in the period between 1992 and 2008. The estimated number of class members is 46 million, claiming GBP 14 billion in damages. The CAT found that the claims should not be certified. The Court of Appeal overturned the CAT's decision on 16 April 2019 and remitted the case back to the CAT for a re-hearing.[5]

As a result, UK companies will be reluctant to forum shop to another European country, even if the costs are high in the UK. Moreover, the fact that more class actions will be brought is not a reason for companies to change their seat outside the UK. Mark laughs: "There are greater issues at the moment."

4 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 16.
5 *Merricks v Mastercard* [2019] EWCA Civ 674.

Business Perspective

Brexit will not have an impact in the short term

That is our cue to address the elephant in the room: will leaving the EU have an impact on class actions in the UK? Mark thinks not, at least not in the short term, especially since the current idea is that the UK will still apply EU regulations for issues like jurisdiction and consumer protection. He does not expect difficulties in acknowledging class action judgments either. It is in the UK's interest to recognise judgments from other countries, he explains. "The only difference might be that less class actions are brought, if in several years we become less regulated and the procurement and competition regulations no longer apply. But that is because of a change in the underlying law rather than class actions themselves." In any event it is still uncertain – at the time of this interview – whether Brexit will actually happen.

Courts should encourage the use of ADR

Since Mark is very positive about the way class actions are being handled in the UK, we wonder if he can suggest any areas for improvement. After a moment of thought, he suggests that "judges should be more proactive in encouraging the parties at an early stage of the proceedings to resolve the case outside of court." The group litigation Mark was involved in was very expensive and difficult to resolve because there were so many parties. Resolving the case via alternative dispute resolution often benefits all of the parties.

Landmark case

We ask Mark what in his view is the most important class action that has been brought in the UK. "The *Mastercard* case comes to mind immediately. And *Morrisons Supermarkets* about vicarious liability."

The *Morrisons Supermarket* case was based on a data breach.[6] A former employee of the supermarket stole and subsequently posted a large amount of personal data of other employees on the internet. Morrisons was found vicariously liable for this data breach. The UK Supreme Court granted Morrisons permission to appeal on 15 April 2019[7].

The *Morrisons* case was a wakeup call, according to Mark. "As a company you can have all the security in place, and because of the unlawful behaviour of one employee, you are liable all the same." It is also a landmark case because it is one of the first where damages for a data breach were awarded.

6 *Various Claimants v Wm Morrison Supermarkets PLC*, [2017] EWHC 3113 (QB) and [2018] EWCA Civ 2239.

7 The hearing in the UK Supreme Court is scheduled to take place on 6 and 7 November 2019.

Defence Lawyer

The future of class actions in the UK from a defence perspective

SIMON NURNEY | DEFENCE LAWYER | Partner at Macfarlanes

26 April 2019, interviewers: Parisa Jahan and Isabella Wijnberg

Simon Nurney has a broad range of experience in high profile group litigation disputes relating to corporate, commercial and construction disputes. He has also acted in a number of high profile group disputes relating to the environment, employment and data protection. He handles litigation for a range of UK and international clients. Simon represented Trafigura in one of the largest class actions in the UK. Trafigura was sued by 30,000 Ivorian citizens who claimed to have suffered damage as a result of slops dumped by the Probo Koala in Ivory Coast. Simon concluded a settlement agreement of GBP 30 million on behalf of Trafigura. Having worked closely with Simon in the past, we knew that he could give us some valuable insight into how class actions work in the UK. We interviewed him by phone.

Growing number and variety of class actions

We begin by asking Simon if he thinks that the number of class actions is going to increase. He replies that he expects that the number of class actions will grow and also that the type of claims will become more diverse. These predictions are based on the fact that consumers are more aware of their rights and can communicate easily through the internet, as well as the introduction of new regulations, such as the GDPR and regulations in the financial world. Simon gives two examples of this trend: the large class actions against Facebook because of the Cambridge Analytica[1] scandal and the recent group litigation against Morrisons supermarkets.[2] In this case, Morrisons was found vicariously liable for a data breach committed by a former employee who deliberately posted a large amount of other employees' personal data on the internet.

Simon mentions an expected increase in CAT class actions, since they can be brought on an opt-out basis while in other cases all the claimants must be named. When we remark that the claimants in the CAT *Mastercard* case[3] were refused certification, he points out that the Court of Appeal overturned the CAT's decision on 16 April 2019 and remitted the case back to the CAT for a re-hearing.[4] He explains: "Depending on whether that decision is upheld and interpreted by a subsequent court, it could have a dramatic impact. I think it could make it easier for proposed class representatives to establish the claims that are suitable to be included in opt-out collective proceedings."

The large fees that law firms can charge will also drive an increase in class actions: "Claims with a sufficiently large claimant base and damages that are collectively high can be financially attractive, especially with increasing fees and the availability of private funding."

Simon also does not expect to see the growth of alternative ways to seek collective redress, such as litigating by mandate or via assignment of claims. These mechanisms are not generally suitable for collective actions in the UK.

No expected change in scope of class actions

According to Simon, it is generally difficult to challenge a claim on jurisdictional grounds. "Clearly it is not impossible, but you are always going to have uphill struggles.

1 *Redmond et al v Facebook*, Inc. Et al, 1:2018cv00531, US District Court for the District of Delaware.
2 *Various Claimants v Wm Morrison Supermarkets PLC*, [2017] EWHC 3113 (QB) and [2018] EWCA Civ 2339. The UK Supreme Court granted Morrisons permission to appeal on 15 April 2019. The hearing in the Supreme Court is scheduled to take place on 6 and 7 November 2019.
3 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 16. See the Mark interview above for a description of this case.
4 *Merricks v Mastercard* [2019] EWCA Civ 674.

I do not think courts are more open to class actions in that respect. In my opinion, this is not an area where there is going to be a massive change." He does notice that the jurisdictional debate nowadays takes more and more time, even though the outcome remains the same. "Jurisdictional challenges should in theory be decided by a judge sitting in chambers, reading the papers in half an hour. However, increasingly, jurisdiction challenges are running into one, two or even three week hearings with huge bundles of evidence being exchanged on both sides."

"Jurisdictional challenges should in theory be decided by a judge sitting in chambers, reading the papers in half an hour."

Satisfying class settlement system

It is possible in the UK to settle GLOs and Simon is reasonably satisfied with how this works in practice. He is not aware of any proposed changes to this. "Settling class actions is not rocket science in my view," he says, "but don't forget I am a defendant's lawyer, so I only look at it from one perspective." In his view, the potential difficulties are more commercial than procedural. It can be quite a challenge for example, to reach a form of a cooperation agreement with all the different claimants to save costs and time by instructing one law firm.

Increasing competition between law firms

Simon tells us he expects an increase in the competition among law firms to represent claimants: "Historically, class actions were limited to personal injuries. There was only a relatively small group of law firms that were able to undertake those class actions. Now you have US law firms invading the UK market which is an attractive market because of English law." "Furthermore," he adds, "firms are specialising in tax law class actions, and you have the competition side and the regulatory side. There are more corporate-based class actions moving forward and that will increase the base of law firms that handle the cases and this will increase the competition of who will act for various claimants. For example, shareholder actions are becoming increasingly common and we expect this trend to continue. Examples include the RBS Rights Litigation (which settled) and the *Lloyds bank* class action brought by shareholders in relation to the purchase of HBOS in 2008. On the other side – especially with class actions against banks – the number of law firms that are able to act on behalf of the bank will be reduced because of conflicts of interests if they have a corporate practice. You see boutique firms coming up in the UK to avoid these conflicts."

Cherry-picking by third party funders

Third party funding is growing in popularity in the UK. Simon explains why: "Legal aid in the UK was withdrawn which had a depressing impact on class actions. Third party funding partially fills that gap and assists in the growth of class actions, making them more accessible." However, funders tend to cherry-pick the best claims. Simon expects them to only take on cases with a 70% chance of success, or more. The reason for that is the cost shifting rules that oblige the losing party to pay the costs of the other party. Historically the 'Arkin cap' has limited the funders' potential liability for adverse costs but a court recently held that it can decline to apply this cap.[5] This means that funders can no longer be confident that their liability for adverse costs will be limited to the size of their investment. In *Excalibur v Texas Keystone*[6] the court found that litigation funders in the UK can be liable to pay costs on an indemnity basis. Broadly, this means that a funder's liability for adverse costs can be increased if the funded party conducts the litigation in an unreasonable or abusive manner – even if the funder is itself not responsible for the unreasonable or abusive conduct. These decisions have obviously had a significant cost impact on funders.

We note that it is difficult to assess whether the funding agreements in place are to the advantage of the actual claimants, due to the lack of transparency in funding documentation. We wonder if the CAT judgment in *Mastercard*[7] will force funders to be more transparent about their funding arrangements in the future. Simon doubts that it will: "The issue in *Merricks v Mastercard*, in so far as it related to funding arrangements, turned on the specific provisions of Section 47C of the Competition Act 1998. Other than demonstrating the established principle that the court may investigate a party's

5 E.g. *Davey v Money*, [2019] EWHC 997.
6 *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144.
7 *Merricks v Mastercard Inc* ([2017] CAT 16.

funding arrangements where this is relevant to an issue in dispute, the judgment is unlikely to have a significant impact outside the context of the Competition Act 1998." Other developments may have more impact, he adds: "Arguably a development which is more likely to result in claimants being obliged in the future to be more transparent about their funding arrangements is the recent line of cases in which the High Court has required claimants to provide information about their funding arrangements in the context of threatened or actual security for costs applications.[8] Given that funded parties will often be susceptible to security for costs applications, these types of application may become commonplace with the result that information about funding arrangements will be disclosable in more disputes than has historically been the case."

Brexit will have limited impact

Of course, we can't ignore the looming spectre of Brexit. In Simon's view, Brexit's impact on the English courts will be relatively limited. He does not see European jurisdictions poaching all the English class actions: "Although France, the Netherlands and to a limited extent Belgium and maybe Germany are developing English language courts which could attract class actions, I think whether these courts might take away work from the London commercial courts also depends on the question whether they are able to determine English law. This will also depend on how the UK will leave, with no deal or with any agreement, or if it does not leave at all."

EU law has the greatest impact on UK law

According to Simon, the UK courts are not looking to other European jurisdictions or the US for guidance on handling class actions. There seems to be no pressure to expand or change the current set of rules. EU law has had the greatest impact on UK law in the last few years, but these laws did not impact procedural law such as the rules on class actions. Simon does not find the US system appealing. "In my opinion, it is open to abuse and a way for lawyers to make significant amounts of money. I do not think that there is an appetite to bring that to the UK. Also, I do not see that there is any push to replicate the US's punitive damages systems."

"I do not see that there is any push to replicate the US's punitive damages systems."

8 See for example Re *RBS Rights Issue Litigation* [2017] EWHC 463 (Ch); [2017] 1 W.L.R. 3539 and *Wall v Royal Bank of Scotland* [2016] EWHC 2460 (Comm); [2017] 4 W.L.R. 2).

Better case-management control is needed

Asked about the ideal class action in the future, Simon first mentions a development he views as undesirable: "There might be some pressure for an opt-out basis given the fact that this is possible under the CAT. That would, however, in my view be undesirable, since it encourages bringing unmeritorious claims."

What he would like to see is a well-established body of case-management approaches for class actions. He explains that the court's class action rules are relatively short and there is no clear guidance. There is currently too much flexibility in how to run a case and there is no consistency in how judges run class actions. That creates a degree of inefficiency and uncertainty. Simon notes that this can be a huge threat to the defendants, since they know they will eventually pay a significant amount of the costs if they lose. It is difficult for the defendant to argue that the costs should or should not have been expanded in the particular circumstances without saying that the trial judge or procedural master got the procedural orders wrong. For the claimants' law firms, unless it is a completely unmeritorious claim, there is no huge incentive to restrict their spending, since these costs will need to be paid by the defendants as part of any settlement that is reached. Even if they lose at trial, claimants will usually have the benefit of after-the-event insurance. "If there was a greater degree of financial and costs procedural control taken from the outside, class actions could also be pushed through a lot quicker, a lot more successfully and defendants would not be so bruised over it. Class actions would be more efficient and cheaper."

Landmark case

We ask Simon to name the UK collective action case that he thinks every lawyer should read. This proves to be a difficult question. According to Simon, no single case stands out. He explains: "The approach of the English courts to group litigation has been to deal with disputes on a case-by-case basis and it is difficult to point to one case that has shaped the conduct of subsequent disputes. It will be interesting in ten years' time to

see the impact of the recent UK Supreme Court decision in *Vedanta Resources PLC v Lungowe*.[9]

> In *Vedanta Resources v Lungowe*, the court held that it had jurisdiction over claims brought by 1,826 Zambian citizens who claimed they had suffered personal injury and damage to property as a result of pollution and environmental damage caused by the Nchanga copper mine from 2005 to the present day. The claims were brought against the Zambian operating company and its UK parent company. The judgment included findings that it was arguable that the parent company owed a duty of care to the claimants and that there was a real risk that the claimants would not be able to obtain substantial justice if they brought the claim in Zambia.

Whilst not all aspects of the judgment were claimant-friendly, it suggests that English courts may become more willing to accept jurisdiction over similar disputes in the future."

Predictions for the future

We ask Simon what he believes will be the most important development in the future of class action. He pauses for a moment, then answers: "Anything that improves the ability of claimants to fund class actions – for example through liberalisation of the rules on contingency fee arrangements or the continued growth of the litigation funding market – is likely to result in an increase in the number of class actions brought in this jurisdiction."

9 *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

The future of class actions in the UK and Europe from a claimant perspective

JAMES OLDNALL | CLAIMANTS' LAWYER | Partner at Mishcon de Reya

6 June 2019, interviewers: Jeroen Bouma and Isabella Wijnberg

James Oldnall is a partner in the Finance & Banking Group at Mishcon de Reya who specialises in complex multi-jurisdictional banking litigation and arbitration, including group actions. He is involved as a claimants' lawyer in the representative action for damages against Google. Google is alleged to have unlawfully collected and sold the personal data of millions of iPhone users through a method known as the 'Safari Workaround'. Even though the High Court dismissed the application for permission to serve the proceedings,[1] it marked a critical step in establishing a set of guidelines and a precedent for similar group claims. The case is now pending at the Court of Appeal. So when James enthusiastically agreed to be interviewed by us, we were soon on our way to Mishcon de Reya's well-appointed offices in central London.

Shift in cultural perception of group actions

When we ask James to share his view on the future of collective proceedings in the UK, he mentions a presentation he gave a while ago during a conference about 'the rise of group litigation'. "I wanted to test that premise. Has the amount of group litigation actually increased?" Quite surprisingly, after checking all the GLOs from the late

1 *Lloyd v Google* [2018] EWHC 2599 (QB).

nineties on, he concluded that there has not been a rise in group litigation after all. GLO numbers were initially significantly higher than they are now, amounting to only 1% of the approximately 1,500 commercial claims decided per year.

However, although the number of GLOs has not grown, there definitely has been a change in the cultural perception of group actions. Where the GLO regime was initially used for labour and medical issues, we now see actions involving mis-selling of financial products and data breaches and this has attracted new law firms and litigation funders to the market. "You could call it a professionalisation of the market," James says. "Different parties have recognised the latent potential of group actions. I think that is what people have been talking about, and I do not think that that latent potential has fully been released yet."

Different type of claims

James also sees the type of claims changing. "As the economy shifts from mining coal to mining data, I think we can expect to see more activity in that area. This change is not so much the effect of the GDPR, but has more to do with the fundamental changes in the global economy. Individuals are waking up to the fact that data has value, and firms are using data in ways that we don't fully understand yet." James also believes securities litigation is increasing and refers to the RBS Rights Issue litigation.[2] "A lot of people have learned from this case and are waiting to see if similar claims can be brought."

The claimants in this case were shareholders of the Royal Bank of Scotland who sought compensation for investment losses incurred following the collapse of RBS shares. They based their claims on the grounds that the prospectus for the 2008 Rights Issue of shares in RBS was not accurate or complete. As part of this litigation, claimants sought disclosure and inspection of interview notes in relation to two internal investigations involving interviews by or on behalf of RBS with current and former employees. The case was settled before the trial began in May 2017. RBS agreed to pay 82 pence per share to investors.

2 RBS Rights Issue Litigation [2017] EWHC 463 (Ch); [2017] 1 W.L.R. 3539.

Additionally, James expects that mis-selling of products in other areas will lead to more group actions as well. "We have had the PPI scandal which was consumer-focused,[3] the IRHP scandal which was SME-focused,[4] and we can expect more of those. Banks will come up with new concepts that cannot necessarily be described as fair. I think consumer actions are the holy grail to denounce these practices."

James does not think that any European jurisdiction has found the ideal regime for consumer actions yet. And the US class action system comes with downsides which the English legal market is 'allergic to', as James puts it. He believes that two competing economic drivers must be rebalanced: the ability of consumers to receive compensation when they have been wronged, and the ability of companies to continue doing business without being subject to frivolous litigation. "The European answer has traditionally been to regulate, but regulators are so out-matched in terms of resources that they are simply not effective in protecting consumers. I think we need a combination of litigation funding with an opt-out regime. The CAT regime is a start but even that has had very limited success so far. So we have to keep looking for an adequate regime."

UK courts reluctant to accept jurisdiction in international cases

James already mentioned a change in the global economy. We observe that one of these changes involves an increase in cross-border issues, since companies are not just based

3 The PPI (Payment Protection Insurance) case concerned the mis-selling of insurances by credit card companies. The financial regulator had the companies set up a successful compensation scheme. See https://www.financial-ombudsman.org.uk/consumers/complaints-can-help/ppi.

4 The IRHP (Interest rate hedging products) case concerned failings in the way some banks sold structured collars, swaps, simple collars and cap products, identified by the Financial Conduct Authority in 2012. The banks involved agreed to review their sales of IRHPs made to unsophisticated customers since 2001. On 10 December 2018, around 13,900 customers have accepted a redress offer and GBP 2.2 billion has been paid out, including GBP 509 million to cover consequential losses. This means that, so far, around 95% of offers have been accepted. See https://www.fca.org.uk/consumers/interest-rate-hedging-products#footnote-2

Claimants' Lawyer

"I can imagine further and greater collaboration between the UK and the Netherlands."

in one country anymore. This may lead to jurisdictional issues. Although UK courts rather easily accept jurisdiction in international human rights cases, they seem to be very reluctant to do so in other cases. James agrees with this observation: "The UK has a relatively large domestic market, compared to the Netherlands for example. In the Netherlands, you would be looking to scale up by reaching out to the European community. I don't think Britain needs to do that for consumer claims. If we take the *Volkswagen* case, for example, there is sufficient domestic mass to bring the claim on our own. So I think that might explain the reluctance of UK courts to accept jurisdiction in such cases. We simply do not need it."

The fact that the Dutch domestic market does need an extraterritorial reach makes the Dutch move forward and create a class action system that is progressive, commercial and trying to meet people's needs, according to James. Therefore, he considers the Netherlands as the most relevant jurisdiction for the UK. "I can imagine further and greater collaboration between the UK and the Netherlands."

Talking settlement

James would also welcome a greater degree of harmony between the regimes in Europe, England and the US. "That way you could reach global settlements, which is another holy grail out there. But this is a bit like driverless cars: everyone knows it needs to happen, the technology is available, but no one knows when it is going to happen."

Not only are global settlements still a bridge too far, as is turns out, settling in the UK itself is difficult as well. James explains: "I think the UK's opt-in mechanism which is underdeveloped in its ability to deal with competing groups, creates an enormous amount of uncertainty on the defendants' side. Whereas a US defendant can put a lump sum of money into a pot, making it the claimants' ordeal to divide the settlement funds, a UK defendant would settle with one group with the risk of another group popping up at any time." Competition between claimant groups is not only bad for defendants but increases the costs for claimants as court battles are waged to determine how to deal with the multiple group's in court. Of course, competition between groups can benefit consumers too by ensuring terms are competitive.

James believes the solution to these problems does not only lie in regulating the legal landscape, but in developing technology. Until such time as the legal framework changes we must look to technology to facilitate opt-in claims, and ensure the fair distribution of the settlement funds or of the compensation awarded.

Transparency is a thorny issue

As third party litigation funding is well established in the UK, we would like to know how James views the question of transparency of the funding arrangements. "Transparency is a thorny issue," James agrees. "You need a certain degree of transparency in order to ensure that the funding agreement is fair and on commercial terms. In other words, that consumers are not being taken advantage of. However," James continues, "you cannot have too much transparency. The defendants will then get an unfair advantage in understanding what the funding terms are and how much funding is available. There is already a considerable inequality of arms when, for example, taking on the largest car manufacturer in the world with almost infinite resources. So this is a balancing act. So far we have seen the English courts demonstrating an awareness of these competing interests and striking a fair balance."

Landmark case

Reflecting on the past ten years, James chooses the RBS Rights Issue litigation[5] (see above) to be one of the most important collective actions. Not so much for the law it created, but for the commercial precedent it established. Several groups of large institutional investors participated in an opt-in group action against a large global investment bank, which had not been seen before on that scale. When thinking of the present, James thinks that there are two cases to observe: *Mastercard*[6] and *Volkswagen*.

5 RBS Rights Issue Litigation [2017] EWHC 463 (Ch); [2017] 1 W.L.R. 3539.
6 *Walter Hugh Merricks CBE v Mastercard incorporated and others* [2017] CAT 16; *Merricks v Mastercard* [2019] EWCA Civ 674. See interview Mark (UK) for more details.

"The first to see how the CAT deals with such an extreme example of opt-out. The second because it is an example of a consumer mass claim for a relatively modest damage sum per individual, which is going to create practical challenges for everyone involved. It will be interesting to see how the court and parties navigate these challenges."

The *Volkswagen* case is based on the allegation that Volkswagen intentionally programmed their diesel cars to limit emissions during laboratory tests.. As a result of this news, the price of Volkswagen stocks dropped dramatically. 'Dieselgate' also involved brands other than Volkswagen and led worldwide to regulatory and criminal investigation actions, various class actions from both car owners and shareholders and a class settlement of USD 15.3 billion in the United States. In the UK, a GLO application against Volkswagen Group UK and others was filed on 28 October 2016 and entered on the Public List of Group Litigation Orders on 21 May 2018. It is known as the VW NOx Emissions Group Litigation. The coordination of the litigation seems challenging. [7]

Predictions for the future

James summarises his thoughts on the most relevant development for class actions in the future in two sentences: "I think ultimately, the UK class action regime requires legislative intervention to make it work. If that is not available, technology is our only hope."

7 See e.g. *Viner and others v. VWUK* and others [2018] EWHC 2006 (QB), *Crossley v. VWUK* and others [2018] EWHC 2308 (QB) https://www.lawgazette.co.uk/law/vw-wins-costs-order-against-premature-group-litigation/5067425.article.

The future of class actions in the UK from a third party funder's perspective

STEVEN FRIEL | THIRD PARTY FUNDERS | CEO of Woodsford

5 June 2019, interviewers: Jeroen Bouma and Isabella Wijnberg

Steven Friel is a litigation funder with extensive experience in financing complex disputes, via litigants and their law firms, often with an international dimension. Prior to joining Woodsford, Steven was a partner in the London office of DAC Beachcroft, and later a partner in the London office of international law firm Brown Rudnick. He has represented clients across a broad range of commercial, industrial and governmental sectors, and has particular expertise in finance, insurance and technology disputes. Now, as Woodsford's CEO, he ensures that the UK-based litigation funder is able to provide its clients with tailored solutions and quick funding decisions. The matters that Woodsford funds are situated not only in the UK, but across the world, including in the Netherlands, Germany, France, Switzerland, Sweden, Australia and the United States. So, when Steven indicated he was willing to participate, it did not take long before we were making our way by train, plane and underground to speak with him at Woodsford's elegant London offices.

US philosophy changes the field of litigation

Our first question is about the future of class actions, which prompts Steven to reflect on the past and the present: "In the UK, up until around 20 years ago, any contingency fee arrangement was absolutely prohibited. With limited exceptions, litigation funding

simply did not exist. We have moved very rapidly into a situation where litigants have ready access to litigation funders and to law firms who take risks through contingency or conditional fee agreements. This rapid change was made possible in part by a new philosophy coming from the US, namely the idea that the private sector can enable access to justice and make a profit by funding litigation."

Steven believes these changes will not stop in the UK and will make their way to continental Europe, if this has not already taken place. "Five years ago, most continental Europeans that I spoke to had little understanding of litigation funding, and found it a very strange concept. Today that is no longer the case. Most continental law firms who have a cross-border practice, have at least one or two partners that know all about litigation funding." These changes can also be observed in cartel damage cases in Germany and the Netherlands: "Much as they have done in other legal practice areas, including M&A and corporate finance, the US and UK law firms are importing their litigation funding philosophy into the jurisdictions they enter. The Netherlands in particular is ripe for significant investors in different types of litigation, both in the high value, low volume market and the low value, high volume market."

Litigation export and import

Steven thinks that although continental jurisdictions are becoming more and more familiar with collective actions, the decisive factor for a litigation funder in choosing the appropriate jurisdiction in large cross-border cases is still familiarity with the legal system and culture. To Woodsford, the UK and the US are the closest kin. Steven admits however that this is not necessarily the right dominant factor. The decisive factor should be which jurisdiction you are likely to get the highest return in, within a reasonable period of time and with the highest degree of certainty.

Steven expects that the way in which UK group claims are structured and financed will be influenced by the US, especially when it comes to securities litigation. One of the reasons for this prediction is the *Morrison* case,[1] in which the US Supreme Court ruled that a securities class action cannot be brought by foreign claimants for misconduct

1 *Morrison v National Australia Bank Ltd.*, 561 U.S. 247 (2010).

regarding non-US securities. Steven explains: "What I think will happen is that the Americans will start cases in the US relating to US securities where they observe corporate misconduct, and thereafter there will be related litigation elsewhere, including in the UK. It is possible that certain issuers will have one category of securities, for example ADRs, listed in the US, and another category of securities, for example shares, listed in London. This gives rise to the possibility that, following the commencement of price drop litigation in the US relating to the ADRs, there will be follow-on litigation in the UK relating to the shares, since shareholders would not be able to get compensation in the US." He adds: "At the end of the day, big corporates will always want to do business in London, they will always want to list on the London Stock Exchange, and they will always need access to the London capital markets. As long as they do, they will have to resolve their disputes here."

Steven expects a huge increase in CAT proceedings in the next ten years.

Increase in CAT proceedings and securities litigation

Securities litigation is one of the areas where Steven sees great potential when it comes to class actions. Another potential area for growth is the CAT regime, which is very new. It permits opt-out class actions for antitrust damages claims. "It is in fact the only proper class action we have in this country, because no other opt-out class action exists." Steven expects a huge increase in CAT proceedings in the next ten years. Steven tells us that Woodsford is heavily invested in these two areas. They also see a lot of opportunities for investing in the near future. "I think we will go from a small number to dozens of cases soon," Steven says.

One of the cases Woodsford invested in was the *Gutmann* case brought before the CAT in February 2019. It concerns two joined collective proceedings in which a large number of London rail passengers seek damages from several railway companies, because the companies allegedly abused their dominant market position by charging the passengers twice for parts of their journey.[2] Steven believes this is a perfect case for the CAT opt-

2 Case 1304/7/7/19 (*Justin Gutmann v First MTR South Western Trains Limited and Another*) and 1305/7/7/19 (*Justin Gutmann v London & South Eastern Railway Limited*), see https://www.catribunal.org.uk/cases.

out regime, because without it, these consumers would not get any redress. "However, proceedings before the CAT are far from easy because its process still has teething difficulties. The needed guidance may come from the experience in the *Mastercard* case, which is the first CAT case to come this far.[3] The case will be heard by the UK Supreme Court. *Mastercard* is quite an extraordinary case, very complicated from a legal perspective. As a consequence, any result will not be the perfect example of what will follow." Jokingly Steven adds: "Since we are not funding it, I am happy that we can benefit from its findings for our own cases."

Funding agreements, transparency and profit

One of the reasons why the *Mastercard* case is so interesting is because a redacted version of the funding agreement had to be submitted in court. We were wondering whether Steven expects this to become a trend in the UK. "For class actions, absolutely," he answers, "and I think that is a good thing. Litigation funders are reputable businesses, providing access to justice. Transparency in collective redress is very important." The only downside to this transparency concerns the defendants' tactics to disrupt funding. "We have seen this behaviour already in the US. If defendants can't beat the claim, they will try to beat the funder. These tactics do not work and only lead to a waste of time and higher costs." However, Steven warns that these tactics have a chilling effect on the funding industry. They create barriers for new litigation funders. They also make it more difficult for funders to make a profit. Therefore, if jurisdictions are considering requiring claimants to provide confidential and sensitive information about the nature of their funding arrangements, mechanisms have to be put in place to protect funders and their clients from the negative consequences of that disclosure.

The current discussion on third party funding in the EU focused mainly on the amount of profit. Steven shares his view on this: "Once it is accepted that litigation is not financed by public means and that private funding is required, it is for the private sector to determine the price. That is allowed for every other economic activity in the private sector. More market competition means lower prices. Therefore, regulators and governments must stop creating barriers for new funders to enter the market. Anything else they do to force prices to change will have a counterproductive effect, especially then it comes to high value commercial issues. It will cause less competition rather than more, and thus create higher prices."

3 *Walter Hugh Merricks CBE v Mastercard incorporated and others* [2017] CAT 16; *Merricks v Mastercard* [2019] EWCA Civ 674. See interview Mark (UK) for more details.

Defendants should settle earlier on

We wonder if the fact that a case is financed by a third party funder has an impact on the defendant's position. "Yes," Steven says firmly, "defendants should settle earlier on." He explains why by telling us more about how Woodsford conducts its business. "Through the course of a year, we will meticulously assess 700 to 800 cases. We only invest in a very small number of those, usually less than 10%. As a result, once we have invested in a case, we feel very strongly about the merits. Generally that means that the defendants should settle, because it is a case in which they are going to lose." That also means that defendant tactics, such as smoking out the claimant or telling the claimant they are getting bad advice from their lawyers, are ineffective. Steven has noticed that in the US and Australia, the defendants tend to settle once the proceedings get to a certain stage such as the certification of the class. "This makes sense. At that point, the defendants are, or should be aware of the fact they have a serious problem on their hands." According to Steven, settling at that stage is not caused by the fact that discovery or jury trials come into sight. It all comes down to the fact that "claimants only worry about losing, whereas defendants worry about losing badly."

"Claimants only worry about losing, whereas defendants worry about losing badly."

Landmark case

While the *Gutmann* case (mentioned above) is Woodsford's most important UK class action, Steven has no difficulty choosing the *Mastercard* case (also mentioned above) as the one most likely to lead to important guidance on class actions in the UK generally. "This case will create guidance for future opt-out class actions, both for the CAT regime and for other regimes. But, with some self-interest I must say that the following cases such as our *Gutmann* case, are equally as important. This case is much more typical of what the CAT should be doing. Therefore, it is important not only how the CAT functions,

but also society, the press, the legal community and consumers react to it. If you don't get it right from the outset, being the first two or three cases, the opportunity for collective redress could be ruined. Judges and policy makers are acutely aware of that."

Predictions for the future

Our last question is a bit harder. When we ask Steven what, in one sentence, will be the most important development in class actions, he needs a bit more than one: "Litigation is expensive, particularly in England. If mass claims are not resolved expediently, it is even more expensive if not impossible without litigation funding. We need collective redress to be developed in a way that litigation funding can work, because of a lack of public means. Litigation funding is an inherently sensible product: it removes the risk from people who cannot bear it, and it forces corporate defendants to behave well, or better at least."

GERMANY

In Germany, the KapMuG and the MFK provide for two collective redress mechanisms that are somewhat similar to class actions. The KapMuG (*Kapitalanleger-Musterverfahrensgesetz*; Capital Markets Model Proceedings Act) came into force on 1 November 2005 in response to the enormous amount of claims in the *Telekom* case. It was initially intended to be in force for five years. After being extended in 2010 and reviewed by the legislature in 2012, the revised KapMuG came into force on 1 November 2012. It will be in effect until at least 1 November 2020. The KapMuG focuses on disputes between investors and securities issuers under the capital markets law. Claimants opt in to a KapMuG procedure by filing separate individual claims to the competent district court (*Landesgericht*). A minimum of ten claimants is required. KapMuG proceedings lead to a declaratory judgment. Damages cannot be awarded. They can be followed by a settlement, which becomes binding when the court approves it and less than 30% of the registered claimants opt out. Claimants can also start individual follow-on actions for damages.

The MFK (*Musterfeststellungsklage*; Model Declaratory Action) came into force on 1 November 2018. The act gained momentum thanks to 'Dieselgate'. Only qualified consumer organisations can start a collective action against companies at the competent higher regional court (*Oberlandesgericht*) to obtain a declaratory judgment on questions regarding consumer issues. The MFK proceedings are admissible if at least 50 consumers file a claim about the same event. Consumers can join the proceedings until the end of the day on which the first oral hearing at court takes place (opt-in). Collective actions based on the MFK can be followed by a settlement, which becomes binding when the court approves it and less than 30% of the registered consumers opt out. Consumers can also start individual follow-on actions for damages.

Class actions | *KapMuG/MFK*	
Scope	KapMuG: Securities issues; MFK: Consumer rights issues
Access granted to	KapMuG: Individual claimants; MFK: Qualified consumer organisations
Opt-in or opt-out	Both: opt-in
Declaratory relief or damages	Both: declaratory relief
Frequently used	No
Regulatory framework	KapMuG: Capital Markets Model Proceedings Act; MFK: Model Declaratory Action
Alternatives used in practice	Assignment of claims and representation by mandate

Class settlements	
Binding class members after court approval	Yes, in class actions
Opt-in or opt-out	Both: opt-out
Regulatory framework	KapMuG: Capital Markets Model Proceedings Act; MFK: Model Declaratory Action

Third party funding	
Regulated by law	No, but qualified organisations may not receive more than 5 percent of their finances from corporate entities under the Model Declaratory Action
Frequently used	No, but increasing; Germany has a long history of funding firms but the status of TPF is still unclear

Good to know

In Germany, a sole opt-out system in class actions and class settlements is considered to be unconstitutional by legal scholars and experts.

The future of class actions in Germany from a business perspective perspective

EKKART KASKE | BUSINESS PERSPECTIVE | Executive Director
European Justice Forum

27 August 2019, interviewer: Isabella Wijnberg

Since 2017, Ekkart Kaske has been working as executive director of the non-profit organisation European Justice Forum (EJF). He is also a member of EJF's board. EJF is a coalition of businesses, individuals and organisations that are working to build fair, balanced, transparent and efficient civil justice laws and systems in Europe. EJF's aim is to ensure that the legal environment in Europe protects both consumers and businesses alike, and that those with a legitimate grievance have access to justice. Before joining EJF, Ekkart worked for more than 12 years in government affairs and public policy roles with global players like Allianz SE and Zurich Insurance Group. He was responsible for the set-up of Allianz's representative office in Berlin and heading the Government & Industry Affairs department at Zurich Insurance Group in Germany.

Ekkart gave us an insight into the impact of class actions on different sectors in Germany. In particular, he shared interesting ideas on how to improve the system of collective redress. This interview was conducted in English.

A broken class action system

Ekkart begins by explaining that he is not very happy with the current system for collective redress. The introduction of the MFK (model declaratory actions) is generally

an important step to allow legal clarification. One problem is that in the past, even declaratory actions in court took too long. There was also the problem of a lack of binding effects when findings could not be generalised. He elaborates: "Just have a look at the *Telekom* case under the KapMuG. Private investors for the third tranche of the IPO are still waiting for a declaratory judgment after more than 12 years." Another current problem according to Ekkart is that competition with the assignment model is undermining the MFK. This is illustrated by the *Volkswagen* 'Dieselgate' case:[1] "There is competition between the assignment model run by funded claimant lawyers, bundling single cases together to a mass claim analogous to the Austrian class action model, and the qualified entities claiming via MFK. Currently there are more than 430,000 cases registered at the Federal Office of Justice, collected by vzbv[2] and ADAC[3] for the MFK. However, at the same time, the litigation industry is trying to attract these claims to sign up to their system and assign the claims to them. "This competition means that various new platforms and process financing forms are popping up. "For example," Ekkart continues, "I know a platform that agrees with people subscribing to their claim that the platform eats up – in the case of success – around 25% of the settlement amount. The fee for joining assignment models may depend on the chances of success. These can vary from court to court where claims are brought. This systematic and economic approach shows that professional third party funders have discovered the German market."

Ekkart believes that there is no proper court-based class action system that ensures the system is efficient.

Ekkart believes that there is no proper court-based class action system that ensures the system is efficient, timely and fair for both claimants and defendants. When a declaratory judgement and the decision on the actual compensation are brought together, this slows down court decisions as a decision on awarding damages requires more detailed and often individual information from both claimants and defendant.

1 See the Michael Molitoris interview for a descripton of this case.
2 VZBV stands for Verbraucherzentrale Bundesverband. This is the Federation of German Consumer Organisations.
3 ADAC stands for Allgemeine Deutsche Automobil-Club e.V. This is Germany's and Europe's largest automobile club.

A similar situation already happened in Spain. "It is a misconception that a one-stop-shop approach provides gains on speed, reduces costs and provides better results for claimants. Especially since courts often lack the necessary resources."

According to Ekkart, class action systems are not an effective and efficient solution to collective problems: "There should be a better system which also makes people feel well treated and understood. Empirical case studies show that aggrieved claimants in Europe don't necessarily want the biggest compensation possible. They want a realistic compensation for their harm and, ultimately, some kind of recognition of their situation. The current system of deterrence does not work for either the claimants or the defendant."[4]

Ekkart explains that in his experience companies are still reluctant to disclose their data or show compassion to claimants, as this could be viewed as an admission of liability. This exacerbates the problem since people do not feel heard in their complaints. The current system therefore results in unsatisfied consumers, creating in addition a risk of reputational damage for companies because customers may then reach out to the media to discuss their disputes. This problem will only increase if the current court-based collective redress in Germany is transformed into a full-blown class action system. This would be very undesirable since "in contrast to what people think, a class action system does not lead to solving problems with a greater efficiency, but opens the door to all kinds of abuses, including US-style settlements in which the claimant's lawyer gets large amounts and the actual claimant only a coupon."

The ombudsman: an alternative for class actions

Since the current class action system in Germany is not working and expanding the options for class actions is not the solution, I wonder what Ekkart thinks should be done to fix it. His response is clear: "Set up an ombudsman system and use digitalisation to interact with consumers more directly. The real answer to wrongdoing by a company is to solve it quickly in a transparent and objective way. This can be done by installing

4 Ekkart refers to C. Hodges & R. Steinholtz. *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement*, Hart 2017.

an accessible, knowledgeable, not-for-profit and neutral party such as an ombudsman. This ombudsman should be very accessible for consumers and collect complaints digitally. That way the ombudsman can also assist companies in improving their services by showing the areas in which they are having problems. The confidentiality of the ombudsman system makes it easier for defendants to admit liability and solve the issue."

Ekkart and other partners, including individuals, academics and businesses, are currently working on promoting this new system across Europe. In Germany, they are planning on presenting their proposal to politicians and confronting them with the fact that the current collective redress system is not working as it should. "Politicians need to understand that the current way is not solving the real problem." He continues: "The whole process would be more efficient if it was a more settlement-orientated system, rather than a system where companies have to secure their position with regard to potential collective damage claims."

The many functions of an ombudsman

The ombudsman system that Ekkart and his collaborators are proposing focuses on some core functions. "The first function is data collection, in the sense of systematically identifying problems via disputes. The second function is to explain and check consumer rights. The third function is the feedback so that businesses can start learning and preventing future problems. The fourth one is providing information for negotiation between parties. The fifth function is creating a proposal to satisfy both sides which will effectively solve the problem. Finally, there is the monitoring function to ensure further learning and to apply feedback." The goal of the system is to help parties to get over their conflict as soon as possible. If the parties do not manage to solve the problem with the help of the ombudsman, they can still go to court. However, considering the burden and costs of a court proceeding for the consumer, the defendant and the court system, this should be the last resort. On the defence side, the ombudsman system must function as a risk-mitigation for companies, both for the reputational side and the financial side. Although scandals can quickly blow over, Ekkart explains that reputational issues can still have a huge and long-lasting impact. It could result, for example, in the government not providing subsidies to a company anymore. This means that even small legal issues can lead to high costs.

"Politicians need to understand that the current way is not solving the real problem."

Germany as a test case

I ask Ekkart how he sees the position of an ombudsman throughout the EU. "All Member States feel the imminent threat of the use and abuse of class actions while at the same time they are seeking solutions for collective problems. That is why I think that the ombudsman system will be a solution throughout the EU." EJF is in initial talks with people from the German political sphere to address this solution in the context of the European New Deal for consumers. This solution could be quite attractive to companies, in particular to tech start-ups as they already use digital platforms, are highly consumer-focused, capture manifold data and have a learning culture. "Sadly, there has been some general pushback due to conservative industries in the trade associations. In any company, there are people that do not want to change the current system. However, the problem that people are not open to change is everywhere and that will not stop us," Ekkart says.

US-style class actions are undesirable

I wonder what Ekkart thinks will happen to German class actions if an ombudsman is not introduced. "In that case, the MFK will be revised and I fear that the system will then be expanded to claiming damages collectively and also opening the system for other claim vehicles than only qualified entities. In my view, this would aggravate the current problem that class actions are mainly commercially driven by third parties' profit motives and are not a fast and real solution to consumers' problems. And obviously competitors may also use the class action system in an attempt to hurt each other."

Predictions for the future

While other interviewees are very cautious in their predictions for the future, Ekkart is very certain about – at least – the direction: "With the current voting trends in Germany

and Europe, consumer rights will be strengthened more and more in the coming years. Change is inevitable." The consequences of this change depend on the way companies react to this development: "If they are not willing to change, the number and impact of class actions will increase since this provides an interesting business model for lawyers, third party funders and other players in the litigation industry. The second option," and it is clear that Ekkart prefers this solution, "is that companies see this development as a great opportunity to bring efficient and effective alternative dispute resolution systems forward, like ombudsmen, which will take away the need for consumers to join commercially-driven class actions." The latter would be challenging since it needs a cultural change in businesses. Ekkart concludes: "The industry has to be smart and propose something that provides a real solution now. A solution that detects disputes early on, gives companies direct feedback and helps them to solve issues in a quick and efficient way. Especially in our fast changing world, innovation is always linked with risk taking and learning. This is the time to innovate also in dispute resolution and implement a learning culture, instead of the expensive litigation culture we are currently developing. It will take courage from business leaders to change, but it will pay off."

The future of class actions in Germany from a business perspective

THOMAS LINGEN | BUSINESS PERSPECTIVE | Vice President Legal, HR and Communication at Office Depot Europe B.V.

27 June 2019, interviewers: Diederick Smit and Isabella Wijnberg

Thomas Lingen is Vice President Legal, HR and Communication at Office Depot Europe B.V. He has practical experience with class actions in the United States and extensive – as he puts it himself – theoretical insights into the class action regime in Germany. Our discussion with Thomas focused on how class action regimes impact the decisions that businesses make.

Class actions not very efficient: high costs and no 'ease of litigation'

Thomas begins by remarking that "the German class action regime is recent and there is no statistical data available in terms of how this is progressing." That will not change in the near future as there are currently only a few public cases. One of the few examples is the famous Volkswagen 'Diesel scandal' which led to a 'truckload of claims' from customers claiming damages. This is not surprising since, in Thomas's opinion, the current class action regime in Germany is not an efficient way of resolving this and other collective issues. He explains that "the administrators' burden is pretty high, which is driving the litigation costs through the roof. And it's almost impossible to deal with the amount and complexity of the various documents." Looking to the future, Thomas expects that if 'ease of litigation' increases, either through the way the courts handle these types of cases or through a change in legislation, more collective claims will be initiated. This could also happen if a larger number of commercial parties, such

as law firms or third party funders, see a business case in class actions, as happened in the US. That would have "a big impact in the litigation arena." If none of these changes happen, Thomas thinks that the class action mechanism in Germany will continue not to be used or will only be used in massive cases. But he notes that this does not seem likely considering the focus in Germany and the EU to provide consumers with collective remedies.

Finality is key

From a defendant's perspective, if the case has merit, the opt-out system is the best system for a class action or a class settlement because it provides finality. "Finality, together with predictability, would certainly make businesses more eager to resolve cases at an early stage." This would apply even more if this was possible on a European level, as Thomas continues: "There is definitely a desire to settle meritorious cases in an easy, final and European way."

Alternative systems do not work for class actions

We wonder whether alternative forms of collective solutions would be able to provide these easy, final and European solutions, but Thomas is pessimistic about this: "In my experience, ADR can be pretty successful, particularly in an environment where there are – to a certain extent – limited parties." But this is not the case in class actions: "The objective of class actions is different, it tries to get binding results on the merits of the case for an unlimited number of claimants. I cannot imagine at the moment that an alternative dispute resolution system would be suitable for that." This impression is strengthened by Thomas's knowledge of the German ombudsman system. In different sectors of the German market, mainly in regulated environments such as the insurance market, the ombudsman system is active. But "it doesn't have a very good reputation and will likely not be able to handle mass complaints in the short term." However, Thomas does not exclude the possibility that in the long run an alternative such as an ombudsman might be the best system if it is actually able to provide an easy, relatively cheap and final solution. "The European market is now in an experimental phase, discovering what systems work and what systems do not so ADR should obviously not be excluded upfront in those experiments," he concludes.

"The European market is now in an experimental phase, discovering what systems work and what systems do not."

Class actions do not influence strategic decisions in this industry

We ask about the impact of class actions on a strategic business level. Thomas kicks off by saying that for all businesses, litigation risks and the value of potential damages claims are embedded in their risk profile. "But," he continues, "the class action regime in Germany, and in Europe for that matter, is currently not an element that we need to take into consideration. This would be premature since it is not very developed yet." However, this could be different for other companies. Office Depot is a workspace solution wholesaler, so it has a different risk profile than, for example, the manufacturing sector or commodity goods industry. In Thomas's view, businesses operating in these markets will probably start taking the number of class actions and the class action regime into account when deciding on investments or strategy.

US style class actions do not drive prices of all consumer goods up

Do businesses in the US raise their prices because of the class action regime? "Well," Thomas responds, "I have been involved in a set of class actions in the US and obviously litigation costs in the US have on a more general level a price-increasing effect for all businesses and all products. But an ethical business will never make the price of a product higher due to expected class actions. So, excluding those who intentionally or with gross negligence put a product on the market that could harm others or cause damage, nobody would take the risk of class actions into account when determining the specific price of the product. Usually for the simple reason that a company is not yet aware of this risk. The difficulty with class actions and all other litigation is that they by definition come after the product has been sold on the market. However, on a general level, class actions do drive up litigation costs in the US as they are easy and cheap to join, so the claimant can only win."

Litigation funding and third party funders in the US and Germany

Thomas believes that class actions are an industry in the US. "This is an industry where

law firms actively and aggressively approach potential claimants, the so-called ambulance chasing, and make a business model out of it, marketing themselves with a certain expertise." According to him, this industry also attracts third party litigation funding. Due to the contingency fee possibilities for lawyers, this is currently primarily used in a B2B environment or in a direct claimant-defendant relationship rather than class actions. But that could well change since Thomas's observation is that the current third party funders see a chance to grow in the class action market. The consistently large number of class actions in the US is obviously trigger for them.

The German market is a whole other story, due to the fact that there are only a limited number of parties "which are kind of hand selected" that could start these class actions. These parties are the only ones who decide whether they have an interest in using litigation funding. "And," Thomas continues, "I am not sure whether they are eligible to buy this kind of funding. In the new class action legislation (*Musterfeststellungsklage*) there is even a maximum percentage laid down to avoid abuse of the system." So, although commercial third party funders and law firms seem interested in the German class action market, he does not expect third party funding to become very popular.

Third party funding in the UK could be useful to create a cap on cost risks

Thomas proves not only to be an expert on the business defence side, but also has some experience in the UK on the business claimants' side. He explains that he is "currently dealing with litigation funding schemes in the UK concerning a damages case." Thomas explains that due to the merits of the case, they had to choose the UK as jurisdiction, despite its very high litigation costs. They are considering a third party funding agreement together with an after-the-event insurance to cap the risk of a potential adverse cost judgment, which can be very high in the UK. In these kinds of circumstances, Thomas sees the benefits of third party funding or ATE insurance, although it is very expensive.

The future of class actions in Germany and Europe from a defence perspective

MICHAEL MOLITORIS | DEFENCE LAWYER | Partner at Noerr

17 May 2019, interviewers: Jeroen Bouma and Isabella Wijnberg

Michael Molitoris is a well-known German lawyer who has extensive practical experience in handling domestic litigation, international litigation and arbitration cases. His past legal work has involved more than 25 countries. His experience extends to the fields of product liability, insurance law, banking law and white collar crime. He is also involved as a defence lawyer in a large number of 'Dieselgate' related cases. He is recommended by Chambers Global 2019 and Best Lawyers Germany 2019 as a leading expert in litigation. We interviewed Michael in person while he was attending a conference in Amsterdam.

Future of class actions depends on Volkswagen

We start the interview by asking Michael about future developments in the German class action system. "This really much depends on how the current market situation will develop," Michael says. "I see three key factors: politics, the evaluation of the Model Declaratory Action (MFK) and the creation of alternatives to the recently introduced instruments, especially by US law firms coming to Germany."

Elaborating on these factors, Michael says; "Politics could go either way. As always, certain parties are pro class actions, and other parties are against them." In any event, Michael does not believe that Germany will have a government that adopts a system as

'extreme' as the US class action system in the near future. "None of the political parties want to empower claimants' law firms and make them richer, enabling them to turn Germany's legal market into a claim industry."

The government's opinion on class actions will also be influenced by the evaluation of the MFK. Whether this law is considered a success very much depends on the outcome of the *Volkswagen* case.[1] "Volkswagen might have to fight the case all the way through because of the number of claimants, but if it would like to collectively settle in order to move on and put the diesel emissions issues behind, that could be seen as a great success of the MFK."

Michael turns out to be very critical of the MFK. "The government picked out the *Volkswagen* case for which it modelled new legislation. The MFK has already been called the 'Lex Diesel' or 'Lex Volkswagen'. A new law should not be introduced on the basis of just one case." Moreover, he wonders if anybody needs the MFK at all. "From a defendant's perspective, the MFK is lacking balanced cost compensation rules. The claimants should bear the real costs and not just a very small percentage if they lose. This would stop them from bringing frivolous claims." From a claimant's perspective, the MFK is not attractive either. "Claimants' Lawyers are not really interested in this declaratory procedure with a consumer organisation as the lead claimant. It is financially more attractive for them to bring the claims individually and charge the highest statutory fees they can get."[2]

Then there is also the newly introduced 'Hausfeld model'. Hausfeld is a US law firm that, backed by third party funding, initiates collective actions by cooperating with a limited company which can ask for contingency fees from the claimants it represents. By doing so, it circumnavigates the prohibition on German lawyers working on a contingency fee basis. Michael looks at this development in a practical way: "Almost everybody uses this example to substantiate the argument that we should not be open to this kind of commercial collective action, but how could we regulate it? If you want to keep an open market, it is hard to restrict all potential models." However, Michael notes that the increasing visibility of claimants' lawyers might be a bigger problem than the creation of regulated alternatives. "Claimants' Lawyers appear on our TV shows on numerous occasions directly and aggressively advertising litigation individually or collectively. This has nothing to do with the introduction of a group settlement regime or the MFK, but has everything to do with the ongoing process of change in our ever changing legal market. We need to find the means to stop clear abuse. Although I am hopeful that we will one day find this balance, this is not something I am seeing yet."

Summarising, Michael concludes: "The future of collective actions in Germany very much depends on the level of success and the public perception of this test case against Volkswagen."

An opt-out system is considered unconstitutional

We continue our conversation discussing Dutch class actions and class settlement proceedings, the latter of which is in principle conducted on an opt-out basis. The general opinion in the Netherlands is that opting out is better than opting in, because this increases the likelihood of a collective settlement and finality. Given the look of surprise on Michael's face, Germany and the Netherlands could not be more different. "In Germany, an opt-out system is considered to be absolutely unconstitutional, it is a definite no go," Michael says. "Everyone has a constitutional right to justice. An opt-out system takes away the claimant's right to decide if they join a collective action."

"In Germany, an opt-out system is considered to be absolutely unconstitutional, it is a definite no go."

This could mean trouble for the recognition of foreign judgments based on opt-out proceedings. Will they be recognised in Germany? Michael makes it clear that

1 *Verbraucherzentrale Bundesverband (vzbv) in Kooperation mit dem ADAC vs. Volkswagen AG*, action brought on 1 November 2018, the day the MFK entered into force. Currently there are more than 400,000 registered claimants in this action. The Oberlandesgericht Braunschweig scheduled the oral hearing for 30 September 2019.

2 In 2002, the maximum for the tariffs was cut off at EUR 30 million meaning that any party claiming more than EUR 30 million would get a percentage of EUR 30 million based on the tariffs. Law on the Remuneration of Attorneys (*Rechtsanwaltsvergütungsgesetz*) Section 22 para. 4.

he would fight against the recognition of any such judgment, because he considers it contrary to the public policy. "Nothing has been tested yet, so it remains to be seen what the outcome will be. But any conclusion to the contrary will have a big impact on Germany and its way of thinking."

Germany versus the EU

This observation leads us to the question of whether other jurisdictions might influence Germany and its case law regarding class actions. Michael answers carefully that, because of Germany's long-standing legal tradition, it is hard to imagine that anything from another EU Member State will be copied. However, he believes the Dutch WAMCA to be interesting and progressive, "but I think the reality is that not many Germans focus on Dutch law so far."

This is different when EU legislation is involved. According to Michael, with regard to the New Deal for consumers, many German legal scholars believe that the EU cannot impose this draft directive on the Member States. He explains: "Although the EU presents this draft directive as a consumer protection measure, it really concerns procedural law and that is up to the Member States themselves. So Germany will – hopefully – try to stop this." Michael does not change his view when we reflect on the scope of Article 6 ECHR[3]: "We have a very well-functioning system of legal aid. It is simply not true that the average German citizen does not have sufficient money to bring an individual claim. And, more importantly, that should not even be the question. The question is whether you want to promote more litigation. Although as lawyers, we might be inclined to say 'the more litigation the better', as a German citizen I am inclined to say no – we should not go the American way." However, he would like to see a sensible European model, with defensive measures against abuse. "Member States should work hard together to make this happen, rather than following their national interests and competing to bring the most interesting cases to their own country."

"As a German citizen I am inclined to say no – we should not go the American way."

Future trends

We see an increasing number of environmental class actions in the Netherlands. Is this also a trend in Germany? Michael is clear in his response: "Yes. Of course proof of causation is still not available and it is really hard to make an environmental claim individually. But yes, I agree that this might become a trend." It is hard to predict if this is also the case for securities class actions, because the KapMuG is not permanent legislation and will only be in effect until 1 November 2020, maybe longer. Out of the few hundred KapMuG proceedings, Michael identifies the *Telekom* case as the most prominent one.[4]

In *Telekom*, approximately 17,000 small investors claimed damages from Deutsche Telekom, the Federal Republic of Germany (as the former main share-holder) and multiple other parties for misleading information in the 2000 Deutsche Telekom prospectus. The majority of the cases were brought in the year 2001. The alleged damage suffered initially amounted to EUR 80 million. The case has dragged on until now due to the possibility for parties to file supplementary motions for new issues at almost any time and the retirement of the chairman of the chamber of the respective court. Due to legal interests, the total sum of compensation claimed by the claimants has doubled to an amount of approximately EUR 200 million. *Telekom* led to the introduction of the KapMuG.

Landmark case

It is no surprise that Michael considers the pending MFK case in *Volkswagen* to be the most important German class action in the past ten years.

3 According to Article 6 ECHR, Member States of the Council of Europe (which includes all EU Member States) are not only obliged to grant their citizens a right to a fair trial, but they also need to provide them with the tools to be able to exercise those rights.

4 See amongst others: Bundesgerichtshof Senatsbeschluss vom 21. Oktober 2014 - XI ZB 12/12, BGHZ 203, 1. First instances: LG Frankfurt am Main - Beschluss vom 22. November 2006 - 3/7 OH 2/06 and OLG Frankfurt am Main - Beschluss vom 3. Juli 2013 - 23 Kap 2/06.

The *Volkswagen* case is based on the allegation that Volkswagen intentionally programmed their diesel cars to limit emissions during laboratory tests. As a result of this news, the price of Volkswagen stocks dropped dramatically. Other car brands are also involved in 'Dieselgate'. It led to worldwide regulatory and criminal investigation actions, various class actions from both car owners and shareholders and a class settlement of USD 15.3 billion in the United States.

Predictions for the future

We ask Michael to tell us in one sentence what he believes will be the most important development in class actions/collective actions in the future. After a moment of deliberation, Michael smiles: "I will need more than one sentence." He continues: "Germany will never be a class action paradise. But I hope Member States can work together to create a sensible European model that fits us all. We also need to find a way to stop abuse by claimants' lawyers that aggressively promote class actions."

The future of class actions in Germany and Europe from a US perspective

MICHAEL HAUSFELD | CLAIMANTS' LAWYER | Partner at Hausfeld

27 June 2019, interviewers: Nadir Koudsi and Isabella Wijnberg

Michael Hausfeld is one of the top civil litigators in the United States and Chairman of Hausfeld, a leading global law firm. He has been involved in some of the largest class actions in the fields of human rights, discrimination and antitrust law. For instance, Michael represented Native Alaskans after the Exxon Valdez oil spill in 1989. Since 2016, Hausfeld has been representing a collecting agent licensed in Germany that launched claims against Volkswagen on behalf of European owners of Volkswagen "unclean diesel" vehicles. Hausfeld's client financial right through its website enables consumers to register their claims with no out-of-pocket costs. In 2017, Hausfeld filed a complaint in the Braunschweig District Court on behalf of more than 15,000 German consumers affected by the Volkswagen diesel emissions scandal. This filing is believed to be the largest single consumer complaint ever filed in a European court. We spoke with Michael through a video connection between our two law firms.

Class action mechanisms will continue to develop

Michael begins the interview by explaining that historically the mechanisms for collective redress were created out of necessity in new economies in order to provide effective and meaningful access to justice when mass wrongs were committed. "It is important to recognise that societies and economies have changed. Singular wrongs

Claimants' Lawyer

can affect people in similar ways, but different jurisdictions focus on different elements of the necessity of the mechanism." According to Michael, there is a strong commonality between what he deems the four principal class action jurisdictions – the United States, Canada, Australia and the United Kingdom – in regard to the policy reasons for the need and desirability of implementing this type of procedure.

As for Germany, Michael expects that the class action mechanism will continue to develop. He feels that the need for a class action was triggered by the *Volkswagen* case that affected half a million individuals in the United States and 8.5 million individuals in Europe[1]. According to Michael, matters like these are the reason that the United Kingdom and the Netherlands adopted combined opt-in and opt-out systems and that German policymakers had an incentive to take action and establish the *Musterfeststellungsklagengesetz:* "Germany is not quite there yet, but the door to collective redress is open for the first time."

Collective action can be applied to different sorts of cases, such as climate change and securities fraud. This results in reasonable room for discretion for policymakers and a chance for legal practitioners to bring forward many different kinds of proceedings. Michael thinks that "collective action should be applied in a way that the resolution provides a measure of justice. The collective action mechanism has social, legal and economic benefits, so it is also important to implement safeguards to prevent abuse."

The amount of environmental claims is increasing

We ask Michael whether he thinks class actions could be an effective method to address climate change. Michael admits that it is difficult for class actions to truly address and resolve the global challenges of climate change. However, he notices that "climate change litigation has been accepted and that the amount of environmental cases is increasing." This advance comes from incidents and political developments that create the need for collective action mechanisms, and is therefore a relatively slow process. Michael also comments that class actions which on first sight might have little to do with the environment can nevertheless have environmental aspects. And again, he points to the fact that the Volkswagen claim had an environmental aspect. The claimants argued that studies had shown that the actual extra emissions caused lung disease and potentially caused deaths. Michael believes there should be an international environmental tribunal since environmental matters are generally global.

1 See the Michael Molitoris (Germany) interview for a descripton of this case.

Europe should not be afraid of funders and contingency fees

We ask Michael for his views on third party funders. He notices that in Germany, there is a fear of the word 'funder'. He is not sure whether this fear is due to the possible abuse by funders or the opportunity for claimants to bring cases to court. And although Michael admits that abuses are possible, these can be prevented by safeguards: "Do we shut all businesses down because there is fraud in some businesses? It comes down to appropriate safeguards and sufficient mechanisms in which abusers are held accountable. You do not foreclose a necessary system because of fear of abuse," he points out.

Michael considers contingency fees, in which the lawyer gets a percentage of the awarded damages or a settlement sum, an apt example of the 'the goose that lays the golden eggs'. He believes that "contingency fees prevent irresponsible behaviour in which lawyers put their commercial interest above their clients because a lawyer who puts his own financial interests above the interests of his clients will soon lose those clients."

He also does not share the fear of third party funders that exists in Europe: "Funders are skilled professionals and will therefore always do due diligence before stepping into a claim. Funders would not be in Europe if they felt that they would be unwelcome. There is sufficient economic opportunity and space to achieve justice on the matters that they are funding."

A Europe-wide collective settlement is not possible yet

We ask Michael if he thinks that the EU should or could develop a collective settlement mechanism. He does not believe that this will happen soon, as all 28 Member States have different judicial history, traditions, and languages. Some Member States have a civil law system while others have a common law system. A Europe-wide network of

common relief could make sense, but Michael believes it would be hard to implement given the sovereignty of the Member States.

In the case of a Europe-wide problem, there are a number of potential solutions. Michael mentions the new WAMCA system in the Netherlands. This system provides an opt-out arrangement for Dutch citizens and an opt-in arrangement for foreigners. The Netherlands also provides the WCAM system in which it is possible to settle on behalf of every claimant worldwide. The WCAM system has occasionally been used in securities cases, but has not tested whether the binding nature of that kind of settlement is acknowledged in other jurisdictions. In cases of competition infringements, Michael believes that judgements or settlements from the United States would not have a binding effect in European jurisdictions due to their compensatory systems that include penalties or treble damages. It is not evident that certified classes in the United States would choose to opt in to Dutch proceedings.

Overlap with class actions in the United States depends on similarities of claims

Michael thinks that class actions in the United States can only be applied in other jurisdictions when there are enough similarities between the claims. In general, courts in the United States do not want to deal with global settlements. However, there are cases in which it would be surprising that there would be overlapping claims in other jurisdictions. The Vitamins Cartel, for instance, had global implications and thereby similar claims were brought in multiple jurisdictions. In the *Elevators and Escalators* cases,[2] however, the cartel did not affect all Member States and resulted in only claims being brought in certain affected jurisdictions on behalf of certain parties.

Landmark case

We ask Michael what he thinks is the landmark US class action case that every lawyer should read. He goes one better, and provides us with a reading recommendation as well, '*A Civil Action*' by Jonathan Harr.[3] Michael recommends this book to those who want to learn more about US class actions. He also mentions two landmark cases from the United States: the *Mastercard* cases[4] and the *Vitamins Cartel* case.[5]

The *Vitamins Cartel* case dealt with collusion by 21 vitamins producers who cartelised the global vitamins market for 16 vitamins, leading to an increase in prices worldwide in the 1990s. This resulted in fines and monetary damages totaling over USD 6.2 billion and European corporate executives serving jail sentences in the US, making the international vitamin cartels one of the largest antitrust cases in history. The decision was also significant because the district court denied the right of foreign purchasers to bring antitrust claims in the United States. On appeal, the Supreme Court held that foreign purchasers had to bring claims for competition violations under foreign law in foreign courts. That limitation was a catalyst for the development of private enforcement of cartel price fixing damage claims throughout the European Union.

"As long as there are mass abuses, from any source, of any kind, anywhere, anytime, there will be a need for a judicial collective mechanism to meaningfully provide a measure of justice for all."

2 European Commission 21 February 2007, C(2007) 512 (*Elevators and Escalators*).

3 Jonathan Harr, *A Civil Action*, USA: Random House 1995 (ISBN-10: 0394563492, ISBN-13: 978-0679772675).

4 For the UK case, see the Mark (US) interview; The US case resulted in a settlement under which Mastercard and Visa agreed to pay up to USD 6.2 billion. See United States District Court Eastern District of New York 27 November 2012, No. 05-MD-1720, Class Settlement Preliminary Approval Order.

5 See also: http://economics.mit.edu/files/12734.

Claimants' Lawyer

The future of class actions in Germany from a claimant perspective

ANDREAS TILP | CLAIMANTS' LAWYER | Partner at TILP

10 July 2019, interviewers: Karmijn Krooshof and Isabella Wijnberg

Andreas Tilp is a renowned German lawyer with extensive experience in domestic and international litigation. He is an expert in the fields of banking and capital markets. Andreas has served as a court expert in cases before the German Bundestag and European Commission, and has advised the German government concerning the KapMuG. He founded TILP in 1994 to represent aggrieved investors. Nowadays, TILP still only represents claimants. It initiated the first KapMuG proceeding in German history against Volkswagen. We interviewed Andreas together with Marc Schiefer, who is also a director at TILP, over the phone.

The uncertain future of the imperfect KapMuG

We start by asking Andreas and Marc if there are any upcoming changes expected in class action law in Germany. This prompts Andreas to tell us about the history of the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz – KapMuG*). He and TILP were at the forefront of developing the KapMuG and to this day, he jokingly calls it 'his baby'. He explains: "It all started in 2001, when TILP brought the first *Deutsche Telekom* case on behalf of shareholders that relied on allegedly misleading capital market information. In total, over 17,000 individual actions were brought, showing the need for a system to handle these cases more efficiently. Eventually, in 2005, the KapMuG was established to provide effective protection to these types of claims."[1] "That being said," Andreas continues, "the KapMuG makes it clear that even your own children are not perfect. In practice, it does not resolve the real problem since it is not aimed at compensating the individual harmed investor, but can only lead to a declaratory judgment." Under the KapMuG, it takes too much time to receive compensation. And Andreas thinks that the German legislator intended it to be slow: "The German legislator was not sleeping while drafting these laws. It intended these procedures to be so slow that they would become somewhat useless instruments."

But the fact that the KapMuG has a sunset clause is even more problematic in Andreas's eyes. It will end in October 2020 and it is still unclear whether the legislature wants to reform or renew it and what will happen with ongoing cases. "If the KapMuG ends, there are two opinions on what will happen with the current ongoing cases. Either the cases will move forward, but on what legal basis? Or the cases will go back to the initial lawsuits they once were before being transformed into KapMuG proceedings by the High Court. The original lawsuits still exist, but are frozen. If KapMuG ends they may have to be defrosted and proceed on that basis."

The MFK is ineffective

When we ask whether alternatives like the MFK Act (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage* – Law on the Establishment of a Civil Procedure for a Declaratory Model Action), are in better shape than the KapMuG, Andreas answers: "Although the MFK is a step in the right direction to improve enforcement of consumer rights by enabling qualified consumer associations to file representative actions, this law is also intentionally flawed." The first disadvantage that Andreas points to is that the action can only be brought by qualified institutions, on behalf of consumers such as consumer associations. This is a problem from the outset, "because the number of consumer associations in Germany is not very high and only a few of them are happy to litigate. Since claims can only be brought on behalf of

1 For further information, see: Practical Law, Class/collective actions in Germany: overview, https://uk.practicallaw.thomsonreuters.com/9-618-1132?transitionType=Default&contextData=%28sc.Default%29 (accessed on 15 July 2019); Re Deutsche Telekom AG Sec. Litig., 00 Civ. 9475, 2002 WL 244597 (S.D.N.Y. Feb. 20, 2002).

claimants who are consumers, it also closes the door to businesses. Secondly, and maybe more importantly, the injured people have to be passive, because they only register their claim, but cannot take part in the lawsuit."

And, as with the KapMuG, another major issue is that the outcome of the proceedings can only be a declaratory judgment and it takes a long time for individuals to obtain compensation. This can take up to 20 years due to possibility to appeal both the declaratory judgment in the Model Declaratory Action and the individual follow-on actions filed by consumers all the way to the Federal Court of Justice.

Andreas concludes that "the instrument is ineffective. In preparatory documents, the government speculated that within one year around 350 different kinds of lawsuit would be brought under the new law. In reality, there have been only four lawsuits, two of which were immediately rejected due to inadmissibility. If the government is serious about providing claimants with the possibility to initiate collective actions in all areas of substantive law, there should be an effective procedural framework that allows you to run such cases."

Alternatives to the KapMuG and MFK are insufficient

We ask whether, in Andreas's view, there are any alternatives that do provide the possibility of some kind of collective redress. He is not very positive about these. "Of course one can think of alternative methods for bundling claims. You can, for example, assign claims to a claim vehicle, but that is difficult to set up." Another option he sees is to bundle multiple single claimants into one lawsuit, but these multi-party actions are subject to strict criteria and in his view these constructions are risky: "One must be aware that the court has the power to split up a multi-party lawsuit again, and actually does so in practice. This is thus not a free-of-risk situation for claimants, because there is a cap on lawyer's fees of around EUR 230,000 each for the first instance and a cap on court fees of around EUR 330,000 in the first instance if a claim exceeds EUR 30 million. So bringing one bundled claim, risking the maximum costs award, can turn into risking the maximum costs award for each individual claim, if the claimed damages are big."

Europe will not bring any change

The foreseen European developments will not bring any improvement, according to Andreas. "I fear that the current government – if it stays in place – will not implement the European New Deal for Consumers sufficiently. The government will argue that Germany does not need to take any action to implement the European directive, because the KapMuG and the MFK already suffice, leaving many claimants empty-handed."

"I fear that the current government – if it stays in place – will not implement the European New Deal for Consumers sufficiently."

Andreas is also very sceptical of the possibilities of having a settlement declared binding in a European court on an opt-out basis: "Maybe this will work on paper, but not in reality. German judges will never accept such a settlement, not even from a Dutch court."

Third party funding not commonly accepted

Andreas reacts enthusiastically to the question of how third party funding is assessed in Germany. He explains that the current status of third party funding is somewhat unclear but that allowing it would provide many parties with access to justice "Germany has a long history of funding firms. In 1998, when a new stock market was introduced, one of the first firms registered (Foris) was a funding firm. Nevertheless, there seems to be a tendency to dislike them." He points to a recent case in which a consumer association filed an action for skimming of profits against a telecommunications company.[2] The action of the consumer association was funded by German funding firm Foris. Andreas explains: "It was agreed beforehand that Foris would receive around 20% of the award. Initially, the courts did not find this funding construction problematic, but in the third instance, it ruled that it was 'against good morals' that an action for skimming of profits is partially brought on the basis of the financial interest of the litigation funder. The court therefore declared the action inadmissible and dismissed the lawsuit. This creates a huge problem, because claimants have a big issue accessing justice. Who will pay for them instead?" Andreas feels that not allowing third party

2 German Supreme Court, 13 September 2018, File No. I ZR 26/16 (Prozessfinanzierer I); German Supreme Court, 9 May 2019, File No. I ZR 205/17 (Prozessfinanzierer II).

funding is unjust. "Not allowing funding firms to step in cripples collective actions." The solution he sees "to ease the nerves of the government" is regulating funding firms.

Germany should introduce discovery

Andreas's enthusiasm increases when we start discussing the US system of class actions, although he is not necessarily a fan of punitive damages. His enthusiasm is more linked to the system of discovery as he tells us "the success factor of the US system is dependent on discovery. Although not specifically a class action instrument, it is the answer for finding the truth." This contrasts with Germany where according to him the possibilities for requesting information from the other party are very limited. He adds: "In reality, there is no discovery." The introduction of a discovery system in Germany would not lead to abuse, according to Andreas, since the party that loses the litigation compensates the winning party for its litigation costs under a statutory fee schedule, and bears the court fees.[3]

Landmark case

Considering his enthusiasm and knowledge of the class action system in the United States, it is not surprising that Andreas first points to an American case when asked about landmark cases. He believes that the *Morrison* decision[4] in 2010 was a real game changer worldwide: "From then on, non-US claimants were forced to sue in countries other than the US."

> The *Morrison* case concerned the purchase of HomeSide Lending – a company servicing mortgages – by the National Australia Bank in 1998. Since National Australia Bank was forced to write down USD 450 million, and later USD 1.75 billion in value from HomeSide's assets, its share price decreased. The claimants purchased those shares before the value inflation and sued HomeSide Lending for manipulating financial models that pushed up the alleged value of HomeSide Lending's services together with National Australia Bank for its awareness of the deception. Only Australian investors remained by the time the case reached the US Supreme Court. The US Supreme Court debated whether the fact that the alleged fraud occurred in the US meant that it should be subject to US securities law, or whether the fact that the alleged fraud related to Australian securities meant that US securities laws did not apply. The US Supreme Court ruled in favour of the defendants, finding that US securities laws did not apply. Therefore, foreign claimants do not have a cause of action under US securities laws to sue foreign and American defendants for misconduct relating to securities traded on foreign exchanges (also known as F-cubed claims).

Another landmark case that Andreas mentions is the *Shell* WCAM case.[5] Because it was a multi-jurisdictional case, it really showed the development in settlement proceedings.

> In Shell, investors sought compensation for damage incurred as a result of misrepresentations made by Shell concerning its oil and gas reserves. In the US, a class settlement was reached for shareholders who bought shares on a US stock exchange between 8 April 1999 and 18 March 2004 or were residing in the US at the time of the purchase. Shell also reached a settlement with non-US investors who purchased their shares on a non-US stock exchange and agreed to pay more than USD 350 million. Shell sought to have this settlement declared binding using WCAM. The Amsterdam Court of Appeal assumed jurisdiction and declared the settlement binding on all members of the class on an opt-out basis, even though the majority were residing outside of the Netherlands and a securities class action was pending in the US.

3 Practical Law, Class/collective actions in Germany: overview, https://uk.practicallaw.thomsonreuters.com/9-618-1132?transitionType=Default&contextData=%28sc.Default%29 (accessed on 15 July 2019).

4 No. 08–1191, *Morrison v National Australia Bank Ltd.*, 561 U.S. 247 (2010) (24 June 2010).

5 Amsterdam Court of Appeal 29 May 2009, ECLI:NL:GHAMS:2009:BI5744.

Of course, Andreas also highlights the importance of the *Volkswagen* 'Dieselgate' case. "That case encompasses all aspects that are currently the main areas for claimants in the US: cartel, consumer claims, securities, and human rights claims." These are also the areas where Andreas expects claims will increase over the years. He believes the *Volkswagen* case can serve as an example.

Predictions for the future

We ask Andreas and Marc to tell us in one sentence what they believe will be the biggest development in the future of class actions. They reply: "We would like to see an EU class action law aimed at providing compensation that is based on an opt-out system that allows discovery and third party funding."

FRANCE

In France, there are three main categories of collective actions: class actions (*actions de groupe*), actions by representative bodies (*actions en représentation conjointe*) and actions in the collective interest of consumers (actions dans l'intérêt collectif des consommateurs). *Actions de groupe* most resemble class actions, because the proceedings are brought on behalf of an unnamed group of claimants (although they must opt in).

Actions de groupe were introduced by the 'Loi Hamon[1]' which came into force on 1 October 2014. This law allowed accredited consumer associations to start class actions against a professional party for consumer and competition law breaches. The claimants could seek pecuniary damages or an end to the breach. In 2016, the scope was extended to health, discrimination, the environment and personal data protection[2]. The procedural rules are laid down in different codes that relate to these specific areas of law. A common framework was also introduced in 2016, but the scope of class actions could only be extended by a special law. Class actions can be initiated by accredited organisations based on at least two individual and similar cases. It is possible to seek injunctive relief to stop illicit behaviour, annul a provision in the general terms and conditions and claim damages. The proceedings are divided in three phases: first, the admissibility of the action is assessed. Second, the court decides on the liability of the defendant and third, the court determines the amount of damages. Punitive damages cannot be awarded. Consumers can receive damages by opting-in after the final judgment has been made public. There are two different ways to proceed. Consumers can ask the company directly for damages or they can go through an accredited association.

Actions en representation conjointe were introduced in 1992[3] to deal with disputes involving a larger numbers of claimants who were in similar situations and had suffered from the same misconduct by a professional party. Initially, they were

1 L n°2014-344/17 mars 2014.
2 L n°2016-41/27 janvier 2016, L n°2016-1547/18 novembre 2016.
3 L n°92-60/18 janvier 1992.

only an option for consumer protection, but the scope was extended to other sectors including the medical sector, financial services and investor protection, real estate and the environment. These proceedings can only be initiated by accredited associations. The action has a limited scope. Claimants can seek injunctive relief to put an end to an unlawful breach that causes damage, annul a provision in the general terms and conditions and claim damages. It is based on an opt-in system: each claimant must give a written mandate to the representative body to begin the action.

Actions dans l'intérêt collectif des consommateurs were introduced in 1973[4]. Certified consumer associations can initiate actions for the benefit of all consumers. In this case, the damages are allocated to the consumer association to compensate damage to the collective interest of consumers.

4 L n°73-1193/27 décembre 1973.

Class actions | 'Actions de groupe'

Scope	Consumer issues (incl. competition); health; discrimination; environment; privacy and data protection
Access granted to	Accredited organisations
Opt-in or opt-out	Opt-in
Declaratory relief or damages	Damages
Frequently used	No
Regulatory framework	Specific codes e.g. Consumer Code, Environmental Code
Alternatives used in practice	*Actions en représentation conjointe*, *actions dans l'intérêt collectif des consommateurs*; digital platforms to bundle claims

Class settlements

Binding class members after court approval	Yes, in class actions, often through mediation
Opt-in or opt-out	Both are possible
Regulatory framework	Specific codes e.g. Consumer Code, Public Heath Code

Third party funding

Regulated by law	No
Frequently used	No

Good to know

- To date, there has not been a single French class action that resulted in a judgment in favour of the claimants.
- Litigating by mandate, or via the assignment of claims, raises serious concerns from a French procedural point of view.

Business Perspective

The future of class actions in France from a business perspective

JOËLLE SIMON | BUSINESS PERSPECTIVE | Deputy Director General Legal, Ethics & Corporate Governance of MEDEF, the French Business Confederation

25 July 2019, interviewers: Elselique Hoogervorst and Giovana Presenti e Silva

Dr Joëlle Simon is the Deputy Director General Legal, Ethics & Corporate Governance of MEDEF (*Mouvement des entreprises de France*), which is the largest business confederation in France. She is in charge of legal affairs and corporate governance. MEDEF represents 173,000[1] SMEs in France. Joëlle started working at MEDEF in 1983 and has been involved in the development of class actions for more than 30 years. Joëlle spoke to us on the phone during a hectic week to share her insightful views on French class actions.

Settlements and ADR are preferred to class actions

Joëlle introduces us to her world by explaining MEDEF's position vis-à-vis class actions. "French companies want to take responsibility when they cause damage to consumers or other individuals. However, we do oppose the US-style class action. We think that individuals expect in that system that they would get their compensation quickly and at a low cost, whereas US-style class actions are in reality long, costly and complex. It is not only a question of legal proceedings but a question of choice of society: do we want to go towards a litigious society like in North America or in Australia? Our answer is clearly no because we know that claimants' law firms see Europe as a new business opportunity. So, we take a very pragmatic approach by actively supporting alternative dispute resolution and out of court settlements. ADR is a far better way to proceed, it is quick and cost efficient." The ADR mechanism used is mediation, because French law does not allow for consumer arbitration. Most mediations concern individual cases, but there are some collective mediations too. MEDEF has been and still is very active in the development of mediation offers by professionals.

Regarding the scope of existing class actions, French class actions are brought in the interests of consumers or other individuals. Joëlle notes: "As MEDEF, we oppose the use of class actions between companies, because we wouldn't want our members to be part of a class action against each other."

Toothless class action mechanisms

To prepare for the interview, Joëlle made an overview of French class actions through the years. This gives a valuable insight into the dynamics of law making. The first proposal to regulate French class actions dates from 1981. It took until 1992 to introduce the first collective action mechanism in French law: the action by representative bodies (*action en représentation conjointe*). Joëlle explains that these proceedings turned out to be rather toothless and not many actions have been initiated. She is not unhappy about that: "This is a result of the fact that this action can only be introduced by a limited number of accredited associations. Also, advertising for claims is prohibited in France, so people cannot be actively approached to join proceedings by radio, television or personalised letters. And, what is a very important point to us, they are based on an opt-in system." There is yet another practical reason why this type of collective action has not taken off, Joëlle says: "This also has to do with the fear that accredited associations have of being held liable as agents by consumers who are disappointed by the judgment."

Joëlle continues by elaborating on the recently introduced class action mechanism, the *action de groupe*. After many years of discussion, it was finally introduced in 2014. These proceedings have not taken off either for the moment, but for different reasons. "The prime minister, who was in charge of this file at the time, wanted the class action rules

1 https://www.medef.com/uploads/media/default/0009/03/10779-plaquette-medef-2019-fr.pdf

to be introduced in the Code of Civil Proceedings. We preferred that they would be laid down in the Consumer Code, because that would reduce the scope." Initially, the scope of class actions was limited to consumer cases and competition litigation cases. "However, they were quite quickly extended to other areas of law. Too quickly from our point of view. We were particularly surprised by the extension to health cases. The parliament and consumer organisations agreed with us that class actions should be excluded from the field of personal injuries. We believe that if you suffer personal injuries, your case is unique and not fit to be dealt with in collective actions." The 2014 class actions were also extended to discrimination, labour, environment and data protection. "We were not very happy about the extension to data protection either," Joëlle remarks. "The GDPR mentions only the possibility to get an injunction to stop illicit behaviour. The French legislature however, decided to 'gold-plate' the regulation and extend its scope to the possibility of getting damages."

Joëlle notes: "The limited number of class actions introduced since then confirms our belief that class actions are not the right answer to real questions." Joëlle mentions two other interesting facts about the 2014 class action law. "Accredited associations are not allowed to generate publicity around class actions before the judgment is final, but we know perfectly well that all the associations do so anyways. We cannot do anything to stop that." Also, it is possible to start a class action based on only two individual cases. Joëlle elaborates: "We tried to propose a requirement that a substantial number of cases must be presented, but unfortunately without success."

No changes expected on a national level

Although the 2014 class action law started with the desire to enable class actions for consumers, the chances of having a class action in areas other than consumer law are in theory bigger. This is due to the demanding requirements for being an accredited consumer association. There are only 15 accredited consumer associations. For environmental and discrimination issues, there are many more. Environmental organisations can be accredited at a national level or a territorial level. "Moreover," Joëlle continues, "consumer organisations do not want to bring a class action if the individual damages are less than EUR 100 because of the costs. So that means that the objective of this legislation, which was to allow consumers to be compensated for very small claims, is not accomplished." At the moment, consumer organisations do not seem satisfied with the class action system in place. "The largest consumer organisation brought just one class action to court, and this was only to show how dysfunctional the system is. It is too complicated from their point of view. Consumer organisations would like to amend the system by introducing opt-out proceedings, but we like to stick to the opt-in principle." Under the French constitution, a citizen cannot be part of a court case without his or her express consent.

"At the moment, consumer organisations do not seem satisfied with the class action system in place."

Approximately ten consumer cases have been brought so far. One was dismissed, because the situation was not covered by the law. The legislature then quickly amended the law. Two cases were settled, and the other cases are still pending because the procedures take a long time. Joëlle is not aware of any pending environmental cases, but there is a pending discrimination case in which the CGT (a left-wing trade union) is involved.[2] The court has to decide whether CGT is admissible in its claim, because CGT did not confer with the company before going to court. This is mandatory under a recent provision that was introduced by the minister of justice. The claimant seeking to initiate a class action must first warn the company of the upcoming class action and give the company the opportunity to settle out of court or to prepare its defence. Recently, a data protection class action was brought against Google.

Currently, it is not possible to initiate securities class actions in France. Joëlle hopes that it will stay this way, because there is a lot of money involved for the claimants' lawyers and that could lead to actions motivated by profit. Another development that does not seem to be gaining ground is proceeding by assignment, which is a common way of dealing with cartel damages claims in, for example, the Netherlands. "Some companies have been approached to test the waters, but they did not go along with this kind of proceedings."

2 *CGT v Safran Aircraft Engine*: CGT claims that Safran discriminated employees in regard to their union activities.

For the moment, Joëlle does not foresee major developments on a national level. "Although it is easier to team up via the internet these days, this has not led to a significant increase in French class actions yet. There are some law firms that have tried, but some did not respect the law and the information they put on their website often appeared to be misleading for consumers, so that didn't go well. I also do not see willingness from the current government to further develop class actions. This could change quickly though, especially if a minister dedicated to consumer affairs is appointed. French ministers love to make laws that have their name on it," Joëlle laughs.

EU New Deal proposal might lead to abuse

However, Joëlle tells us that she is worried about another development coming from the EU. "Our main concern today is the EU proposal for the class action directive."[3] She thinks that it is a bad proposal as it will let the Member States keep their own system, it will not harmonise the national mechanisms and it will not properly address questions raised by transnational cases. "It will give a lot of power to qualified entities, to which we are strongly opposed. We are afraid that some entities will get accreditation in Member States that have less demanding standing requirements than countries like Germany, France or the Netherlands. Once accredited, they can introduce class actions in other Member States, like France, which could introduce more profit-motivated actions into our system."

She is also opposed to this proposal because it does not regulate litigation funding and especially third party litigation funding, it does not have a 'loser pays all' rule, and the prohibition on punitive damages is only mentioned in the considerations, not in the proposal itself. "The 'loser pays all' rule is key for us, as it prevents abuse. We do welcome a European solution, but we do not agree with this text."

"The 'loser pays all' rule is key for us, as it prevents abuse."

3 COM(2018) 184: A proposal on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC ('Representative Actions Proposal').

When asked, Joëlle confirms that she would welcome a European solution to have cross-border settlements recognised throughout the EU. But problems could arise with recognising settlements on an opt-out basis in Member States where opt-out mechanisms might be found to be unconstitutional, such as Germany and France. "According to at least two surveys regarding the conflict of laws ordered by the European Commission and the EU Parliament, it is clear that we need specific rules on class actions, because it does not work to just apply Brussels I in those kind of proceedings."[4]

Third party funding is rare

Joëlle's concern about the New Deal proposal can also be linked to the fact that in France, third party funding and abuse of class actions seem to be practically non-existent. "The topic is being discussed because of the potential conflict of interests. Class actions should be conducted in the interest of consumers and individuals, not with a financial objective. But of course we know that even in France, there are settlements that mainly serve to benefit the claimant lawyer. However, I think, but maybe I am wrong, that it is not in the French culture to act this way. I also need to mention: we have quite traditional judges in France. They are not very keen to try things from another law system that they are not familiar with. My guess is that it will take some time before the French courts will embrace class actions. In any case, what we would like to avoid are US-style class actions. French companies do not refuse their liability, but they do not want to give money to the wrong pockets either."

Other types of financing for class or collective actions are uncommon in France. Joëlle strongly opposes using public funds: "Another way of financing class actions is by using public funds, like in Quebec. But we think that is a vicious system, because money is taken away from the compensation that consumers are entitled to, and then used to finance other cases." Contingency fees are not allowed in France, although a lawyer can agree to success fees on top of modest initial fees.

4 E.g. 'Collective redress in the Member States of the European Union', a study requested by the JURI committee European Parliament, October 2018, 'Presidency memorandum on the relationship between the proposed directive on Representative Actions and Private International Law,' Working paper Council of the European Union – General Secretary, July 2019.

Landmark case

When asked what she considers to be the most important class action, Joëlle mentions the largest workplace bias class action in the US, *Wal-mart*.[5] A French landmark case is hard to find. "Maybe," she adds, "I should mention that most French class actions are about social housing."

> The *Wal-mart* case is the largest US gender discrimination class action, brought on behalf of 1.5 million female Walmart employees. They claimed they were passed over for promotions and were paid less than men. Although the District Court and the Court of Appeal (the Ninth Circuit) certified the class, the US Supreme Court ruled in favour of the defendant. It found that the class could not be certified because the commonality requirement was not met. In February 2019, a new gender discrimination class action was initiated against Walmart.[6]

Predictions for the future

When we ask what she considers the most important development in the future of class actions in France, Joëlle answers: "It will depend on the future of the EU directive proposal."

5 *WalMart Stores, Inc. v. Dukes, et al.*, 564, U.S. 338 (2011).
6 Cf. https://www.theguardian.com/us-news/2019/feb/18/walmart-gender-discrimination-supreme-court.

The future of class actions in France from a defence perspective

DIMITRI DIMITROV | DEFENCE LAWYER | Partner at Gide

30 April 2019, interviewers: Eline Groen and Isabella Wijnberg

As a partner in Gide's Competition & International Trade practice group, Dimitri Dimitrov has extensive experience in both litigation and advice in all fields of economic law, such as competition and distribution law, defective product liability and consumers' protection. He has developed a particular expertise in healthcare, pharmaceuticals and life sciences. We spoke to Dimitri and Isabelle Chivoret at Gide's offices about recent developments and the future for class actions in France. This interview was conducted in English.

Major changes are not expected in France

From the outset, Dimitri emphasises that class actions are not yet frequently used in France. To date, only a limited number of class actions have been initiated[1]. Due to practical and procedural difficulties, it is not expected that the volume of collective actions will increase much in the near future. At this stage, major legislative changes are not expected in France although presently there are discussions on how to improve the regime. "To increase the number of collective actions," he explains, "a change in legislation would be necessary and, although there are some discussions amongst lawyers and legal professionals about the flaws of the current regime, there

1 Approximately 13 for consumers' protection, and 3 for other fields (medical products, discrimination etc.).

Defence Lawyer

are no immediate legislative projects." For Dimitri, there is no reason for French courts to treat collective actions involving foreign parties differently from any other civil case. The courts neither welcome nor oppose those actions.

A judgment can be obtained within a normal procedural timeframe. The amount of damages that can be awarded to consumers (only special damages can be awarded) is considered to be low compared to the damages awarded in other jurisdictions. For example, in contrast to the United States there are no punitive damages in France. "The relatively low level of damages was identified as one of the factors that explains the relatively limited number of class actions."

Class and collective actions are broadly publicised and the defendant company needs to carefully manage its communication in this regard. It is important to properly manage consumer claims at a very early stage. Dimitri comments that "I am aware of some individual cases where consumers threaten that they will post something online and file a complaint with an accredited association and/ or the French authorities in charge of consumers' protection."

Most class settlements remain confidential

In France, it is possible to settle at any time during the legal proceedings. However, Dimitri has seen that in practice, class settlements are generally reached at a very early stage in the proceedings. A court can also propose a mediation, with the court acting as an intermediary by appointing an independent mediator. Dimitri does not expect this to change much.

A settlement agreement reached in a class action is supposed to be confidential. However, when a settlement for damages is reached during a class action, the court can also indicate if this should be publicised so that other consumers can opt in.

In the case of 'collective actions ' on behalf of their members, individual private settlements are in practice more difficult since each underlying party needs to reach a settlement individually. In Dimitri's experience, this is not a practical system, especially from a defendant's perspective. There can always be individuals who do not want to settle and continue the court proceedings.

Third party funding is not common yet

Asked about the role of third party funding in France, Dimitri replies that external funding is not commonly used yet. In France, lawyers are not allowed to make 'no win, no fee' arrangements. They can agree success fees, but not as the main part of the fee.

Litigating by mandate, or via the assignment of claims, raises serious concerns from a French procedural point of view. This may explain why third party funding has not developed in France, although there are discussions in this regard, namely in the field of private enforcement actions following a cartel.

Claim vehicles and third party funders are thus not very active in the French market yet. Dimitri has seen some parties exploring whether France would be an interesting market, but there are still many procedural difficulties to be addressed.

As mentioned above, class actions can only be launched by accredited associations, which are non-profit organisations acting on behalf of consumers. These associations are not driven by the desire for profit, so the proceedings they take are not attractive to funders.

The fact that the potential damages are relatively low might also explain why the class action system is not, as far as Dimitri knows, being abused. There are probably enough safeguards to prevent frivolous actions.

French courts do not look to other jurisdictions

It is possible that French courts look to other European jurisdictions for guidance, like Italy and Germany. However, the collective redress system was only recently introduced in those jurisdictions, while France already has some experience.

The US is perceived as a cautionary tale. Some abuses in the US class action system were pointed out in 2016 when implementing the Hamon law. "Obviously, US class

Defence Lawyer

actions may lead to initiating collective actions in France but these will have to be specifically tailored to the French situation as the regime is very different."

EU 'New Deal'

Knowing that other jurisdictions do not have an impact on the French class action, what about the proposed EU 'New Deal' directive? Dimitri explains that most aspects of the proposal are close to the French system and therefore will improve the regime to some extent regarding cross-border collective actions. Dimitri points out that in practice parties will need to follow the procedural rules of each of the EU jurisdictions.

Landmark case

We ask Dimitri what he thinks has been the most important class action in France to date. He finds collective actions in the medical sector are a sensitive topic for the public. "For example, the *Depakine* case was broadly publicised."

In the *Depakine* case, some women who took an anti-epileptic drug during their pregnancy made by a French pharmaceutical company claim that this drug caused congenital malformations and neurological disorders in their babies. A class action was launched in 2017 by a French association (Apesac) on behalf of patients. A decision was rendered on 27 November 2017 following a procedural hearing by the pre-trial judge (*juge de la mise en état*). The judge rejected the first claims brought by the association, i.e. (i) the payment by the defendant company of a provision of EUR 400 million in the event that it would be ordered to compensate patients and of a provision of EUR 667,350 for legal fees, and (ii) the request for documents on the risks of the drug held by the company.[2]

2 This summary was kindly provided to us by Dimitri. Please see for more information: https://www.lemonde.fr/securite-sanitaire/article/2017/11/29/les-victimes-de-la-depakine-deboutes-de-certaines-de-leurs-demandes-financieres_5222345_1655380.html.

Predictions for the future

We finish the interview by asking Dimitri what he thinks will be the most important development in the future of class actions in France. He replies: "In France, there is a cautious trend that the number of collective redress procedures increases. Since the beginning, there were concerns to prevent ending up in abuses."

"In France, there is a cautious trend that the number of collective redress procedures increases."

Claimants' Lawyer

The future of class actions in France from a claimant perspective

CHRISTOPHE LÈGUEVAQUES | CLAIMANTS' LAWYER |
Principal Partner at Christophe Lèguevaques

27 June 2019, interviewers: Nienke Ebbs and Isabella Wijnberg

Christophe Lèguevaques is a famous claimants' lawyer in France who founded his own law firm. Christophe does not shy away from unconventional methods for defending consumer rights, particularly in product liability cases, privacy cases and cases against financial institutions. Christophe was the first to launch a digital platform (MySMARTcab) where consumers can subscribe to join certain legal actions as an alternative to the official 'action collective'. MySMARTcab connects individual claimants with lawyers and enables consumers to access their case files directly. The interview was held in French. The quotes mentioned below are translations of the French conversation.

The French class action system is not designed to function properly

From the very beginning of the interview, one thing is clear: Christophe thinks that the current French class action system is defective. In his words "it is not designed to work". The main problem he sees in class actions is that claimants cannot claim monetary compensation for '*prejudice moral*', i.e. for the mental distress of knowing that they will probably become ill in the future[1]. The proceedings are also unnecessarily complicated.

1 The French concept of '*prejudice moral*' cannot be translated into English since it is more limited than the common law concept of non-pecuniary damages.

First, there is a procedure to assess if the class action is admissible and the defendant is liable. This takes a lot of time because companies will usually fight the claim up to the French Supreme Court. Then each injured party begins individual proceedings to claim damages. The individuals have to show a causal link between the damage and the unlawful act. If they do, they are awarded damages. Again, this can go to the French Supreme Court. Another problem is that class actions are limited to certain topics. "Class actions in France take too much time, are costly and very complicated." According to Christophe, the reason for this is that the French class action system has been heavily influenced by lobbyists from large companies. He therefore does not expect the system to be much used in practice.

'Prejudice moral' can be claimed in bundled claims

However, according to Christophe, "there is one feature of the current system dealing with bundled claims in France that works very well and should even be expanded to other types of proceedings: the possibility to claim damages based on '*prejudice moral*' damages." This type of damages cannot be claimed in regular civil proceedings, nor can they be claimed in class actions, but can be claimed in proceedings bundling a large number of individual claims. "For example, all workers who run a certain risk of getting ill because of their work environment and fear this risk can ask for damages based on '*prejudice moral*', even if this risk has not materialised." Christophe continues: "The damages claims by the workers who fear this same risk can be decided collectively in one proceeding bundling individual claims. The damages when the illness actually occurs can only be assessed on an individual basis and with the help of an expert." Collectively claiming damages based on '*prejudice moral*' is a way for Christophe's clients to receive damages quickly and then fund individual follow-on proceedings. However, Christophe explains that "this is the only 'collective' feature of the French law that actually works."

MySMARTcab – an alternative

Since Christophe does not believe that the class action regime in France is in the consumers' interest, he developed a mechanism: the MySMARTcab platform. However, creating this platform proved to be rather difficult. First of all, it is not possible to

assign a claim. There is a French legal maxim '*nul ne plaide par procureur*' – nobody is allowed to plead his or her case through an intermediary. This makes it difficult to collect a large number of claims into a single claim vehicle. Second, lawyers were not allowed to use advertising until 2015, which made it impossible to notify individual consumers who were harmed to let them know they had a way to claim damages. This has changed, although it is still not allowed to 'ambulance chase', meaning lawyers cannot try to persuade injured parties to bring a legal action. However, Christophe managed to create MySMARTcab within the boundaries of the law. The platform is accessible via a website. It brings consumers in direct contact with a member of the attached group of lawyers working on a certain number of cases that are pre-selected by Christophe and his team. It also gives the consumer the possibility to notify Christophe and his team if there is a case that is suitable for collective redress. Consumer associations are not involved because they have no added value. The allocated lawyer then contacts potential participants through the platform and informs them about the conditions for participation such as the costs, risks and estimated duration of the procedure. The files are managed online and participants have access to their files at all times. According to Christophe, this increases the equality of arms and "makes class actions much more democratic". "This platform," he continues, "uses the normal procedural regime in which everybody has to start their own proceedings, but transforms them into a form of collective action with all the benefits that come with a larger scale." The big difference between the class action system and MySMARTcab is that the consumer stays owner of the action and is not dependent on the decision of a consumer association or a majority. "Basically, it is a form of cost sharing between the various consumers."

French companies are not willing to settle

As a rule of thumb, companies in France are not willing to settle, even if they have received an adverse declaratory judgment. Christophe states: "In France, companies will need to fear collective actions more before they will start considering a settlement." In his view, the system would need the US discovery system, allowing claimants to get an insight into the company's documents, as well as the US system of punitive damages that would make companies fear litigation and force them into settlement. The current French procedural law allowing a party to request certain very specific documents by way of disclosure is insufficient "since you must practically have the document to be able to request it." This will not change in the near future, according to Christophe, due to the lack of political will to actually solve consumers' problems.

France versus Europe

Comparing France to other systems in Europe, Christophe indicates that the Netherlands is an important jurisdiction for class actions. "The *Urgenda* case against the Dutch government forcing it to increase their efforts to obtain the Paris climate agreement is a great example." For foreign claimants, the French system could be interesting because it is possible to claim damages based on '*prejudice moral*'. "But it would be even better if there is an EU class action, collecting all European claimants against all European defendants, although this is not likely to happen soon." However, it could be the next step of the MySMARTcab platform to work on a European level if lawyers and consumers from other countries are willing to participate. This would enable consumers to initiate claims in the most favourable jurisdiction. Maybe it would even enable them to settle large European issues on an international level within the national procedural frameworks.

Third party funding is not in the interests of consumers

When we speak about third party funders, Christophe points out that he does not believe third party funding to be in the interest of consumers. "How can I explain to my client that the procedure is free of charge, but they must pay 30% of the damages they receive to the third party funder?" Christophe is also critical of the motivations of funders, since they are not in the business for philanthropic reasons. He fears a conflict between the consumers' interests and those of the third party funders who want to

"How can I explain to my client that the procedure is free of charge, but they must pay 30% of the damages they receive to the third party funder?"

make a profit. He also thinks it will be difficult for a lawyer to give priority to the consumers' interests if the third party funder pays the bills. "However," Christophe concludes, "third party funding is not necessary when using MySMARTcab, since people pay less than they would pay for a mobile phone or for dinner in a fancy restaurant."

Predictions for the future

"It is inevitable that the number of class actions will increase, even if this will take some time and will likely be due to alternatives rather than actions based on the actual class action law," says Christophe. As a general trend, he foresees a continuation of class actions in medical matters and consumer cases. He also predicts an increase in procedures against the government, especially in environmental cases and cases dealing with malfunctioning public transport. According to Christophe, collective actions will prove their benefits in the coming years and only then will they be more accepted by the public.

BELGIUM

On 1 September 2014, Title 2 of Book XVII of the Belgian Code of Economic Law came into effect, making class actions possible in Belgium. Originally, class actions were limited to actions initiated to compensate consumers for certain damages. As of 1 June 2018, the scope of protected persons was extended to include small and medium businesses.

An authorised representative organisation can begin a class action on behalf of a group of consumers or small and medium enterprises. Class actions can be initiated when enterprises breach their contractual relationships or a long list of Belgian laws and EU regulations, including infringements of EU competition law.

The representative organisation can claim damages on behalf of the entire class of claimants for their collective damage. A class action is only admissible if the representative organisation is 'suitable' for this purpose. The class action must also be more effective than individual proceedings, given the size of the group, the existence of individual damage that can be sufficiently related to the collective damage and the complexity and legal efficiency of the class action. The Brussels Commercial Court and the Brussels Court of Appeal have exclusive jurisdiction. The court can choose an opt-in or an opt-out procedure on a case-by-case basis.

The procedure is in two stages. First, the court must decide on the admissibility of the claim. If the claim is admissible, there is a mandatory cooling-off period to allow the parties to seek an amicable settlement. If they cannot, the procedure continues on the merits of the case, but the parties may still settle the dispute at any time before the court issues a decision on the merits. Any settlement agreement must be endorsed by the court.

The court decision binds all members of the group on whose behalf the authorised representative has initiated the proceedings.

Class actions | *Rechtsvordering tot collectief herstel, Action en réparation collective*

Scope	Breach of contract or infringement of specific legislation regarding e.g. consumer issues, product liability, competition
Access granted to	Authorised representative organisation on behalf of consumers or SMEs
Opt-in or opt-out	Opt-in or opt-out (decided by the court); in the case of foreign claimants or physical or moral harm, opt-in is mandatory;
Declaratory relief or damages	Damages
Frequently used	No
Regulatory framework	Title 2 of Book XVII of the Belgian Code of Economic Law; Judicial Code
Alternatives used in practice	Actions for the protection of a collective interest; Joined actions of multiple claimants

Class settlements

Binding class members after court approval	Yes, in class actions or separate settlements
Opt-in or opt-out	No opt-in or opt-out moment after a settlement is approved in class actions; when approving separate settlements, the court choses an opt-in or opt-out regime
Regulatory framework	Title 2 of Book XVII of the Belgian Code of Economic Law

Third party funding

Regulated by law	No
Frequently used	No

Good to know

Currently, the Belgian consumer organisation Test Aankoop (*Test-Achats*) has a monopoly in the field of class actions. It has started eight out of the nine class actions initiated so far.

The future of class actions in Belgium from a defence perspective.

HERMAN DE BAUW | DEFENCE LAWYER | Partner at Eubelius

3 June 2019, interviewers: Parisa Jahan and Isabella Wijnberg

Herman De Bauw is a senior partner at Eubelius, a Belgian law firm located in Brussels. Herman is specialised in the field of commercial and market practices, consumer rights, distribution law and competition law. Earlier this year, Herman successfully represented Belgium's leading telecommunication company, Proximus, in Belgium's first major class action lawsuit. This resulted in a decision on the merits brought before the court by the Belgian consumer organisation Test Aankoop. Proximus was accused of misleading commercial practices, aggressive commercial practices and contract violations against some 30,000 consumers. The Commercial Court of Brussels found the claim admissible but Proximus appealed the decision. On appeal, the Brussels Court of Appeal confirmed the admissibility of the claim, but declared it unfounded in all respects, and acquitted Proximus. We hopped on a train in Amsterdam to meet Herman in his office in Brussels to hear what he thinks the future of class actions in Belgium looks like. The interview was conducted in Dutch and translated into English.

Changes in the system and an increase in cases are unlikely

According to Herman, there is only one consumer organisation that really counts in Belgium: Test Aankoop. "Since Test Aankoop is in practice a monopolist in the field of

class actions in Belgium and no one will object to this, and as the likelihood of a class action on behalf of a group of small and medium enterprises seems rather small, I do not foresee major changes in the number of class actions in Belgium in the near future."

He continues: "In any event, I believe that legislative reform will only take place after more class actions have been brought before the courts. At this time, there have been only a handful of cases, and some of them have been settled without a court decision. Consequently, the experiences are too limited to see on what points things should be changed or improved." Whether the number of class action cases increases will largely depend on what Test Aankoop does. Considering their limited resources and an apparent lack of appetite for too many cases, the number of class actions in Belgium will probably remain relatively low for the next couple of years.

Almost non-existent threshold for admissibility

When we ask Herman whether Test Aankoop or other representative organisations authorised to introduce a class action claim would have any incentive to lower the requirements for admissibility, he laughs and replies "the threshold for admissibility of a class action claim can hardly be any lower than it is now." On the question of whether it makes sense to abandon the admissibility phase, Herman points out that "this is likely to simplify the procedure, but under the current rules the two-stage procedure is necessary as it is in the first phase that the court will decide whether the opt-in or opt-out regime will apply."

Class actions as a marketing tool

Herman explains that he believes that the reason why Test Aankoop is currently the only organisation initiating class actions in Belgium is a practical one. "Other organisations are too small, lacking logistical and financial resources to start a complex and expensive legal case, the outcome of which is usually uncertain."

On the other hand, for a consumer organisation, a class action case is an opportunity to put itself in the picture and to justify its presence on the market. Herman points out that starting a class action is a serious financial undertaking, but also a powerful marketing tool. "The business model of Test Aankoop is under pressure. Test Aankoop has been around for over 60 years, and for a very long time it was the only source for consumers to get comparative information on competing products. However, since comparative advertising became legal, but especially since the internet revolution, consumers no longer need Test Aankoop to compare products. They have Google and other search engines instead." And this information is free, while most of the services provided by Test Aankoop require paid membership. Consequently, a class action may be an interesting tool to draw attention to a consumer organisation's services, and to confirm its necessity as a protector of consumer interests. Herman thinks that the marketing element is one of the reasons why Test Aankoop only challenges well-known enterprises, like Thomas Cook, Proximus, Volkswagen and Facebook. "Taking on a case against such a company is an attractive marketing tool. Test Aankoop is extremely good at public relations and never fails to get extensive press coverage when it starts a class action suit." These are cases where a consumer organisation may score points in the public opinion, at least if it wins. "The appetite to inform the media when such organisation loses the case is, understandably, much smaller," Herman smiles.

Foreign individuals in a Belgian class action

The group of consumers on whose behalf a class action suit is initiated may include both consumers residing in Belgium and consumers residing abroad. "But the latter must always 'opt in', i.e., expressly ask to be member of the group. Consumers residing in Belgium do not need to opt in, unless in the admissibility phase the court decides in favour of an opt-in regime."

No alternative methods

Herman indicates that under Belgian law, following the French saying '*nul ne plaide par procureur*' (nobody pleads through an intermediary), it is not possible to represent a party through mandate or power of attorney. So, there are no alternative routes for a class action if the consumer is not willing to become a claimant in a court proceeding. This system is very different to the Dutch one.

US abuse not possible in Belgium

The class action legislation in Belgium is a political compromise that takes into account a very delicate balance of interests. It was introduced under strict conditions, including guarantees that an authorised representative cannot gain financial benefit from a class action suit. At the most, if during the proceedings the parties reach a settlement, this settlement can provide that the other party pay the proven costs incurred by the representative in the proceedings. In addition, professional regulations prevent situations where lawyers representing an authorised representative could charge excessive fees based on the amount awarded by the court which, in a class action case, could be substantial. That is why Herman states "as far as class action cases are concerned, we will not see any American excesses in Belgium."

Consumers pay the price for consumer protection

Herman believes that "we should not overprotect consumers." He points to the example of the legal warranties for consumer goods,[1] where there is some demand for an extension of these warranties. "We should not forget that consumer protection also has a price tag for the consumer." Any costs for the manufacturer are passed on in their prices. In the end, consumers pay the higher price for more protection. On the example of consumer warranties: "We have to ask ourselves, does the consumer want lower prices and less warranty protection, or does he want higher prices and more warranty protection. Or do we want to leave it up to the market to decide?"

"We should not overprotect consumers."

The New Deal is not part of the zeitgeist

When asked about the possible implications of the EU New Deal, Herman states: "I am somewhat sceptical about whether this is the right moment. Considering that the political climate in many European countries is not necessarily in favour of the EU, is this a good time to have more EU law and less powers for the Member States? The zeitgeist may not seem ready for it now and maybe the EU should first try to improve what it already has."

1 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Landmark case

Herman considers the *Proximus* case to be the most significant class action judgment in Belgium so far. It is the only case that reached the level of appeal and in which a judgment on the merits was issued. In addition, the Brussels Court of Appeal addressed a number of legal issues for which there were no legal precedents.

Proximus wished to replace an old model of its decoder for its television broadcasting services because they were no longer compatible with new technologies and could no longer be supported. At a certain date in future, the old model would simply no longer allow the customer to use the Proximus television services. Those customers who were still renting the old model received a new model from Proximus, for the same rental fee. Proximus offered customers who had previously purchased the decoder the opportunity to rent a new decoder, with a period of one year during which no rent was charged. Test Aankoop considered the terms under which Proximus had made the offer to constitute a misleading and aggressive commercial practice, and a violation of Proximus's contractual obligations. On 30 January 2019, the Brussels Court of Appeal dismissed all claims.

One of the reasons why this case is noteworthy is because the Brussels Court of Appeal decided in favour of an opt-in proceeding, reversing the judgment of the court of first instance on this point which had decided in favour of an opt-out proceeding. Herman explains: "The conversion from opt out to opt in was justified in this case, as the central question was whether or not customers had been misled by Proximus. Under the circumstances, this was clearly a question to be answered at the level of each customer individually. In such case, an opt-in procedure makes more sense." An opt-out procedure requires all consumers who qualify as a group member to send a letter to the court stating that they do not wish to be a member of the group. In the *Proximus* case, few customers, if any at all, would have gone to the effort and expense to do that, simply to give up a free opportunity to receive financial compensation even if they did not feel that Proximus had acted wrongfully.

Another interesting point of the case is that the court ordered Test Aankoop to provide evidence of fault, damage and causal link in the relationship between Proximus and each individual customer, resulting in an increased burden of proof for Test Aankoop.

The judicial system needs more resources

For decades the Belgian government has neglected to provide the judicial system with the necessary resources to operate as it should. The handling of a class action is a substantial administrative burden for the court's secretariat, especially in the case of a procedure where the group consists of many thousands of consumers. Herman says: "The court secretariat seems currently not to be properly staffed and equipped to deal with the administrative burdens that come with a class action. Over the last few years, the Belgian Minister of Justice has made noteworthy efforts to improve and modernise the legal system, but there is still a long way to go to undo the shortcomings of the past."

Predictions for the future

We finish the interview by asking Herman to describe in one sentence what he thinks will be the most important development in the future of class actions. He replies: "I do not expect major changes to the rules or a substantial increase in the number of class action cases in the near future. Due to the limited number of cases since class actions became possible in Belgium, any future development in the legislation will largely depend on the experience that will be gained over the coming years."

The future of class actions in Europe from a claims aggregator's perspective

TILL SCHREIBER | CLAIMS AGGREGATOR AND MANAGER |
Managing Director at CDC Cartel Damage Claims

30 April 2019, interviewers: Zeki Korkmaz and Isabella Wijnberg

CDC Cartel Damage Claims is the European frontrunner in recovering antitrust damages by bundling claims on the basis of assignment. CDC brings them to court in one legal action, in its own name and at its own cost and risk. CDC also provides solutions for cartel members on how to reduce their risk exposure associated with antitrust claims. As managing director, Till is responsible for managing, funding and settling some of the largest private antitrust damages cases in Europe. We were invited to CDC's office in Brussels, where we were warmly welcomed by Till and Martin Seegers. Martin has been legal counsel at CDC for 12 years and is involved in all of CDC's cases across Europe. Till and Martin took the time to answer our questions after we made our introductions over coffee. This interview was conducted in English.

Increasing number of collective actions

From Till's introduction, it becomes clear that CDC's business is focused on dealing with cartel damages claims of companies. Those companies are generally not the end consumers of the products. This is a deliberate choice by CDC since "it is much more difficult to substantiate the dispersed and small damages suffered by end consumers than by a direct purchaser, because typically, end consumers are only indirectly linked to the companies involved in the cartel."

Till also notes that the companies that suffered damage as a result of the cartel are increasingly aware of their right to claim compensation. He expects that this will lead to a growing number of individual as well as collective actions. He points out several reasons for this awareness. "Companies see that others were successful in bringing damages claims, so they do not want to stay behind. As a result, we are not only looking for cases ourselves, but we see more and more companies that contact us." Furthermore, Till has noticed that the Antitrust Damages Directive1 has created the sense of awareness that cartel damages can be claimed throughout the EU, although the Netherlands is and will continue to be an important jurisdiction for bringing mass claims. "However, we do not necessarily have a choice of jurisdiction, in particular when national infringements are concerned, which can typically only be brought before national courts."

Besides a growing awareness, developments in legal IT will also lead to an increase in antitrust damages claims, Till says. "Typically, large companies are in a position to handle antitrust claims and litigation themselves. But mass litigation is regularly a solution for small or medium sized companies, which I think have difficulties claiming damages on their own. IT systems make it easier to bring such claims."

Opting-in by assignment is an effective solution

As Till mentioned that the claims aggregation model is increasingly known by companies, we wonder if this is the only model CDC uses for bundling claims. Till confirms that while CDC is looking at alternatives, this remains the preferred option for the moment. "We always take the full assignment, which is the best way to create synergies via outsourcing the overall process of quantifying damages and enforcing claims. I think it works very well in practice. Typically, we deal with a higher number of companies in a range from 10 to 50, but in recent cases the number has grown to several hundred. Moreover, the assignment model is accepted by the courts as well as the companies. They see it as a fair way of getting compensation." Till is convinced that the assignment model will be valuable in the future. "The assignment model is not only used in antitrust cases, but also, at least partially, in other cases, like shareholder actions and the 'Dieselgate' cases in Germany."

1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

By assigning their claims, the claimants make it clear that they want to join the action. Till prefers this to opt-out proceedings. "You must always have some sort of individual substantiation. Moreover, we understand that at least currently, we need to individualise the damage. To quantify the individual damage, you need a lot of data which you only get when bundling claims. Therefore, we prefer opting in to opting out. I also think that opting in is more in line with what the companies want. They can decide not to bring a claim against their supplier, but instead try to resolve the conflict in a different way for strategic reasons."

Although Till prefers an opt-in model, he imagines that in certain cases class actions on an opt-out basis might be more efficient: "End consumers might be more dependent on this kind of collective redress, because litigating against large companies is risky. There are also synergies for the defendants and the courts, as you don't want to have twenty million end consumers with small claims across Europe."

EU jurisdictions have a different approach to cross-border issues

Till's last remark brings us to the question of what he thinks of the different approaches to cross-border claims in EU jurisdictions. "There are still significant differences indeed," he says. "The Netherlands has always been rather open to foreign claims. That is different from, for example, Germany, where it is a challenge to bring a foreign claim to court. In the Netherlands, the judges are not afraid to – if necessary – apply foreign law. Dutch courts also seem to be much more pragmatic. I think that has very much to do with legal culture."

"The Netherlands has always been rather open to foreign claims."

According to Martin, the different approach might also cause problems when recognising opt-out class action judgments or opt-out class settlements from another EU jurisdiction, although this has not yet been tested. In Germany, for example, it is

considered a basic principle that a claim cannot be adjudicated without the claimant's knowledge and consent. However, the Dutch court has no problem with declaring cross-border settlements binding on all the class members that do not opt out ('WCAM settlements'). Till and Martin share their view on what is necessary to facilitate cross-border settlements: "What could be interesting is to have an overall European collective settlement. If you want to bring claims in 12 or 15 jurisdictions, you would like to be certain that you can end the proceedings by a court-approved settlement that is recognised throughout the EU. It would be best if you have the possibility to opt in."

Competition between jurisdictions

Given the fact that jurisdictions differ that much, we ask what Till believes to be the most relevant jurisdiction for class actions in about ten years' time. "This depends on how the competition between jurisdictions turns out," he answers. "For example, it remains to be seen how the New Deal proposal will be implemented. Also, everybody is curious to know how the new Dutch WAMCA legislation will be applied in practice. Furthermore, investing in an effective judicial system is key. Think of having interested judges who have the resources to deal with complex mass claims and court administrations investing in IT systems. For example, in the Netherlands and in Finland it is possible to submit data electronically, whereas in many parts of Germany you still have to provide paper. Another important factor is the court's approach to submitting documents in foreign languages. The Netherlands accepts not only documents in Dutch, but also in English, German and French. This is different in other countries. Lastly, the existence of specialised courts, such as the CAT in London and the Netherlands Commercial Court, makes a jurisdiction attractive as well."

Third party funders and abuse

Since CDC is partially funding cases with third party funders, we are curious to know what Till thinks about third party funders coming to continental Europe. "I doubt if their business plans are realistic," Till says. "I think there is a lot of money but a rather limited number of cases. This might lead to the situation where a lawyer who would normally advise against litigating brings a case in which a professional funder bears the risks of losing. That means an increase of litigation and potentially of bad cases."

"We're doing one case, but it has to be done well legally. Because if we lose, a big investment is gone."

These funders and CDC have different business models. Till explains: "Our idea is very much: we're doing one case, but it has to be done well legally. Because if we lose, a big investment is gone. The claims aggregation ensures that meritorious cases are pursued. Other funders have a different approach. They get a multiple of three to four times their investment so that even if they lose about half of their cases, they would still make profit because of the money they invest in all the other ones. So they have an incentive to have more cases in a broader portfolio. Take the class action *Mastercard* case in the UK for example. See the Mark interview (UK) for a description of this case. From what I read in the papers, that case seems mainly be driven by lawyers and their funders. I believe that the funding agreement holds that the funder either gets GBP 125 million or more than 20% of the unclaimed amount. The unclaimed amount could be very significant because even if there is a judgment, most of the funds will probably not be claimed by the affected class, as the individual amounts to which each of the 47 million end consumers are entitled to will be very low. I think judges should have a careful look at that."

Till and Martin have not come across abuse of the class action system in the jurisdictions that CDC has been active in (the Netherlands, Germany and Finland). "We negotiate a contract with companies that are also represented by lawyers and trade associations, so we think that for corporate claims the risk of abuse is not so big. Furthermore, in order to bring an action you really have to make a careful assessment of the risks and the budget. So bringing claims that have no substance is pretty much excluded in the claims assignment model, other opt-in models or individual claims. In opt-out situations, it may be different but we have no experience with that."

As an aside, Till shares his view on the funding of consumer organisations that in some class action systems must bring class actions as the qualified entity to do so: "They have

to handle class actions in a kind of pro bono way. I don't think that's realistic. At least in complex cases, you need access to money in order to pay for good lawyers and good economists. Otherwise, you will not be on the same level as the defendants."

Landmark case

When we ask Till and Martin what they consider to be a landmark case, they pick a case that CDC handled: the German *Cement Cartel* case[2]. Till and Martin explain that it paved the way for proceedings based on assignment and had a huge impact on other competition litigation cases.

A number of German cement manufacturers agreed on market allocation and quotas from the beginning of the 1990s until 2002, when the cartel was detected. The German competition authority imposed a fine of EUR 702 million, which was reduced to EUR 330 million on appeal. CDC acquired damages claims from several corporate customers of the cement manufacturers and brought them in its own name to the German court in 2005. After the Federal Court of Justice confirmed that CDC's action was admissible in 2009,[3] the Higher Regional Court of Düsseldorf dismissed the claim in 2015. It found the assignment of claims invalid in light of the cost risk shifted to CDC without documented financial means when concluding the claims purchase agreements. CDC therefore lodged a second action for damages in 2015. More than 20 corporate customers of cement producers assigned their claims amounting to more than EUR 138 million in damages. The Regional Court of Mannheim rejected the claim as time barred. In 2018, the Federal Court of Justice issued a judgment that clarified the legislation on limitation periods, thus overruling the interpretation of the Mannheim Court.[4] Following an appeal against the Mannheim Court's decision to the Higher Regional Court of Karlsruhe the case has been settled out-of-court in the meantime.

2 See https://www.carteldamageclaims.com/competition-law-damage-claims/cement-cartels.
3 BGH 7 April 2009, KZR 42/08.
4 BGH 12 June 2018, KZR 56/16.

Predictions for the future

We ask what Till and Martin believe will be the most important development in class actions. Many developments seem important, but they decide on this one. "Companies and natural persons will be more aware of their rights and more willing to pursue them. Access to information and information technology are the key elements to enable corporate victims and individuals to enforce their rights."

Claimants' Lawyer

The future of class actions in Belgium and Europe from a claimant perspective

BART VOLDERS | CLAIMANTS' LAWYER | Partner at Arcas Law

Interview 16 May 2019, interviewers: Eline Groen and Isabella Wijnberg

Bart Volders is a partner at Arcas Law. He holds a doctorate (PhD) in law and has taught private international law at the University of Antwerp. He has also lectured in Toulouse (France) and Bujumbura (Burundi). He regularly publishes in national and international legal journals. We visit Bart in the Arcas office in Edegem, a small town near Antwerp. This former factory is now the headquarters of Belgium's largest class actions, since Bart is counsel for Test Aankoop in the Belgian Dieselgate class action against the Volkswagen group of companies and Volkswagen distributor D'Ieteren. He is also representing Test Aankoop in its claim against Facebook. This interview was conducted in Dutch and translated into English.

Consumer organisations will unite to have more bargaining power

Bart begins by telling us that the way class actions are currently used in Belgium will change in the future. However, before elaborating on this, he explains the Belgian system: "We can distinguish three periods: the past, the present and the future. For a long time in the past, there was no law on class actions in Belgium. Nevertheless, there were all sorts of alternatives, such as litigating by proxy." In this scenario, proceedings were conducted by a representative entity based on a proxy given by the individual claimants. This alternative is still being used for cases that fall outside the scope of the current class action legislation. Bart gives an example: "We see this kind of 'alternative' collective action when a group of investors seeks compensation for the loss of shareholder value. I have the impression that this sort of activism is increasing, so I expect that alternatives to class actions will be more frequently used."

"As for the present," Bart continues, "class actions are possible, but initially, the scope of the class action legislation was limited to consumers, so only Test Aankoop, a consumer organisation, has brought class actions up until now. However, last year, the scope was expanded to non-consumers, such as small companies." So far, only seven class action proceedings have been initiated under the current class action legislation. These are mostly related to national matters involving a relatively limited group.[1] However, Test Aankoop has also started two 'larger' international cases, 'Dieselgate' and *Facebook* (the latter action is dealing with the infringement of privacy rights). Both cases are being brought against international companies and involve aspects of private international law. Bart observes that "what also makes these cases interesting is that parallel proceedings are being conducted in other jurisdictions dealing with similar issues/infringements. We see that consumer organisations are starting to work together. For example, Test Aankoop is the Belgian member of Euroconsumers, which is an international group of consumer organisations from Belgium, Italy, Spain, Portugal and Brazil. Euroconsumers coordinates the class action cases internationally by exchanging information and initiating simultaneous proceedings in several jurisdictions."

In the future, Bart expects that consumer and other representative group organisations from different countries will work together closely when bringing cross-border mass claims.

We need enforceability of EU settlements, not EU class actions

Bart's last observation leads to the question of whether he thinks the EU needs some kind of an 'EU class action' to facilitate cross-border mass claims. He is not convinced.

1 After the interview took place, on 11 July 2019, Test Aankoop started a class action against Ryanair on behalf of 40,000 passengers to claim compensation for having been affected by a four day strike of Ryanair's staff in Belgium. https://www.hln.be/nieuws/binnenland/test-aankoop-start-collectieve-rechtszaak-op-tegen-ryanair~a05c7aab/.

"This could be an important evolution in the interaction between the EU and the national class action systems, which enables consumers to take on larger cases. However, national class actions are now more efficient and I do not think a European system will come into effect anywhere soon (although the EU has been working on EU class actions for a long time now)."

Moreover, Bart sees an increasing competition between the different national systems, not only between the EU Member States, but also with the US, with group representatives seeking the best forum to lodge the class action claim. Jurisdictions like the Netherlands and Belgium already allow foreign claimants to join their class actions. The US also allows non-US citizens to join certain class actions in certain instances, like it was decided for example in the *Bernie Madoff* case.[2]

However, when it comes to recognising class action rulings and settlements in EU Member States, Bart believes that EU law should evolve and can make a difference. "If a class action settlement involves several jurisdictions, the defendants must have certainty that the settlement will be enforceable in all relevant jurisdictions. If not, they would likely not be prepared to settle. European legislation confirming that cross-border class action settlements are amenable to recognition and enforcement throughout the EU would therefore be valuable. And I believe this could be a relatively simple step for the European legislature to take."

Class actions will become more and more popular

When asked about future trends, Bart says he expects the number of collective actions in general to increase. He mentions an increase in cases against public authorities as a way of demanding accountability. As an example, he notes that there are already some environmental cases pending against the state in Belgium.

2 *Hill et al v. JPMorgan Chase & Co, U.S.* District Court, Southern District of New York, No. 11-07961 and Shapiro, *et al. v. JPMorgan Chase & Co., et al.*, U.S. District Court, Southern District of New York, No. 11-08331. The court approved the USD 218 million settlement with JPMorgan that was accused of playing a central role in Madoff's Ponzi scheme, being Madoff's bank for more than 20 years. The settlement was part of a USD 2.24 billion global resolution of Madoff-related matters by JPMorgan.

Bart also expects that the amount of personal injury mass claims will increase. "To date, personal injury claims are not often the subject of collective claims, but asbestos cases make an exception. Group actions were started and the legislature created a compensation fund for the victims of asbestos as an alternative to litigation."

Another trend Bart notices is that claimant organisations in the US and Europe inspire each other and that several US firms actively initiate class action or class action-styled proceedings in Europe, most likely backed by third party funding.[3]

Funding is problematic under the current regime

Moving on to the topic of third party funding, we want to know to what extent this funding is allowed in Belgium, given the strict admissibility requirements in class actions. Bart explains: "I believe that third party funding is not allowed in cases that fall under the scope of the current class action legislation, because the organisations that can qualify as 'group representatives' under the class action law cannot operate on a profit-making basis. This is different for the alternatives to class actions." Bart gives the example of CDC, which conducts cartel damages proceedings for large groups of potential claimants based on assignment of claims. The strict admissibility requirements in the class action legislation do not apply to that kind of organisation. Bart expects this may lead to competition between the organisations that fall under the class action scope and those that do not, which can benefit from third party funding.

In any event, Bart considers it key that representative organisations and third party funders have a financial buffer that allows them to make mistakes. "It is not realistic to presume that you can win all cases. Making mistakes means that you will lose money, so you must have some financial reserves. This buffer can, for example, be created by

3 Hausfeld was involved in the US settlement agreement that compensated Volkswagen car owners. In Germany, Hausfeld and MyRight, representing thousands of Volkswagen customers filed a compensation claim against Volkswagen. The District Court and the Court of Appeal in Braunschweig rejected the claim, LG Braunschweig 31 August 2017, 3 O 21/17 (055), OLG Braunschweig, 19 February 2019, 7 U 134/17. The Court of Appeal gave permission to appeal the decision at the Federal Supreme Court. Several other proceedings against Volkswagen have been brought, some of them in favour of the claimants, e.g. OLG Koblenz, 12 June 2019, 5 U 1318/18, OLG Karlsruhe, 18 July 2019, 17 U 160/18, OLG Braunschweig, 13 June 2019, 7 U 289/18.

Claimants' Lawyer

"We should avoid a situation where claim organisations are obliged to look at cases solely from a business perspective."

setting aside a percentage of the proceeds from another proceeding." Bart also sees a role for the legislature: "We should avoid a situation where claim organisations are obliged to look at cases solely from a business perspective, so that only the most successful ones will be brought to court. In my opinion, one of the goals of the class action law is that consumers have the possibility to start group actions. This possibility should not be theoretical or only apply to the most successful ones with large expected proceeds." For the moment, however, the Belgian legislature does not seem to want to facilitate this.

Financial incentives do not have to lead to abuse

Creating a financial buffer will not necessarily lead to abuse of class actions, according to Bart. "I strongly believe in the self-regulation of representative organisations and the important role that the court can play in this issue. The organisations that fall within the scope of the class action legislation often have a long-standing reputation (which is key for these organisations' future operations) and are under public scrutiny. I do not expect such organisations to derail. This might be different for organisations that fall outside the scope of the class action law. They are often less transparent, and they aim to make a profit." For now, there are no general legislative measures to prevent abuse.

Landmark case

Bart does not have to think long before telling us what he thinks is the most important class action in the past ten years. "The interim judgment in the the *Volkswagen* 'Dieselgate' case. It is an important legal decision, which clarifies a number of aspects of the class action legislation. Furthermore, it is the first case in which a group of consumer organisations from different countries, representing cross-border interests, had discussions with a large, professional company."[4]

4 Nederlandstalige rechtbank van eerste aanleg Brussel 18 December 2017, published in the Belgian Official Gazette (*Staatsblad*) 8 mei 2018, Numac: 2018706243 (*Test Aankoop v Volkswagen e.o.*).

The *Volkswagen* case is based on the allegation that Volkswagen intentionally programmed their diesel cars to limit emissions during laboratory tests. Other car brands are also involved in 'Dieselgate'. It led to worldwide regulatory and criminal investigation actions, various class actions from both car owners and shareholders and a class settlement of USD 15.3 billion in the United States. In 2016, Test Aankoop started a class action against the Volkswagen group of companies and Belgian Volkswagen distributor D'Ieteren. The court found the action admissible in December 2017. The proceedings are ongoing.

Predictions for the future

When we ask him what he expects to see in the future, Bart mentions two developments: "I expect that the number of class actions will increase further, along with a growing competition between the limited number of regulated proceedings (those that fall within the scope of the class action law) and the unlimited non-regulated proceedings (those that fall outside the scope of the said law). Furthermore, a European settlement would be the best solution for recognising international settlements and can be realised in the near future."

ITALY

In Italy, class actions are currently codified in Article 140-bis of the Consumer Code. Only 'consumers' or 'users' whose 'homogeneous rights' appear to have been violated may file a class action. They are entitled to file this claim directly or through an association. Initiating a class action is possible in three situations: (1) breach of contract, (2) unfair or anti-competitive commercial practices, and (3) product or service liability. Consumers or users can initiate a class action both to ascertain the defendant's liability and to obtain damages. It is not possible to claim punitive damages.

Italy has an opt-in system. If a 'consumer' or 'user' wants to be bound by the court's decision, they must join the class and file their documentation after the preliminary ruling on standing, listing the elements of fact and law on which their claim is based.

The Italian legislature introduced a new title on class actions (*Procedimenti collettivi*). This will come into force on 19 April 2020. The biggest changes are: the scope of persons who can initiate class actions is broadened from 'consumers' and 'users' to all persons with homogeneous rights; the scope of the type of class actions is broadened to a wide range of contractual and tort claims; class actions must be brought before a specialised court, the Specialised Business Division (*Tribunale delle Imprese*);

The new class action proceedings will be held according to Articles 702-bis and following of the Code of Civil Procedure: after the court decides on the admissibility of the case, the case will be published on a web portal. After the publication, all proceedings must be commenced within 60 days and will be consolidated into the first proceedings if they are brought against the same defendant and based on the same facts. Furthermore, a class representative will be appointed who will allocate the compensation of the individual members of the class and who receives a contingency fee.

The judge can order an exhibition to obtain information from the defendant, with substantial fines if the defendant fails or refuses to provide the information. The opt-in mechanism changes: instead of one opt-in moment, there are two moments to opt in. A claimant can join the class action after the preliminary ruling on standing and after the judgment on the merits.

Class actions | *Azione di classe*

Scope	Breach of contract, unfair or anticompetitive commercial practices, product or service liability; new law: wide range of contractual and tort claims
Access granted to	Consumers or users, directly or through an association; new law: all persons, represented by class representative
Opt-in or opt-out	Current and new law: opt-in
Declaratory relief or damages	Current and new law: both
Frequently used	No; new law not yet in force
Regulatory framework	Article 140-bis Consumer Code; new law: Articles 702-bis and following and Articles 840-bis to 840-sexiesdecies Code of Civil Procedure
Alternatives used in practice	Representation by mandate

Class settlements

Binding class members after court approval	Yes, in class actions
Opt-in or opt-out	New law: opt-in after settlement proposal made by the court, opt-out after settlement on the parties' initiative
Regulatory framework	New law: Code of Civil Procedure

Third party funding

Regulated by law	No
Frequently used	No

Good to know

The 'Italian torpedo' will not be possible in class actions under the new law. Class actions will be governed by the rules on summary proceedings and the court is given specific timeframes to speed up the proceedings.

Business Perspective

The future of class actions in Italy from a business perspective

BARBARA BENZONI | BUSINESS PERSPECTIVE | Senior Vice President at Eni Gas & Power

17 May 2019, interviewers: Zeki Korkmaz and Isabella Wijnberg.

Barbara Benzoni is Senior Vice President and Legal Counsel in the gas and power division at the Italian energy company Eni. She provides legal assistance to Eni's business, focusing on international midstream and downstream gas and chemicals, while coordinating a team of 22 international lawyers. Prior to becoming Senior Vice President at Eni, she was Head of the Legal Department at Eni. She is a frequent speaker at dispute resolution and arbitration conferences throughout Europe. Since 2013, Barbara has been a member of the board of directors of Union Fenosa Gas SA. Given her extensive experience in the oil and gas sector, she gave us a valuable insight into class actions from a commercial perspective in Italy. We were especially eager to hear her thoughts on the new Italian class action law that was introduced earlier in 2019. This interview was conducted in English.

"Que sera, sera" (whatever will be, will be)

We ask Barbara what she thinks the future holds for Italian businesses with regard to mass claims or class actions. She explains that due to the new class action law, there is a chance that class actions will develop in Italy in the near future. "Currently, class or mass actions are seldom initiated in Italy. I think Italy is one of the countries where class actions never really took off. Of course, the new legislation will also demand a lot from the courts who will, for example, have to decide whether claims in a class action are homogeneous or not. The new class action law might be a development in this respect."

The alternatives are not very popular

According to Barbara, alternatives for class actions such as litigating by mandate or via assignment of the claim are not much used. "However," she says, "these options are possible under Italian law since, for example, assignment of debts is very common and there is no reason why this would not be possible for a claim." However, she adds, "We do have very strong and active public authorities, such as the antitrust authority, the data protection authority and the authority for the gas and electricity field. They have the power to regulate certain activities and fine the companies."

Risk assessment does not include Italian class actions yet

Barbara explains that because that class actions have not been widely used in Italy, companies do not yet have to take this option into account in depth when setting up their litigation strategy or risk assessment. She adds that "it is nearly impossible to make a risk assessment at this moment." However, Barbara emphasises she might take class actions into consideration in the future. We are curious to know if class actions are something that companies would consider in their risk assessment when they want to expand to other EU jurisdictions or the United States. "This would definitely be worthwhile," she answers, "given the fact that class actions are used more often in common law jurisdictions."

An increase in class actions for environmental and health issues

We continue the interview by asking Barbara what kind of class actions she expects in the future. It does not take long for Barbara to say that "at this moment, I would definitely expect mass claims to be launched with regard to the environment and health. We see authorities and organisations already using them. I also expect the pharmaceutical sector to see more class actions. Privacy, however, is at this moment more an issue of public enforcement." This might change in the future due to the newly enacted law, she adds. "It will however take some time before class actions in the field of privacy claims are launched in Italy."

Business Perspective

Class/collective settlements from an economic perspective

According to Barbara, it is not easy to say if people will try to reach class settlements. She explains that the rules of the new class action law should be tested first. "If it works, this option will be used. I can see some organisations or associations trying to reach class settlements, and with a clear set of rules for consumers, there is definitely a chance," she says. We were eager to know if Italian companies would like to have the option to settle more easily with a large group of claimants. "Not really," she answers. "From an economic perspective a company would rather deal with the individual claims. But clearly, consumers would prefer the opposite." She explains however that when the claims are homogeneous she would prefer collective settlements, as it would be more efficient and beneficial for both consumers and companies to settle these claims. When claims are not homogeneous though, she prefers to handle individual claims.

Italian courts will have difficulty complying with strict time limits

When we mention that the Italian courts have a reputation for handling cases in a time-consuming way, Barbara laughs and confirms that this is still the case. Given her answer, we ask her about the 60-day time limit in the new class action law, and if she thinks courts will comply with it. "Hardly," she answers, "I don't think they will. It is very difficult to comply with that. Courts might use procedural ways to delay the process, for example by saying the claim is not substantiated enough or by imposing an additional burden of proof."

No third party funding or abuse in class actions

We wonder if Barbara thinks that the Italian system is being abused by commercial actors. She clearly does not think so, as she answers: "Abuse? No, on the contrary. There is definitely no abuse." She tells us that she is not aware of any third party funders that are active in the Italian market, especially not for collective actions. There were some claims that were funded apparently, but none of those were collective ones. She notes that third party funding is more common in the UK and other common law jurisdictions as well as in bilateral investment treaties disputes.

Landmark case

Barbara gives some thought to our question on choosing an important class action, since few class actions have been brought and even less have proceeded to the merits. She picks the first product-related class action, *Codacons v Voden Medical Instruments*, a case that was decided by the Italian Supreme Court in early 2018.[1]

> The case concerned a do-it-yourself test of the A flu virus (swine flu), that was produced by Voden Medical Instruments. In 2010, Codacons, a consumer organisation, brought a class action claiming damages related to the test and to unfair commercial practices. Italian class action proceedings are opt-in proceedings, but in this case, Codacons acted on behalf of just one claimant. The Italian Supreme Court upheld the decision of the Milan Court of Appeal that the information and advertising of the test was misleading. The Italian Supreme Court also confirmed that even a single claimant can represent the interests of the class of consumers who could potentially have bought the test.

Predictions for the future

At the end of the interview, we ask Barbara if she can summarise her view on the future of class actions in Italy in one sentence. It does not take long before she answers "*que sera sera*", meaning 'whatever will be, will be'. She continues by explaining that she is interested to find out what will happen in the next three years. "We will need to see how the new rules will be applied in practice and if it is workable," she says.

1 Cassazione Civile n. 2320 del 31/01/2018 (*Codacons v Voden Medical Instruments*).

Defence Lawyer

The future of class actions in Italy from a defence perspective

DANIELE GERONZI | DEFENCE LAWYER | Legance - Avvocati Associati

24 May 2019, interviewers: Parisa Jahan and Isabella Wijnberg

Daniele Geronzi is partner at Legance, an Italian law firm with offices in Milan, Rome, London and New York. Daniele Geronzi co-heads the Dispute Resolution practice. He has almost 20 years of experience in advising primary national and international financial institutions and corporations on complex commercial, financial, corporate and insolvency litigation. Daniele was involved in leading class actions in Italy. He has advised clients on securities litigation before courts and agencies (CONSOB and Banca d'Italia). He successfully co-assisted a leading global tobacco company in the first Italian class action brought by smokers. For this interview, we visited Legance's beautiful offices in Rome to find out more about Daniele's views on the future of class actions in Italy. This interview was conducted in English.

Change is in the air

After settling in with a proper Italian espresso, we are curious to hear what Daniele predicts in the way of trends and changes. Daniele answers: "I foresee a lot of change in the use of class actions in Italy in the future due to the new law that will come into force in April 2020. The changes will relate to both the quantity and the type of claims." Given the low number of class actions to date, it doesn't seem like an increase would be difficult to achieve. Since the class action legislation was introduced in 2010, there have only been 48 class actions. Twenty-three were declared inadmissible and only four of them were awarded the damages they had sought. The lowest was EUR 14.50 for only one claimant with a defective influenza test and the highest was EUR 3,600 for 130 claimants for a ruined holiday.

He explains to us that one of the biggest changes is that the law regulating class actions will be codified in the Italian Civil Procedural Code and not by the Italian Consumer Code anymore. "The consequence of this is that the scope of class actions is not limited to consumers and users anymore, but applies to everyone. The scope of application of class actions will also be broader, since it will not be limited to contractual disputes anymore, but will also apply to tort disputes and even environmental issues." He continues: "There are also some new procedural instruments introduced that are not necessarily linked to class actions. For example, under the current law, there are no disclosure duties for defendants. In the new class action rules, a disclosure duty is introduced. Another new rule that is not necessarily linked to the core of class actions is the possibility for the court to ask a witness to answer specific questions in writing and to submit a written witness statement." Daniele foresees that class actions will be used as test cases for these new procedural instruments and that these "also may lead to new perspectives for other civil disputes."

The New Deal goes beyond the powers of the EU

We ask Daniele whether the New Deal proposal in the EU or the earlier EU Recommendations[1] influenced the new Italian law, but he answers in the negative. In his opinion, the new class action regime goes beyond the New Deal by explicitly widening the scope beyond consumers, while the New Deal is limited to them.

The international influence

Daniele agrees that class actions increasingly have an international angle, but adds: "In principle, the Italian system does not accept an opt-out system for both class actions and class settlements, since it is considered against the due defence principle and public

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

Defence Lawyer

order. Legal scholars are clear about that." But it appears that the case law is moving in another direction, since he points us to a recent decision of the Court of Milan which recognised a US judgment for the first time, holding it against a claimant who had not opted out of the class.[2] "The court stated that while preserving the principle of due defence, an exception is possible if the specific person has been put in a position that they were informed sufficiently." We observe that that seems to clear the way to recognise a settlement declared binding on an opt-out basis from the Dutch courts. And maybe vice versa? Are Dutch or other international claimants welcome to opt in to the Italian procedure? Daniele stops to think. "That is a good question." He continues "yes, why not? The court sets the criteria for opting in, so I do not think that nationality should be a problem. Especially if an Italian company has a problem that is spread throughout Europe."

The Italian torpedo

But the question is how long will these Italian proceedings take? Many lawyers are familiar with the Italian torpedo, the delaying tactic where companies bring an action before the famously slow Italian courts before the action is brought in a more efficient jurisdiction. Daniele laughs "I do not think that the Italian torpedo is possible in class actions. The class action regime provides a summary proceeding which we already have in the court of civil proceedings. There will be just one hearing, a round of defences, a very simple gathering of evidence and then the decision." Apparently, the legislature also wanted to officially rule out the possibility of the Italian torpedo since it is laid down in the law that proceedings should not last more than a couple of months. "But we will see..."

"I do not think that the Italian torpedo is possible in class actions."

Claimants may begin litigating environmental issues in Italy

As Daniele explained earlier in the interview, the scope of class actions will change under the new rules and it will be possible to bring environmental claims to the court in a collective form. "However," he continues "there is no widespread culture in Italy with regard to climate change. People need some time to get used to these kinds of remedies." Nevertheless, once the claimants have discovered this possibility, Daniele thinks it could well become very popular "since in Italy and especially in big cities there are a lot of pollution problems."

Personal injury claims excluded from class actions

"In Italy, we have the requirement that the interests of the claimants have to be homogenous, so that excludes personal injury claims." Daniele does not think that this will change, since personal injury claims are by definition not homogenous and class actions in this area have failed already, due the lack of homogeneity.

Third party funding and punitive contingency fees

We ask Daniele for his views on how third party funding is used and assessed in Italy. "Parties in Italy started to consider third party funding just a couple years ago, so it is a relatively new phenomenon." He explains that it is not frequently used, since litigation in Italy can be not so expensive and there are no proper class action instruments yet. After the new law comes into force, he expects an increase in third party funding. He goes on to note: "A problem might be that third party funders can influence the strategy, but I guess that this is an issue with third party funders in general."

The new law also introduces a kind of punitive damages in the form of a contingency fee for both the lawyer and the representative of the claimants. "This is obviously upsetting to the defendants," Daniele observes. "Especially because this fee is awarded in addition to the amount of the damages that the court awards." The exact level of the fee depends on the number of claimants, the value of the claim for the claimants' lawyer and the claimants' representative.

'Cowboys' can abuse the system

We ask Daniele whether he thinks that this new class action law in Italy could lead to abuse. "Yes," he explains, "unfortunately there are a lot of options for abuse that the legislature did not prevent." As an example, he mentions that a couple of companies can start a class action against a competitor under the new rules and profit from the

2 Tribunale di Milano, 25.10.2018., *RODEL s.p.a. v. DEUTSCHE LUFTHANSE Aktiengesellschaft*, Sentenza 10773/2018.

disclosure provision to obtain information for their own benefit. Another example is that the association that starts the class action is unregulated in the amounts that it can ask individuals to pay to join the class action. "Basically there are no real safeguards in the new law so I see ample possibilities for 'cowboys' to abuse the system if they want." So only time will tell whether the cowboys are interested? "Yes," he laughs, "and it will be my task and the task of the big firms to prevent these kinds of abuses and conflicts of interest."

Class settlements are mainly out of court

In Italy, it is possible to settle class disputes – like any other civil dispute – before the court and with its help. Daniele thinks a settlement is the most likely outcome for a genuine class action. "However," he remarks, "the involvement and powers of judges are usually very limited, so parties really have to do it on their own." It's not surprising then that 90% of cases are settled out of court. However, things may change with the new class action law that provides courts with broader powers. As a matter of fact, judges will be able to propose settlements and class action adherents must object within a tight deadline otherwise it will be considered automatically accepted by them by a mechanism of silent consent.

'Azioni collettive' versus 'Procedimenti collettivi'

When we ask Daniele if there are any alternatives for collective redress, he helps us to develop our Italian language skills by explaining that the alternative to the new '*procedimenti collettivi*' are the ordinary '*azioni collettive*'. In contrast to what the name suggests, the '*azioni collettive*' are not collective actions, but regular proceedings with many claimants. The difference with the new '*procedimenti collectivi*' is that the individual claimants are represented on an individual basis through a mandate, these is no requirement of homogeneity and it is of course not possible to opt in.

There are other collective litigation instruments, but these can only be used against the public administration. "Those instruments are not aimed at receiving compensation, but are more of an instrument to protect the interests of citizens if the public entities act in contravention of their public duties."

Landmark case

We ask Daniele what he thinks is the most significant Italian class action case. "A good example of how the current system of class actions works," Daniele explains, "namely that there are not many successful class actions in Italy and if they are successful, the compensation is low, is the class action against Trenord.[3] There were 3,018 claimants, but the compensation was only EUR 100."

> Trenord is a railway company in the Lombardy region of northern Italy.
> The collective claim was initiated by amongst others Altroconsumo, the Italian consumer organisation, on behalf of people who suffered from severe transportation problems at Trenord during 15 days in December 2012. According to Altroconsumo, the difficulties affected approximately 700,000 commuters.
> The Milan Court of Appeals ordered Trenord to pay the 3,018 opted-in members of the class action EUR 100 each, in addition to the automatic compensation already paid by the railway company.

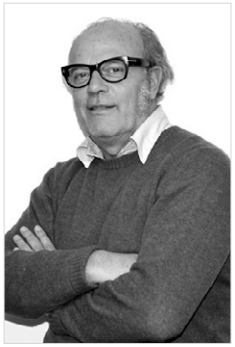
And of course it is worthwhile reading the first class action that was brought by smokers against a leading global tobacco company, "and not only because I worked on it."[4]

Predictions for the future

We ask Daniele what he predicts for the future of class actions in Italy. He answers: "There will be more class actions in Italy when the new law comes into force, not only in numbers but also from a material point of view. However, the question is whether these class actions will be successful, due to the homogeneity issues."

3 Corte di Appello di Milano, 25.08.2017, Repert. n. 2828/2017 del 25/08/2017, *Associazione Codici Onlus e Centro diritti cittadino v Società Trenord*.
4 Corte di Appello di Roma, 27.01.2012, *Codacons v Soc. Bat Italia, Foro it.*

Claimants' Lawyer



The future of class actions in Italy from a claimant perspective

SERGIO CALVETTI | CLAIMANTS' LAWYER | Partner at Calvetti & Partners

23 May 2019, interviewers: Parisa Jahan and Isabella Wijnberg

Sergio Calvetti is the founder of Calvetti & Partners (1987). He specialises in financial and banking law and representing individual claimants in class actions, especially against pharmaceuticals and financial institutions. Given Sergio's large portfolio of class actions, we wanted to find out his views on their future, also in light of the new class action law that was introduced earlier this year. We were invited to Sergio's office in Treviso to interview him in Italian. His meeting room feels more like an art gallery than a lawyer's office. In fact, Sergio's second love, after law, is art. He is an avid collector of paintings, sculptures and musical heirlooms. Sergio's offices boast a large collection of artworks by renowned artists. Laura Cagnin, one of his colleagues, joins the conversation. Sergio's dog graces us with its presence. The quotes mentioned below are translations of the Italian conversations.

Changes within the Italian class action landscape

According to Sergio, US style class actions are a new territory for Italians. But after the new law comes into force in April 2020, "class actions will for sure become an increasing trend in Italy and will increase in quantity." Although he is sure that this will be a trend, this might take time, because in his words "Italians are not keen on change." He thinks it will be necessary to make the Italian public aware of the changes in the class action landscape. Raising public awareness, for example by media coverage, is a start. And the media is certainly interested in the topic. Sergio shows us an article in the local daily newspaper, *La Tribuna di Treviso*, in which he commented on one of the class actions he works on, representing 20 claimants from Treviso in a personal injury case against a multinational pharmaceutical company.

Collective actions require homogeneity

After Sergio showed us his newspaper article, we explain that in the Netherlands, we are quite limited in claiming compensation for physical damage in class actions, because this kind of damage is rarely homogenous. We are curious to know if this is seen as a problem in Italy as well. Sergio explains that the options for claiming compensation for physical damage under the current class action regime are limited. However, he thinks this might change under the new legislation, if the courts have to find practical solutions for large claims. For example in his opinion, in the Treviso case, the court could issue a declaratory judgment that the drug has a certain effect on people. After this, individuals can use this judgment to quantify their damage and solve individual issues such as the period they used the drug etc. In terms of standing, he finds it difficult in practice to find a sufficient number of people to start a class action. "Quantity is an important factor for the effectiveness of a class action."

European public enforcement would encourage private enforcement

We continue our discussion about his class actions against pharmaceutical companies. Sergio explains that public and private enforcement can cooperate well. "For example," he continues "judges can find that a certain medicine does not function well, due to an investigation of this medicine by the *'Agenzia Italiana del farmaco'* ("AIFA"), the Italian pharmaceutical agency." In his eyes, this enforcement should be European and this affects the opportunities for harmed individuals to get compensation. As an example, he mentions the class action he worked on against the makers of the contraceptive pill 'Yasmin', which allegedly causes thrombosis. In Italy, a lot of women were questioned about these side effects. Sergio mentioned that he knows that in Switzerland, the Netherlands and Croatia, similar interviews were held to test this medicine. "If there

Claimants' Lawyer

was one common organisation that undertook these interviews, instead of several national organisations, it would be easier to show the size of the group of individuals that are affected by the medicine. This would make it easier to start a class action. Furthermore, we need control of medical institutions such as AIFA on a European level, since they are not supervised." In an ideal world, not only would there be a European public supervisor but there would also be a European court that specialised in European class actions and that could also take on personal injury cases, like injuries caused by the side effects of drugs.

"In my view, the Italian system is what I call 'normatively restricted'."

Need for homogeneity on a European level

We query whether more legal homogeneity on a European level would be necessary. "Yes, indeed," Sergio answers, "In my view, the Italian system is what I call 'normatively restricted' and I think it is fundamental that there is homogeneity on a European level. What I mean by that is that the laws in the European Union are currently based on the economic principles of the politically strongest countries rather than on uniform valid principles. One of the consequences is that each of the countries still has a large liberty in deciding its legal system. However, national politics influence the legal systems of Member States. As the political systems differ, for example, the laws differ in a broad sense." So in short, it would be important to give less room to each individual Member State to decide its own rules, we ask. "Yes, because it is even more important to have legal instruments against big multinationals." In Sergio's view, these companies are benefiting from the current system, especially the pharmaceutical and the financial industry. He continues, "American companies that are active in the Italian market abuse the fact that it is not allowed to claim punitive damages."

No current alternatives to litigating by mandate

According to Sergio, it is currently only possible to join a consumer association and give a lawyer a mandate to litigate for the association. "Until the new law comes into force, litigating by mandate is the only option. And to be honest," he continues "it might be the best option even after the new law enters into force."

Limited class settlement options

Sergio explains that court-approved settlement options are currently only available in Italian arbitration proceedings. Arbitration is different to litigating before a national court and you have to agree to arbitration, which is uncommon in the legal relationship between a company and consumer. "I do not expect the settlement options to change in the near future", he says. However, consumers can settle collectively out of court.

Third party funding and potential abuse

Sergio believes third party funding in Italy will give more opportunities to consumers. He explains: "Third party funding is possible and we are funded through third party funders, the consumer association." Given this answer, we wonder if he thinks that the class action system is being abused. He does not think that that abuse of class actions occurs or is likely to occur in Italy, although he notes: "In theory, of course there are possibilities to incorrectly influence the proceedings. I can also imagine that a pharmaceutical company might finance a class action against its competitor."

The Italian torpedo not used in class actions

We ask Sergio whether the Italian torpedo, a tactic where a party tries to frustrate its opponent by bringing an action in an EU Member State with a reputation for having an inefficient judicial system, which is often used in competition litigation cases, could also be used in class actions. But, although according to Sergio the phenomenon is widely used, it is not common in class actions. "The Italian legal system is fundamentally slow and complicated. However, the Italian proceedings for class actions do not take particularly long, especially not if public interests are at stake."

Landmark case

We ask Sergio what in his opinion is the most important Italian case in this area. This is not an easy question for Sergio, who initially tells us: "There are a lot of cases, all of them are important." After a moment of thought though, he picks the *Freedomland* case.[1]

1 Tribunale di Milano 25 luglio 2008, Sentenza N.9828/2008.

Freedomland is one of the few successful class actions in Italy since the tribunal of Milan ordered the Consob bank to pay EUR 3 million in compensation to 2,000 shareholders in Freedomland, including 1,500 shareholders from Treviso. Sergio acted on behalf of the shareholders "who bought stock of the company Freedomland and found out that the company arbitrarily fixed the share price and did not capitalise the value of the shares." This judgment is notable, according to Sergio and Laura, because the Court of Milan recognised the responsibility of CONSOB, the National Commission for Companies and the Stock Exchange, which is rare.

Predictions for the future

We conclude the interview by asking Sergio what he thinks will be the most important development in the future of class actions. He replies: "An increase in class actions, both in quantity and in the type of cases and the establishment of a central European body to safeguard homogeneity and effective enforcement."

USA

In the USA, class actions have become commonplace since their introduction over 50 years ago. The class action is a form of representative litigation. It involves one party who acts as the claimant (lead plaintiff) and represents a group of people who are in similar situations but absent from the proceedings (the class). The representative claimant goes to court to obtain class-wide relief for a tort that the defendant(s) are alleged to have committed. The representative claimants, if successful at the class certification stage, either negotiate a settlement on behalf of the class or participate in a trial on their own behalf and on behalf of the class.

Class actions are explicitly permitted in both the federal and state systems. Federal class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. State class actions are permitted under individual state law, but most states have a law that is analogous to Rule 23 or have, through case law, adopted similar standards. Rule 23(a) requires: (1) numerosity: the class must be so large that joinder of all members is impracticable (2) commonality: there must be questions of law or fact common to the class; (3) typicality: the claims or defences of the representative parties must be typical of the claims or defences of the class; (4) and adequacy: the representative parties must fairly and adequately protect the interests of the class.

The action must also meet the requirements of at least one of the three types of class actions identified in Rule 23(b): (1) prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudications ; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate, respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members (predominance requirement), and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (superiority/manageability requirement). Most monetary actions are brought under this category.

Many courts also impose an ascertainability requirement, which means that members of the class must be identifiable by objective criteria. Ascertainably is often described as an additional 'implicit' Rule 23 requirement.

In the federal system, there are generally no limitations on the type of relief available in a class action. A class member may be entitled to whatever relief would be available to them in an individual action. This can include monetary damages (including punitive damages), restitution, or injunctive or declaratory relief. Some states limit the types of recoveries that can be achieved through a class action.

Collective settlements are possible, and are reviewed by a court to determine if the collective settlement is fair and adequate. A collective settlement requires approval from a court to take effect and parties can opt-out.

Class actions Survey

Class actions

Scope	General
Access granted to	Representative claimant ('lead plaintiff')
Opt-in or opt-out	Opt-out
Declaratory relief or damages	Both, including punitive damages; some state laws limit the type of recovery
Frequently used	Yes
Regulatory framework	Rule 23 of the Federal Rules of Civil Procedure; specific state laws
Alternatives used in practice	Mass actions, which are single lawsuits with a large number of individually named plaintiffs

Class settlements

Binding class members after court approval	Yes
Opt-in or opt-out	Opt-out
Regulatory framework	Rule 23 of the Federal Rules of Civil Procedure; specific state laws

Third party funding

Regulated by law	Not on a federal level, but sometimes aspects of TPF are regulated by state law
Frequently used	Yes, however contingency fee agreements are more frequently used by the claimants' lawyers

Good to know

- Opinions on the class action system in the USA are often divided along party lines. Democrats tend to support class actions, Republicans tend to oppose them.
- More and more claimants prefer suing in state courts rather than in federal courts because they view state courts as more claimant-friendly.

Business Perspective

The future of class actions in the United States from a business perspective

JOHN W. LEBOLD | BUSINESS PERSPECTIVE | Associate General Counsel for Sherwin-Williams Company

3 July 2019 , interviewers: Karmijn Krooshof and Isabella Wijnberg

John W. Lebold is Associate General Counsel of 'complex litigation' for the Sherwin-Williams Company in Ohio and has worked for Sherwin-Williams for the past 30 years. John is responsible for handling all long-tail toxic torts facing the company, including lead, asbestos and benzene litigations. He also handles insurance coverage issues for the company. Due to the broad range of litigation Sherwin-Williams has faced over the years, John has a wealth of experience on both the defence and offence sides of class action litigation. We met John during a conference in Paris and afterwards he kindly took some time to provide us with his insights.

The comments provided by Mr Lebold are his own and do not necessarily reflect the opinions of the Sherwin-Williams Company.

No major changes or increase in the number of class actions for the short term

We start our interview by asking John if he predicts any developments in class actions in the United States. John points out that the American legal system changes very slowly. Because of this, he does not expect anything major to happen in class action litigation for the short term. John also explains that "the overall count of class actions has been fairly consistent over the years and I do not think it is going up significantly."

However, there is at least one exception: privacy claims. "Privacy will be a big new area in class action litigation." John expects privacy class actions to increase because this type of claim is – by its nature – relatively uniform. He continues: "If you have a security breach, everybody has suffered the same breach at the same time and therefore everybody is harmed in the same manner. This makes it easier to form a class, as everybody is exposed at the same time and suffers the same 'injury'."

Class actions and class settlements can sometimes be a good thing for companies

According to John, class action litigation can also be a useful tool and is not always a bad thing for companies. He explains: "Class actions tend to be a lot more efficient. Instead of having to defend a thousand cases, you just need to defend one. Because of this, defence costs will be much lower." The same can be said for class settlements: "Unless a claimant opts out of the class, you are pretty sure that you have captured all the injured parties with one single settlement." This means that class actions and class settlements help corporations to resolve pending litigation in a more efficient way. Moreover, this efficiency benefits the judicial system.

Influence of class actions on product pricing

We continue talking about the influence of class actions on costs. John makes a distinction between the 'front end' and 'back end' influence. On the front end, meaning the moment that a price of a product is determined without any class actions pending, litigation costs for that product will not be specifically calculated, because "no company in its right mind would put a product on the market that it thinks is defective and will cause class actions. However, general litigation costs are part of the general business cost and are therefore a part of the cost of the product." John agrees with our observation that it is likely that these general litigation costs are higher for companies in the United States than in Europe.

On the back end, meaning after a class action has taken place, this could be different, according to John: "If a company has settled damages over a specific product and they are still going to sell that product, companies may start building in a little buffer to try

and recoup that payment." However, the ability of a company to recoup a settlement by raising the price of its product is dependent on the market in which the company is active. He explains: "If competitors have competing products, but those competitors were not part of the class actions, they will not raise their price. As a result you are prevented from raising your own price."

Limited use of alternative dispute resolution mechanisms

We wonder whether alternative dispute resolution systems could limit the general costs of litigation in the United States, but even if this in theory could be the case, John feels that it is not likely that the use of alternative dispute resolution mechanisms will become popular. He feels that the class action system is functioning reasonably well and is used extensively. "The courts are used to it. We have a whole structure and procedure based on class actions. As a result, I think that class actions are here to stay."

One alternative system that is commonly used within the United States, however, is Multi District Litigation (MDL), especially for personal injury cases. In an MDL, one federal judge deals with all the cases that concern a particular product or particular injury and handles them from beginning to end. This process usually turns into a settlement or a bellwether trial to gauge what a claim is worth. John explains: "MDL is thought to be a more efficient way to resolve a complex case by one federal judge instead of having cases filed in 25 States, with 25 different judges having 25 inconsistent results."

Global settlements are unlikely but desirable under the right circumstances

We ask if it would it be desirable to have the possibility to have a global MDL or at least a global settlement. John responds by pointing to the difficulty of finding a court that will assume jurisdiction, since the US courts are unlikely to exert that kind of jurisdiction. However, he does believe that – under the right circumstances – a structure to facilitate a worldwide settlement would be a good thing: "I am not sure what those circumstances are yet, but suppose you are selling a product worldwide that has a certain defect; it would be much more streamlined and less cumbersome to resolve the issue with a worldwide settlement." One of the difficulties he sees is that other countries do not have the damages model of the US system. This will likely lead to a worldwide settlement that is based on the US benchmark, making the settlement much more expensive than it would be in most other countries.

"As long as we have attorneys, there will be abuses"

With regard to potential abuse of class actions, John points out that a number of years ago, the federal rules were significantly altered by the Class Action Fairness Act.[1] This Act requires a claimant to show they have suffered significant loss to be admissible in a class action. This has given defendants more protection against class actions that are initiated solely to squeeze money out of a company. This has resulted in a slight drop in the number of class actions.

However, this is not the end of the abuses in the class action system in the US. John says with some resignation in his voice that "as long as we have attorneys, there will be abuses." And he continues: "It does not take much to file a class action." We query whether such abuses are mainly made by third party funders rather than lawyers, but according to John, abuses are frowned upon. He explains that '"even though the requirement of having a personal stake in a case has been relaxed, you do not see a lot of parties in the United States that buy up claims in order to make a profit. This is partly due to the fact that, in the case of a class action, parties do not find out what amount is awarded until the end. As a result, it is less desirable for somebody to buy certain claims." John believes that syndicates of investors that offer funding to lawyers before class action litigation are becoming more prevalent. This kind of 'pre-funding' occurs in both class actions and individual cases.

Opting out as method for a better settlement deal

Leaving aside the topic of abusive lawyers, we ask John about the apparent trend that individual parties tend to opt out of a class because they consider the settlement agreement a starting point to discuss a new settlement. John agrees that this happens

1 Class Action Fairness Act of 2005.

very often. "Particularly in class actions where enough money is at stake. Opting out can sometimes double a claim in size. As a result, there is a lot of incentive to see where the class is headed and opt out if this plays to your advantage." However, this only works if the group of opt-outs is not too big: "Opting out will blow up the entire agreement if such a large number of individuals opt out, that the fund either gets so small or there are so many big claims on the outside, that the class action does not facilitate its original purpose. If there are a few opt-outs it generally becomes a negotiation and those people tend to get paid a bit more."

US system should caution EU countries when drafting class action legislation

When asked if he would advise European countries to draft class action legislation like the legislation in the US, John laughs and says, "My advice would be very simple: 'Do not go there'." He continues, however, by saying: "In any event, European countries should look at the US and say: 'Perhaps we do not want to go that far, but let's draft some class action legislation that is more narrow and tailored to our needs and the problems we are trying to fix.' In this way, European countries could make class action legislation more effective and less open to abuse."

Predictions for the future

We ask John if he can tell us in one sentence what he thinks is the future of class actions in the US. "Overall, I do not predict major changes with regard to the US class actions system. However, I do believe class actions will be used more and more to address societal and environmental issues."

The future of class actions in the US and the EU from a business perspective

LARS A. SJÖBRING | BUSINESS PERSPECTIVE | Executive Vice President Legal Affairs, General Counsel and Secretary at Veoneer

27 June 2019, interviewers: Zeki Korkmaz and Isabella Wijnberg

Lars Sjöbring currently works in Michigan as Executive Vice President Legal Affairs, General Counsel and Secretary at Veoneer, Inc. Veoneer designs, develops, manufactures and sells automotive safety electronic products and is a spin-off of the electronics business of Autoliv, Inc.

Prior to this, Lars was Group Vice President Legal Affairs, General Counsel and Secretary at Autoliv, Inc., which manufactures automotive safety products such as airbags, seatbelts and (before the spin-off of Veoneer), automotive safety electronics. He was also Senior Vice President & General Counsel at Transocean Ltd., and Director M&A Legal at Nokia. In view of his extensive experience, we were very pleased that Lars was able to give us an insight into class actions from a commercial perspective, especially considering that Lars has first-hand experience of this type of litigation. This interview was conducted in English.

Class actions as a tool for dealing with liabilities in M&A

We ask Lars if he has seen the approach to managing liabilities in class actions change over the years. "Definitely," he answers. "Companies are becoming more and more experienced in managing class actions, whereas ten years ago people, at least outside the US, did not speak about managing these litigations but just about fighting them or

avoiding the risk they posed. Maybe this was because they were unfamiliar with them and unwilling to take the risk, so they did not conclude an M&A deal but waited for a bankruptcy or just walked away." According to Lars, this changed when American investment banks and US lawyers with experience in this field gained influence. Now people are more willing to assess the risks.

Asked whether managing liabilities in class actions will also play a role in deciding whether to buy a company in Europe, Lars explains that there are three options when there is this kind of exposure. "You could buy a company and ask for indemnities, which they will probably reject and even when provided it is uncertain if you can collect on them and if they are sufficient. Another option is that you could also wait for some sort of bankruptcy or reorganisation and then buy the business. The third option would be to welcome class actions as a tool to deal with liabilities – it is not for every case and for every exposure, but it would be wrong to just ignore its potential." Contrary to many Europeans, who are very worried about class actions, Lars welcomes them as a mechanism for dealing with liability issues. However, he does not necessarily want the US model where class actions are in effect a "business". "Therefore, the third option means that you are willing to buy and support the company, while at the same time you need to go through a process where you manage these claims on an individual basis – and preferably you do so on a collective basis," he says.

A pan-European mechanism

Lars notes that managing class actions is always complex and expensive. In Europe it is also, in his limited experience, less predictable because (assuming we are talking about a multi-jurisdictional situation), the different legal regimes involved are typically not applying a common set of procedural or substantive rules – but they are also not applying a common and predictable set of rules for coordinating these issues. He would welcome a pan-European mechanism that provides a solution for an international group of claimants with decent compensation for those who run the cases. The compensation should be based on work performed, and not be a percentage of the amount at stake. Smiling, he adds: "I would prefer this solution over the American plaintiffs bar's approach of '*Fressen für alles*' ('food before anything else'), which turns

class actions into a business rather than a legal service. But remember, in the US you typically carry your own costs for litigation and that is a crucial fact in understanding how class action business works in the US. The risk of having to pay the defendants' costs is not there – only that you are not compensated for your efforts."

However, Lars signals a possible downside to a pan-European mechanism, if the choice of the appropriate forum is based solely on the number of claimants. He is not certain whether the smaller Member States would accept that, if it would mean that Germany, France or the UK would always get the case. "It would be helpful if you could have a 'principle gravity point' and have the courts in that country have jurisdiction. The US has a system where all the federal courts cooperate. It's a mechanism that provides reasonable access to justice for individuals or companies, while providing certainty for those in a corporate defence role, such as myself," he says. "Also, the federal courts use this to allocate cases such that – very simply put – all federal courts take their share."

"The bigger the country the more worried they are."

We wonder if there is a European jurisdiction that companies fear more than others when it comes to class actions. "I don't think so. I think companies look at this in terms of where they sell the majority of their products," Lars answers. "In general this means: the bigger the country the more worried they are I would guess. Usually, it is the US that global companies are afraid of getting sued in – though you hear occasionally people speaking of risks in other countries. Very few times you hear a company that worries about getting sued in countries like the Netherlands or Germany."

Class actions do not provide perfect justice

Lars explains that class actions are not intended to provide perfect justice for the individual. It is too expensive to achieve that – it is not a reasonable societal cost. Class actions are intended to provide reasonable compensation for those who have suffered a loss at a reasonable cost through a manageable process. He stresses, however, that he does not think class actions are wrong. In an ever more globalised and integrated economy, you will inevitably see losses sustained across national borders and the legal

systems of the world must be able to handle this. He thinks that there should be more focus on how to identify cases that are suitable for class action claims and the process through which they are handled – and obviously these issues are related.

As an example, Lars mentions the highly publicised diesel-emissions cases. "Here you have a large number of buyers in a large number of countries. Assuming they have a claim for compensation, which is maybe not a given, one must ask if they should be compensated very differently within the EU – with some maybe receiving no compensation at all while others do. If a car manufacturer "takes care" of the engine problem and adjusts the software such that the emissions met the regulatory requirements, the cars' performance may be negatively impacted; if they do not, and get some sort of waiver allowing the cars to be sold or continue to be used as is, the cars might still pollute "too much" versus what buyers had expected. Some buyers may have bought these cars thinking they bought a "clean vehicle"; others that they bought one which balanced performance and environmental concerns well. Both of them may feel harmed – again leaving aside the many other interesting issues these cases give rise to in terms of if any compensation should be paid – and I know of no precise formula to say what is "fair" compensation but seeing that buyers in one EU jurisdiction get a very different treatment than those in other jurisdictions doesn't seem quite fair either. This is where a common process can fill a useful role. Besides that, it is sometimes difficult for a large number of people having sustained similar losses to get access to justice – while in some countries individuals can get legal assistance of various kinds, that may not be sufficient to provide such access." According to Lars, the legislature should provide a way for individuals to access to justice. "If they do not provide this tool, you will see law firms trying to represent medium to large companies that have bought thousands of cars or trucks."

The need for protection against abuse

On the other hand, the industry also has an interest in solving mass claims in a cost-efficient and predictable way, which explains why it should welcome class actions as a tool to solve these issues. The cost of running litigation in several countries alone can kill a company. A company faced with multiple uncoordinated claims being brought against it could also be at risk of being "run into the ground" by uncoordinated plaintiffs. When they are spread out over several jurisdictions with different rules and procedures, the various plaintiffs may have no interest in coordinating their actions and providing the company with a way to manage the process. Rather, the individual plaintiffs may look only to their own interests. Rather than providing the defendant a manageable process, see only to their own interests and turn an otherwise manageable issue into something forcing the defendant into bankruptcy. That may have other unacceptable societal costs like thousands of people losing their jobs. "Such negative consequences need to be taken into consideration," Lars says. "This is why you need to be able to manage collective claims in a reasonably predictable and efficient way, within a reasonable timeframe. And without inviting the bad behaviour you see in the US."

As an example of this behaviour, Lars mentions a situation in which a class action is brought, while in reality (or in all likelihood), there is no case. "The problem is that plaintiffs' lawyers can say 'we will find out if there is a case only when you have spent several million dollars on responding to the discovery requests you will be subject to.'" Having been confronted with such a mindset, Lars explains that people may think it is cheaper to settle and pay one or two million upfront than it is to go on and pay litigation fees. (In Lars' view that is wrong – the plaintiffs will always come back if you are an "easy target".) And companies know that even if the case is won, their legal costs will not be compensated. He thinks of the 'brain tumour claims' mobile phone manufacturers had to defend against. "As I recall it, the class in this class action was those who had been exposed to the risk of developing tumours because of ever having used a mobile phone at any time. Interestingly, the class expressly excluded anyone who had actually developed any form of brain tumour as those cases would be litigated separately and at much higher recovery levels. Leaving aside the lack of scientific evidence, the plaintiffs brought this big case against anyone and everyone who had ever been involved in mobile phones in the US. In my humble view, it was a shakedown. Everyone in the industry was up in arms having to pay to defend against the claims."

"People need clarity, I need clarity, but I also need protection from abuse and that is what is lacking in the US model."

Lars says. "The thought some had was that it was better to agree on a settlement and pay maybe USD 10 million for research on this instead. The claimants' lawyers then could get a couple of million for achieving the settlement, and the case would be closed." According to Lars, there is no real threshold that keeps people from "throwing mud and seeing if it sticks". "So yes," Lars concludes, "people need clarity, I need clarity, but I also need protection from abuse and that is what is lacking in the US model."

Third party funding

Following this train of thought, we ask what Lars thinks of litigation funding. "I struggle a bit," he says. "Society should provide someone who is injured with the ability to have access to a reasonable remedy. In that respect, third party funding is not the problem, because this might be a better tool than others. What I don't like about the US model is that claimants can make a lot of money, but if they lose, they only lose a little bit, whereas I am always paying for losing." When asked, Lars explains that he believes that transparency of the funding arrangement is important to protect consumers from abuse. "In any case, the court should review the funding arrangement and there should be some sort of reasonableness to the fees that are paid."

Class actions cause surplus on prices

We are curious to know if class actions lead to a surplus on prices. Lars is clear about that: "Absolutely. It is included. It is the cost of doing business in the US already and the price will reflect the global litigation costs if they rise – that is why there is a societal interest in this. We need efficient tools – not tools prone to abuse providing for increased societal costs. Risks are often insured – at least at some level. There are insurance solutions for many things. They might be imperfect, but there are helpful tools." However, not everything can be insured and not everything can be seen just as a price issue. Lars knows a medical technology company that does not want to sell into the US because they cannot get insurance to cover the potential risks. "This of course impacts the price in the sense that the product is not available." Another example is the self-driving car technologies being developed right now. "The insurance companies may say that something is a great product, but that they have too little data to put a price tag on it and are therefore not interested in insuring this product." Smiling, Lars adds "By the way, some would say that insurance companies do not want these technologies to develop, because it will put them out of business. They make money out of selling car insurance, whereas this self-driving technology prevents accidents from happening."

Landmark case

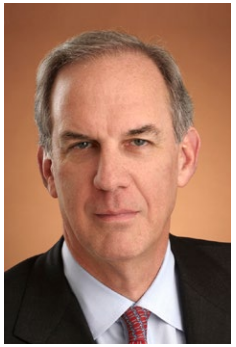
As we reach the end of our interview, we ask Lars to mention a significant case that the readers can learn from. He quickly tells us that there is a lot to learn from the 'Macondo incident', also known as the 'Deepwater Horizon incident'. "In the settlements there, BP understandably did not want to spend a lot of time and money on costs associated with assessing the individual claims. There were simply too many claims and the costs for doing so would be very significant. Instead, and to avoid such costs, they constructed a simplified process. Simply put, if you had a certain amount of sales or earnings one year, and less the next year and you operated or worked within a certain distance of the affected parts of the Mexican Gulf coast, you were entitled to compensation. While on its face this was a simple and straightforward model which should provide a fast and cost-efficient resolution, it turned out to be a gold mine for people seeking to abuse the model. Understanding that the class-action process is prone to abuse is crucial when dealing with these cases."

The Deepwater Horizon incident refers to an explosion that took place in April 2010 on an oil platform that was chartered by BP to drill oil in the Gulf of Mexico. The explosion cost 11 people their lives. It also resulted in a massive oil spill. Many civil[1] and criminal actions were brought against BP. BP set up a fund to deal with claims and concluded several settlement agreements. One of them was a settlement with the US Department of Justice, agreeing to pay USD 4.5 billion in fines and other payments, the largest of its kind in US history.

1 *United States of America v. BP Exploration & Production Inc. et al.*, Civ. Action No. 2:10-cv-04536.

Predictions for the future

We conclude the interview by asking Lars to tell us in one sentence what he views as the future of class actions. He smiles as he answers: "I'd like to see a pan-European solution, so I will only have to deal with one jurisdiction in cross-border cases."



The future of class actions in the US from a defence perspective

RICHARD CLARY | DEFENCE LAWYER | Partner at Cravath, Swaine & Moore LLP

4 April 2019, interviewers: Albert Knigge, Nadir Koudsi and Isabella Wijnberg

Richard Clary is a partner in Cravath's litigation department and its former Head of Litigation. He is based in New York where we had the pleasure of visiting him. He is a leading practitioner in many areas, including commercial litigation, securities litigation and antitrust litigation. His extensive experience includes being lead defence counsel for Credit Suisse in numerous cases. He handled the Enron-related civil litigation cases, one of them being the USD 40 billion Enron federal class action litigation in which the US Court of Appeals for the Fifth Circuit reversed the class certification. Richard is recommended by many publications and is included in Lawdragon's Hall of Fame 2018. This interview was conducted in English.

Increase in number and type of class actions

Class actions have been well developed in the US since the 1960s. However, Richard has seen a recent increase in the number of class actions and also in the type of class actions. Class actions mainly used to deal with antitrust and securities issues, but this is no longer the case. "There are now many class actions filed in the fields of product liability and what I would loosely call 'consumer fraud claims'. We are now seeing more claims regarding, for instance, mislabelled consumer products (that claim to be, but are not 'all natural') or class actions alleging technical violations of new statutes, such as

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statutes to curtail the sending of unsolicited faxes or so-called robocalls."
Another trend that Richard has noticed is that more class actions are brought in which virtually none of the relief actually goes to the members of the class and instead goes to organisations whose interests and policies align with the interests of the class. This is called the full *cy près* doctrine. The cy-près doctrine was originally used to distribute any remaining settlement proceeds after class claimants had been paid. But with full cy-près settlements, the actual financial recovery for any class member is so small that it is not worth the cost of distribution. A hypothetical example of this would be a class action against an internet search engine in which the defendant agrees to change its behaviour going forward, nobody receives damages, the class attorneys get paid, and the settlement proceeds go to, for example, an organisation that monitors the privacy protection in electronic communication. The organisations that benefit are not the claimants to the proceedings. The rules on standing require that class actions must be initiated by an actual claimant and those organisations usually do not meet this requirement. The Supreme Court was supposed to rule on the propriety of full cy-près settlements earlier this year (*Frank v. Gaos*), but instead remanded the case to the lower court to decide whether the named plaintiff had standing.

As a final note, Richard adds that although damages are the main driving force in US class actions, there will sometimes also be a request for injunctive relief or claimants will assume that a change of behaviour can be included in a settlement. Injunctive relief class actions are usually brought in civil right contexts where the point is, for example, to change policies in a police department or other types of governmental institutions.

Issue class actions on the increase

Richard also expects the use of 'limited issue class actions' to increase. These are class actions that relate to certain parts of the claim, specifically certain liability issues that are relevant for the whole class. The court's ruling is binding on the defendant for all class members when they bring their individual claims. Richard explains that there is currently a discussion going on about whether the entirety of the claim must be certifiable, with the issue class being a management tool inside a larger class action, or whether there can be certified classes just for certain liability issues. "Generally speaking, I think the use of limited issue classes will increase. Personally, I think that is a good thing."
We ask Richard why. "Let me give you an example: there was a class action filed against Nassau County here in New York, because Nassau County's sheriff had a policy of sending everyone who was arrested over the weekend into pre-trial detention, no matter what they were arrested for, and everyone had to be strip-searched, regardless of whether there was any reason for it. Under our constitution, such a search requires probable cause on an individual basis. This led to a class action, in which Nassau County argued that there was no certifiable class because each individual person would have to come forward and show that there was no probable cause for that individual to be strip-searched. However, the court ruled that this class action was certifiable as an issue class addressed to whether the policy generally was unconstitutional. As a result, Nassau County was required to send notice to everyone who had been in pre-trial detention. This was a way to notify these people that their constitutional rights might have been violated, so that all the people who would fall into the category of the issue class could be identified. This could not have been done if the case went through the traditional class certification route, because certification of the entire case would not have been possible; individual issues would have predominated."

Trends in the scope of class actions

Richard identifies two key trends in the scope of class actions. The first one concerns the standing of claimants. For example, in claims about inappropriate 'robo' phone calls, there is a discussion about whether the plaintiffs should have standing, since each individual's damage consists of a few minutes of lost use of a cell phone due to robocalls. In these cases, the impact on individual plaintiffs is very small and the question is whether this type of damage is enough to create standing in a class action. Some courts say yes, this qualifies as an injury that supports standing; other courts say no, this does not qualify as a real injury. The US Supreme Court had the opportunity to clarify statutory standing in *Frank v. Gaos*, but instead asked the lower court to address standing. There is, in any event, a push by the plaintiff's side to expand concepts of standing.

The second trend that Richard mentions concerns the question of jurisdiction. In the US, there are two different concepts of jurisdiction that come into play in class actions:

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international jurisdiction and jurisdiction between the federal and state courts. To start with international jurisdiction, after *Morrison*[1] there has been an effort from the courts to limit jurisdiction for people who are overseas. With regard to the jurisdiction issue based on the different states within the US, there is a discussion going on about whether nationwide class actions must be split up between states or whether a federal court has overall jurisdiction. "Take, for example, a consumer class action pending in New York regarding cosmetic products that are sold across the country," Richard says. "Can I include Florida residents who bought these products in Florida? The products are the same, the alleged misstatements are the same, but these are state law claims and the laws of the state of New York and the state of Florida are similar but not identical. Plaintiffs want their class to include all purchasers nationwide, and the defendant may want to limit the class to a single state. The district courts have split, with some courts allowing nationwide classes and some only allowing state-based classes.

Richard thinks the outcome will be in the middle. If plaintiffs are able to prove that the laws of the different states involved are sufficiently similar, the court will allow a class that covers all those states. However, if the state laws are sufficiently different, the citizens of the other states will be excluded and separate class actions should be started in those specific states. Richard notes that this is currently an issue for the southern states as state law in these states differs. The laws in Louisiana, for example, have a strong historical basis in French law, which gives it a very different starting point to laws in other states.

"In any event," Richard concludes, "I think that for all parties, 50 parallel class actions in each separate state are not to their benefit, as a single nationwide class action is easier to settle and, if defendants win a nationwide class action, such a victory would mean a conclusive end to the litigation rather than having to deal with all remaining class actions in different states."

1 *Morrison v. National Australia Bank*, 561 U.S. 247 (2010). In this case, the US Supreme Court restricted the extra-territorial application of U.S. securities legislation, ruling that the Exchange Act only applies to the sale or purchase of securities listed on a US exchange or the sale or purchase of other securities in the US.

No real alternatives to class actions

Richard confirms our suspicion that there is no real alternative to class actions in the US. "There is no need for an alternative since our class action system is well developed," he explains. The closest alternative to class actions are *parens patriae* claims by the attorney general. In *parens patriae* claims, the state declares itself to be suing on behalf of its people.

"There is no need for an alternative since our class action system is well developed."

We then ask Richard to explain multi-district litigation (MDL) to us. MDL is a special federal legal procedure designed to consolidate the process of handling complex cases in civil actions pending in different districts and involving one or more common questions of fact. In Richard's words: "a mechanism for bringing some logical cohesion to complex claims pending in different districts by aggregating them." MDLs are only for pre-trial purposes and the MDL judge can decide everything through summary judgment. Each individual claim will then be returned to its original court for trial, if the case is not settled or dismissed before the MDL judge. A class action can be brought inside an MDL proceeding.

Richard notes that MDLs are in full swing. He has seen an increase of MDLs, especially in the product liability sphere, and there are many developments in the MDL context with test trials and bellwether trials. Claims that are not suitable for class actions may be handled in MDL. Personal injury claims and exposure claims cannot be brought in a class action, because the exposure for each individual is too different. However, via MDL, claimants can have a court decide on underlying fundamental questions such as 'does a product cause cancer?' The downside is that you still have all the individual litigation about individual harm following the answer to such a question.

Class settlements increasingly include non-class members

When we ask him about developments in class settlements, Richard answers that he does not see any big upcoming changes. What he has seen though, is an increase in non-class members included in class settlements. This happens regularly and he thinks

this will continue to happen: "We are seeing more and more that companies say 'I want global peace so I am willing to include in the settlements even parties who are not class members or might not even have a valid claim'. An example of this is the *DeBeers diamonds*[2] class action in which the US Court of Appeals for the Third Circuit Court indicated that such a broader settlement is allowed."

More frivolous class actions

The US is frequently accused of being a bad example when it comes to class actions. We were therefore eager to learn Richard's view on the abuse of class actions. He says: "I think we are seeing more frivolous class actions, especially in the consumer area. Examples are partial fill cases where the packaging allegedly misrepresents how much product is inside or a class action against sandwich company Subway on the ground that the 'footlong' was not actually a foot long. There was also a claim against Starbucks that there was too much ice inside Starbucks ice coffee."

"I think we are seeing more frivolous class actions, especially in the consumer area."

Richard believes that there are enough safeguards in place to prevent abuse, but thinks that judges need to be encouraged to be a little more robust in using them. In the certification phase there is no judgment on the merits, for example, but it is possible to look at the merits and take those into account in the certification phase. The Supreme Court has conflicting judgments on this, however.[3]

According to Richard, claims with excessive percentages for third party funders or high fees for lawyers like contingency fees do not directly lead to abuse. In US class settlements, the court has to approve the amount of the settlement that goes to the attorneys. Even if the plaintiffs and defendants have all agreed that the plaintiffs should get a third of the recovery, the court still has an independent duty to analyse how much effort and work went into the settlement and whether the fees are measured accordingly and reasonably. You get a percentage of the recovery, subject to a check as to whether or not, given the hours spent on the case, the total fees reflect too much of a premium as opposed to the situation where the attorneys are hired on an hourly basis.

In the MDL context, judges are starting to look at the division of money more critically, both among the lawyers and between the lawyers and the client. For example, they may rule that the actual recovery of the individual claimant cannot be lower than a certain percentage.

US vs UK, NL and EU

We wonder if other jurisdictions are relevant for US class actions. Richard answers: "We have been watching the UK, especially the CAT. Also, Dutch law seems to be getting ahead of the pack. Where this most ties into American class actions is where it can essentially be parallel proceedings: this would solve the *Morrison* problem by having parallel class actions both in the US and somewhere in the EU."

Asked about the recent developments in Europe that are moving towards more collective redress and collective kind of cases, Richard replies: "If I understand correctly, the current development is the use of a sort of designated not-for-profit organisations as plaintiff versus the US system where the lawyers find somebody (sometimes a neighbour or relative). I think this is a wise trend to help curtail abuses as such institutions have no commercial goal."

We ask Richard what he considers to be the most important class action case in the US in the past ten years. "I guess I would say *Wal-mart Stores v. Dukes*[4], because there was a fairly dramatic change in the law in the Supreme Court opinion both on the process on how one should analyse class certification and in the result."

2 *Sullivan v. DB Investments*, 667 F.3d 273 (3rd Cir. 2011) (en banc).

3 Compare for example *Amgen, Inc. v. Connecticut Retirement Plans* (2013) (materiality of alleged misstatement in a securities case is not a class certification issue) with *Haliburton v. Erica John Fund Inc.* (2014) (price impact of alleged misstatement is a class certification issue).

4 *Wal-mart Stores v. Dukes*, 564 U.S. 338 (2011).

Landmark case

The *Wal-mart* case is the largest US gender discrimination class action, brought on behalf of 1.5 million female Walmart employees. They claimed they were passed over for promotions and were paid less than men. Although the District Court and the Court of Appeal (the Ninth Circuit) certified the class, the US Supreme Court ruled in favour of the defendant. It found that the class could not be certified because the commonality requirement was not met. In February 2019, a new gender discrimination class action was initiated against Walmart.[5]

Predictions for the future

We ask Richard to sum up in one sentence what he believes will be the most important development in class actions in the US. "In the US, the most important development will be the clarification of the law regarding who may be an absent class member: must every member of the class have individual standing, must every member of the class have suffered injury, must every member of the class have a viable claim for liability and damages."

5 Cf. https://www.theguardian.com/us-news/2019/feb/18/walmart-gender-discriminationsupreme-court.

The future of class actions in the US from a defence perspective

DAVID STERLING | DEFENCE LAWYER | Partner at Baker Botts

7 March 2019, interviewers: Nadir Koudsi, Albert Knigge and Isabella Wijnberg

As the working day in Amsterdam is drawing to a close, David Sterling, a partner at Baker Botts, is starting his day with a cup of coffee at his office in Houston. David is recognised as one of the leading lawyers in class action litigation, with a strong track record in defending clients against class actions. He principally represents companies and their officers and directors in securities class actions. In November 2017, The *National Law Journal* named him on its list of 'Litigation Trailblazers' for representing a client in what is considered to be the most widely-followed securities class action in the United States since 1988 *(Erica P. John Fund, Inc. v. Halliburton Co.)*. This elite list recognises individuals who have changed the practice of litigation through the use of innovative legal strategies. David has been ranked in Band 1 for Securities Litigation (Texas) by Chambers USA every year since 2006.

David shared his views about the future of class actions in the US with us at his office in Houston. This interview was conducted in English.

Strong political influence on class actions

Class actions in the US seem well-established. However, David explained to us that, as a broad trend, the views on the class action system in the US are linked to political

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"The future use of class actions also depends on the type of class action."

preferences: "Democrats love class actions and Republicans hate them." At the moment, there are no major pieces of legislation being drafted. What David does see is courts trying to 'tighten the screws' on class actions. "Federal courts of appeal and state supreme courts are trying to make it harder for class actions to be successful." This is because these courts are generally conservative.

According to David, "the future use of class actions also depends on the type of class action." Antitrust class actions will probably decrease because they depend on how strongly the government enforces antitrust law and there is a downward trend there. Securities class actions are in an upward trend as a result of a couple of opinions that have come from the US Supreme Court. He sees no major trend in consumer class actions or employment law.

A steady number of class actions but an increasing number of opt-outs

On average, there are 10,000 class actions brought each year in the US. David believes that "the plaintiff bar will always be tempted to bring a class action instead of a regular individual claim when they think they have a chance to have it certified." This leads to a higher settlement value and thus to higher contingency fees.

One trend that David has seen recently is the large number of class opt-out proceedings in which class members bring their own claims, as they think they can negotiate a better deal for themselves. This is especially common in antitrust and securities class actions.

Arbitration clauses prevent class actions

Another significant trend is the increasing use of arbitration clauses in consumer contracts. The scope of these arbitration clauses is very broad, basically stating they cover 'any claim you may have against the company'. According to David "the US Supreme Court has been very deferential to these provisions; an arbitration provision in consumer contracts is binding." These clauses work as an impediment to bringing class actions. We observe that this is very different to European jurisdictions where these clauses are frowned upon or even prohibited.

In any event, David emphasises: "It is clear that companies would rather arbitrate than be in a court, if the alternative is a class action suit." Cable companies are a good example: many Americans have small disputes with cable companies and if they were allowed to bring these in court proceedings, this could turn out to be a powerful class action. However, this does not happen because cable companies have contracts that require these customers to arbitrate any disputes, thereby preventing a class action lawsuit. For now, these arbitration clauses are a powerful restriction on consumer class actions, except for defective product class actions. And, although there are various bills intended to limit these practices of effectively preventing class actions pending in Congress, according to David, those bills will never pass as long as Republicans control at least the Senate.

State courts more plaintiff-friendly than federal courts

As the conversation moves towards the trends in jurisdiction, David explains that more and more claimants prefer suing in state courts rather than in federal courts as they view state courts as more plaintiff-friendly. For example the California state court is perceived as particularly plaintiff-friendly and is therefore a popular venue for claimants.

Class certification is the only stage in which a legal battle takes place

We note that, although thousands of class actions are brought in the US each year, only a few end in a final judgment. Why is that? Do US lawyers give up too quickly? David laughs: "No, in general defendants try to avoid trial. If a trial goes badly, the damages awarded can be enormous, not only because in some cases punitive damages can be awarded, but also because of the number of potential class members." "Also," he continues, "anyone can file a class action suit, but this means nothing until a court certifies the class. Once a class does get certified, cases only rarely go to trial as they

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get settled beforehand. So the big battle is usually on the certification requirements. And this is not likely to change in the near future. It is not for nothing that over the past ten years, the US Supreme Court has emphasised that courts at the class certification stage are supposed to be true gatekeepers. In the old days, certification was easier and problems were left for the later stages of the proceedings. However, nowadays, to certify a class, a court must scrutinise if each of the rule 23 elements are met, at least at federal court level."

Alternatives to class actions are rarely used

In contrast to most European jurisdictions, in the US there is no trend of moving to alternatives for aggregating claims or at least not of a mass assignment of claims, according to David. "However," he adds cautiously, "there are certain trends to circumvent certification requirements, which would impede bringing a class action in certain situations." As an example, he notes that sometimes there are mass actions, which are single lawsuits with hundreds or thousands of individually named plaintiffs. And there are some securities cases or toxic tort personal injury cases that are also conducted as a mass action. The reason such cases proceed as mass actions rather than class actions is that in personal injury cases it is hard to pass the predominance requirement for certification of a class action.

US claims culture trends: less abuse but still a paradise for lawyers

In many civil law countries, the US is perceived as having a litigious culture and is used as a cautionary tale, so obviously we have to ask what David thinks of this. "Well, the class action system and the high number of class actions largely contribute to this perception." Asked whether he sees any trend of abusive litigation, he explains that abuse still occurs regularly in some states but probably not in all.

The coupon cases in Texas in the 1980s/1990s are a good example of this kind of abuse. These were class actions that settled shortly after filing. All of the class action members got a discount coupon while the class action lawyers got a large amount of money. This happened, for example, in a Chevrolet pickup trucks class action, in which the class action members got a USD 250 coupon off of their next purchase, while the lawyers got USD 6 million. This led to a bill in Texas that prescribes that if class action members get a non-cash remedy from a settlement, the lawyers must get paid in the same ratio of cash to non-cash as the class – meaning, if the class only got coupons, that's all the lawyers can get. This stopped consumer class actions in Texas and Texas claimants' lawyers now sue in another state.

"With regards to the future, I expect abuses to become less common."

"However," David continues, "with regards to the future, I expect abuses to become less common. But it will likely remain very common for US citizens to receive letters in their mail stating they are part of a class and are entitled to receive around a dollar, while the lawyers walk away with millions in fees."

Landmark case

Since the US has been, and in many ways still is the leading jurisdiction in class actions, we ask David what he thinks is the most significant case we should know about. After taking a moment to consider this, he answers: "'the *Comcast* case". The *Comcast* case was an antitrust class action initiated because Comcast's business strategy allegedly reduced competition and lead to supra-competitive prices. David notes that this is a very significant case, as it established that a class must show a common damages theory in order to be certified.[1] This stopped a fair number of class actions in their tracks.

"Other important judgments for the future of class actions," he continues, "are a number of US Supreme Court judgments dealing with the binding effect of arbitration clauses in consumer contracts. These have also shaped the current class action practice."

US versus Europe

Near the end of our conversation, we ask David to reflect on the US system and how it can be compared with the trend in Europe to find ways to handle aggregated claims. According to David, class actions are "in a way a tool for justice: many people with claims that are too small to be brought individually but that are identical can be

1 *Comcast v. Behrend*, 569 U.S. 27 (2013).

brought via a class action." He continues: "There should always be an avenue to bring such claims. Not only for consumers, but also for securities class actions." Then reflecting for a moment: "On the other hand, the class action vehicle is very powerful so courts need to be vigilant and really ensure that a claim is eligible as a class action." "But", he concludes, "'as long as courts are rigorous in ensuring that the class action requirements are met, then class actions are an important tool for civil justice. The US Supreme Court's rulings on arbitration clauses therefore are appalling as they are basically a license for companies to act with impunity against consumers."

Asked about Europe he says: "To be honest, European jurisdictions do not seem of any major relevance to the US."

Predictions for the future

We ask David to describe in one sentence what he thinks will be the most important development in the future of class actions. He replies: "If Democrats win the Senate in 2020 and if we get a Democratic president, I think we will see a significant legislative effort to try to undo the US Supreme Court case law in the class action context. If the Republicans win, there will likely not be big changes."

The future of class actions in the US and Europe from a claimant perspective

JEREMY LIEBERMAN | CLAIMANTS' LAWYER | Partner at Pomerantz LLP

6 March 2019, interviewers: Nadir Koudsi and Isabella Wijnberg

Jeremy was honoured as Benchmark Litigation's 2019 Claimant Attorney of the Year and has been recognised as a 2019 Super Lawyer in securities litigation. He played a key role in the litigation of a closely-watched securities class action that involved Brazil's largest oil company, Petrobras. This class action resulted in a historic USD 3 billion settlement for which Jeremy was responsible. Currently, he is representing European pension funds in individual actions against BP in the United States District Court for the Southern District of Texas. In addition to his legal practice, Jeremy frequently lectures about current corporate governance and securities litigation issues. We met him at one of those lectures at a conference in Tel Aviv and we later interviewed him by phone. This interview was conducted in English.

Class actions are increasing

We ask Jeremy how he expects US class actions to develop in the future. "Well," he says, "the explosion of securities and shareholder litigation abroad strengthens US class actions, as it demonstrates that the mechanism of class actions is becoming more globally accepted. Pro-business groups like the US Chamber of Commerce are making efforts to eliminate class actions in the US. The key mechanism for elimination is stipulating arbitration clauses in consumer contracts. However, as long as mass issues

arise (like the issues that led to the class actions against Volkswagen and Petrobras) a mechanism to solve such issues is required." For that reason, Jeremy believes that the class action mechanism will remain alive and well: the US system provides a necessary and streamlined system in which corporations, which are becoming ever larger and will always have the economic upper hand in litigation, can be held accountable for misconduct by individuals. Jeremy has such confidence in the class action mechanism that he believes that the alternative options of collective redress in the US, such as litigating by mandate or assignment of claims, will not increase. Currently, these alternatives are barely used because the class action mechanism appears to be so effective.

Jeremy also notices that the scope of class actions is getting broader. "Shareholder claims no longer necessarily pertain only to financial securities claims, but can also be based on issues within the company that impact shareholder value. Issues like these could be sexual harassment and wage/overtime claims." He also sees an increase in antitrust cases and privacy claims. For the latter, he gives the example of a claim against Pokémon Go (first asking whether we are familiar with Pokémon in the Netherlands, prompting an enthusiastic "yes" from the younger of the two interviewers). The claim against Pokémon Go was based on the fact that this game required people to enter private properties to catch Pokémon on their mobile phones, leading to trespassing and general disturbances. This claim eventually led to a settlement with the company behind Pokémon Go.

The scope of class actions will be also be widened at the international level. According to Jeremy, this is going to be a key global issue over the next decade. *Morrison*[1] was, in Jeremy's view, a very poor ruling and he expects that in time the scope for class actions will be broadened again: "*Morrison* is asking litigants to show where a transaction occurred but in the digital age that is a foolish and antiquated question; stock exchanges all work digitally and therefore it is not possible to show where a transaction occurred."

1 *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Jeremy outlines other jurisdictional problems by explaining that there are more and more proceedings related to dual classes of shares: securities that are listed in the US and securities that are listed outside the US. Such proceedings have to deal with issues of parallel litigation where courts go 'back and forth' with accepting foreign law claims under the concept of supplemental jurisdiction. "I think that over the next 20 years, some key jurisdictions will arise that can deal with international claims," Jeremy concludes.

"I think that over the next 20 years, some key jurisdictions will arise that can deal with international claims."

Arbitration clauses barring class actions in the United States

Jeremy already mentioned the use of arbitration clauses to exclude class actions. In the EU, arbitration clauses in the general terms of consumer contracts are not likely to be accepted. Jeremy believes that the US Supreme Court accepted such clauses "in an intellectually tortured way". "The key thing in arbitration is consent. Arbitration was originally meant for maritime businesses where two companies could create a shared legal forum through arbitration, but the arbitration clauses in consumer contracts are different as these are not based on consent and effectively bar consumers from starting class actions." Jeremy also sees cost issues related to these arbitration clauses and points out that he has seen arbitrations that cost USD 10,000 for a claim of USD 100.

Jeremy believes that a change of administration and a change in Congress will likely lead to a change of the Arbitration Act that will prohibit the use of these arbitration clauses in consumer contracts. "However," he adds, "this will take a long time as we would need Democrats in the White House and in both chambers of Congress."

The key ingredients for successful class actions

Jeremy mentions three key ingredients for a successful class action: the ability to buy global peace via opt-out settlements, contingency fees and adverse costs. The ability to buy global peace will push corporates to settle earlier. It also allows them to settle more

efficiently, as the settlement puts an end to all litigation. Contingency fees are important as they motivate the lawyers to negotiate larger settlements and bar third party funders from gaining influence in the litigation. Lastly, adverse costs are important to prevent abuse of the system. "These three ingredients make for a successful class action system in the US and they should be imported into Europe," Jeremy says. He clarifies that this does not mean that the system is completely perfect and abuse-free. However, the abuses provide important lessons on how to improve the system and adopt a class action mechanism that works in Europe.

Jeremy believes that the US system could be improved with quicker rulings. Even though the US system is quicker than the European system, rulings still takes a long time. "We have had certain cases litigating for 14 years; over that time claimants might pass away or go out of business or laws might change." The settlement value of any claim takes into account a discount based on the time that is required to get a final ruling.

Not much third party funding for US claimants' firms

Jeremy notes that claimants' firms rarely use third party funding. "If you're proven to be good professionally, then you have no need of a third party funder." He thinks that in some specific cases third party funding might make sense, but that this would be a rare exception. According to Jeremy, third party funders are not putting in capital of their own and are looking for a large yield which has downsides for claimants. Jeremy thinks third party funding mainly increases the costs: "The more hands you have in litigation, the higher the costs."

As third party funders are usually investors without an official duty to anybody apart from themselves, Jeremy has concerns about whether third party funding really benefits the underlying claimants. "It is a good concept but we do raise concerns; you don't want anybody to dictate to the litigating firm how to handle a claim based on their shareholders' interests." At the same time, lawyers have a fiduciary duty to the class and answers to the courts; in a way this is more balanced. Jeremy explains that claimant law firms are in a way their own funders: "There certainly is a level of entrepreneurship to litigating class actions as a claimant firm. Adding third party funding to this takes away the model of working on a contingency basis that rewards skilful lawyering."

Relevant European developments

Jeremy has not heard much about European developments regarding class actions that the US system should copy. He thinks this might simply be due to the lack of similarity between the systems. He has heard that in Israel the lead claimant can get a larger percentage of the reward compared to the rest of the class, because the lead claimant is at the forefront of litigation. "That would be helpful in US litigation," says Jeremy, "because there is always a gap between law firms (who have a financial incentive to litigate the claim) versus the head claimant who is like an investor who is putting his name and reputation on the claim." He notes that a law firm is really motivated to bring the claim and to be the leader, whereas the class representative is financially not as motivated. This is due to US law in which is determined that class representatives are not entitled to a larger percentage of the claim than any other claimant. Jeremy thinks that an extra monetary incentive for the head claimant would therefore be welcome.

With regard to 'parallel' proceedings in Europe, Jeremy believes that in the future, these cases will be handled on a global scale. In addition, he notes that his clients outside of the US rely on his firm to get recovery which compels them to get involved in cases outside the US from a client's perspective. "From my point of view I would much rather spend my time in US litigation as I am a member of the bar here and I can control the situation while in EU litigation we are more like a facilitator rather than a litigator."

Landmark case

Jeremy considers the Court of Appeals' judgment in the *Barclays* case to be a landmark decision.[2]

2 *Waggoner v. Barclays PLC*, No. 16-1912 (2d Cir. 2017).

In *Barclays*, investors brought a securities fraud class action against financial services provider Barclays and three senior officers. Barclays and the three senior officers were accused of secretly giving advantages to high frequency traders over other clients who used an alternative trading system. In this case, the court granted the motion for class certification.

Before this case, litigating parties would each hire experts from prestigious universities to make a market study in order to certify a class, 'a battle of experts', as Jeremy calls it. The court ruled that such market studies are not necessary, based on the Supreme Court's decision in the *Halliburton* case.[3]. As a result, class actions are more accessible for claimants.

Predictions for the future

When we ask Jeremy what, in one sentence, will be the most relevant development in class actions in the future, he answers: "In the short term, there will be bumps in the road due to political interference. In the long term, the class action will prove its extraordinary efficiency while they are getting larger, more international and more important."

3 *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. (2014).

ISRAEL

Israel has a long history of class actions. They are limited to certain areas of law or types of actions, although the Class Action Law of 2006 has broadened their scope. Class actions can concern for example the infringement of consumer and competition law, securities issues, environmental issues and product liability. Monetary remedies can be sought.

The general procedure is that a claimant submits a motion for judicial approval of their personal claim as a class action, and to serve as the representative claimant. A non-profit organisation and some public authorities can bring a class action under certain conditions. The court has to certify the class. In principle, class actions have an opt-out mechanism, although the Class Action Law provides the court with the option to require class members to opt in.

On 8 April 2018, new regulations introduced court fees for class action lawsuits. The fees are meant to discourage ill-founded class actions or class actions that have negligible importance or value.

Since the Class Actions Law was enacted, the majority of the class actions in Israel are resolved either by settlements or consensual dismissal. Both must be approved by the court in order to protect the interests of the class members.

Class actions

Scope	Broad list of claims, based on the infringement of e.g. consumer, securities and competition law; environmental claims; product liability
Access granted to	Class representative and certain non-profit organisations and public authorities
Opt-in or opt-out	Opt-out, the court can choose an opt-in regime
Declaratory relief or damages	Both
Frequently used	Yes
Regulatory framework	Class Actions Law, Class Actions Regulations
Alternatives used in practice	No

Class settlements

Binding class members after court approval	Yes
Opt-in or opt-out	Opt-out
Regulatory framework	Class Actions Law

Third party funding

Regulated by law	No, but public funding is regulated
Frequently used	No

Good to know

Israel has the largest number of class actions per capita worldwide.

The future of class actions in Israel from a business perspective

LIAT COHEN-DAVID | BUSINESS PERSPECTIVE | Vice President and General Counsel at Meitav Dash Investments

2 July 2019, interviewers: Diederick Smit and Isabella Wijnberg

Liat Cohen-David is Vice President and Head of Legal Department at Meitav Dash Investments Ltd. Meitav Dash is one of the leading investment houses in Israel and manages over USD 36 billion for private, business and institutional clients. Class actions have become a fact of life for many companies in Israel and Meitav Dash deals with class actions, both as a claimant and as a defendant.

Largest number of class actions per head of population, but even more settlements

Israel has the largest number of class actions filed worldwide per capita, if we are to believe the statistics.[1] However, Liat believes that the numbers are somewhat misleading. "We have a lot of class actions, but only a limited number of class actions end with a court decision. I do not know the exact number, but probably less than ten class actions per year end with a court judgment. The others are dismissed or withdrawn by the claimants." Like the United States, the majority of class actions in Israel end with a settlement. Moreover, claimants often file more than one class action on the same topic, and that can influence the statistics. This makes it even harder to compare Israel to other jurisdictions. Liat explains: "In our investment house, we can

1 https://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-2/1169544/israel.

see a few of such identical cases. Obviously these test cases are often not successful but they do cost a lot of money and time."

Court fees might influence an increase of human rights class actions

When we ask Liat whether she expects the recent introduction of court fees for class actions to influence the number of class actions, she responds that she thinks that this is highly unlikely. "In an attempt to strike a balance and make it possible for everyone to file a class action, the court fee is not very high. This is probably not enough to minimise the abuse of class actions."

Lawyers share responsibility for the large number of class actions

Apparently, Israel not only has the largest number of class actions per capita but also the largest number of lawyers per capita. Liat notes: "And it is likely that there is a connection between the two, since lawyers struggle to get enough work." Lawyers in Israel are very active in approaching possible claimants. There is no real loser pays rule vis-à-vis the claimant, so they are not afraid to initiate frivolous proceedings and withdraw them if things do not go their way. Liat adds that not long ago, her company had a class action filed against it based on an incorrect understanding of the law. "We explained to the lawyer who filed it that the claim had no legal ground whatsoever. So, he simply withdrew the claim." However, even in that case, the lawyer was still paid. She concludes that "some lawyers definitely abuse the class action system."

Doing business is more difficult

We ask Liat what impact the frequency of class actions has on business. "It's hard to do business and give service to over one million clients if we continuously have a potential class action hanging over our heads," Liat explains. As a result, Israeli companies operate very carefully and consider their legal position: "Without the constant threat of class actions, businesses could probably provide their services cheaper, quicker and more efficiently." This makes it very delicate to run a business in Israel: "We cannot assign a lawyer to every employee to oversee whatever he or she is doing. As a business, you have to trust your employees to be careful and to know when to contact the company's legal counsel. But even if they are careful, class actions are inevitable."

"Israeli companies operate very carefully and consider their legal position."

No international class actions

The good news for European and US companies is that class actions remain a local affair with the exception of some securities class actions. Liat explains: "Israel is a small country. Our services are only local. The only exception is dual-listed companies, those listed on both the Tel Aviv stock exchange and on a European or US stock exchange. But even in the case of a dual-listed company," she continues, "the Israeli court will not grant damages to investors who bought on the US stock exchange but only those who bought their stocks in Tel Aviv." However, Israeli courts are open to the judgments of foreign courts even if they are not formally recognised. "Especially to those from the US since, in our perception, class actions in the US are more developed," she adds.

Room for improvement

We ask Liat for one suggestion of something that would improve the current system. She answers: "The most important change would be to reduce the abuse of the class action system." According to Liat, the courts should be less tolerant towards abusive claimants and their lawyers and introduce some form of 'loser pays' rule for claimants, "especially if a class action would be filed and then withdrawn before even one court hearing has taken place." This would make people think twice before starting a baseless class action.

Predictions for the future

When we ask her what she expects to see in the future, Liat observes that Israeli courts are becoming more professional and that they now have a greater economic understanding: "In Israel we used to have the same court for all cases. We now also have a specialised commercial court." This will probably make proceedings increasingly efficient since the parties have to spend less time explaining specific mechanisms to the court. She hopes that this will make procedures faster, noting: "In the Israeli court system, especially with class actions, it takes a lot of time before the court gives its final

judgment. The current average is a few years. And it is hard to manage a company well with many class actions on your mind."

Besides that, Liat expects more cases will be settled quickly if mediation becomes more common. She also hopes that the lawyers will prioritise their clients' interest over their own interests.

The future of class actions in Israel from a business perspective

HADAR VISMUNSKI-WEINBERG | BUSINESS PERSPECTIVE |
Vice President, Chief Legal Counsel and Corporate Secretary at Partner Communication Co Ltd

10 July 2019, interviewers: Parisa Jahan and Isabella Wijnberg

Hadar Vismunski-Weinberg is Vice President, Chief Legal Counsel and Corporate Secretary at Partner Communications Co Ltd, the second largest telecom group in Israel. The company provides telecommunication services, including internet, phone and television streaming services. Prior to joining the company, Hadar served as Vice President and General Counsel Global R&D of Teva Pharmaceutical Industries Ltd. In the 20 years she has spent working as a lawyer in Israel, Hadar has had a huge amount of practical experience in dealing with class actions. We were curious to hear her views on the future of class actions. This interview was conducted in English.

Class action culture in Israel

After we realise that both the interviewee and the interviewer share the same last name, although spelled differently – Wijnberg and Weinberg – Hadar gives us an introduction to the class action culture in Israel. "With everything we do, we have to be aware of class actions. We are not happy to deal with this, but it is part of the life. Of course some of them are justified and rightfully protect consumers but some of them are totally baseless. Every tiny advertisement, campaign or offer is scrutinised by lawyers that do class actions." She explains that there has been an increase in class actions in Israel over the last few years. "There are a lot of places where you can get a

lawyer who can help you to sue a company. Even for small things, for example if someone needs to pay two dollars extra on their bill, it could be a reason to sue a company." Hadar tells us that every individual can start a class action. We assume that this is one of the reasons that the number of class actions per capita is higher than in the United States. She responds that "the number of lawyers in Israel is high and they are all looking for something to do. I am surprised though to hear that we have the highest number of class actions per capita, but it does not sound implausible to me."

Abuse of the Israeli class action system

We wonder if Hadar thinks Israel has many frivolous class actions or cases of abuse of the system. In that respect, she says: "I cannot say that there is abuse in the majority of the class action cases but there is definitely abuse in some cases. One of the forms of abuse that happens often is when lawyers manipulate people to sue companies, so that the lawyers earn money through the lawsuit." Hadar explains that luckily, in some cases, companies are able to prove that a particular class action procedure is not about the claim itself, but a means for the lawyer to make money. If there is enough evidence to prove that the lawyer has set up the scene and actively approached the individuals, a claim can be declared inadmissible by the court. She gives an example from her recent practice. "We once had a claim from a woman who claimed she had a gas leak in her kitchen that caused damage. She claimed that she tried to call 911 but that there was a malfunction in her telephone that meant she was not able to call 911. She tried to sue us for the damage caused by the gas leak. However, through her phone data we could show that she had various calls with her lawyer before the gas leak and the alleged 911 call. Therefore, we could prove that it was not submitted in good faith and that it was the lawyer who took the initiative, so the court dismissed the case."

The future of class actions in Israel

Asked about her view on the future of class actions, Hadar responds jokingly: "I wish I had a crystal ball. I don't know. I really hope that it will become less crazy compared to now. One important thing I hope is that courts will start awarding punitive damages and legal expenses to the defendants in cases without merits. This would maybe, at least, lead to a decrease of unjustified class actions. If nothing changes, nobody will slow down." Hadar concludes: "As long as nothing happens, I do not see a slowdown."
In view of this, we wonder whether Hadar thinks a 'loser pays' rule for all cases would be desirable. She thinks it would be. "If the risk of being convicted for costs is too low, you will have a lot of claims. If the risk is too high, it is again a negative thing since this would prevent access to justice. The system has to be in balance and must be designed so that 'bad' lawsuits will be removed and the right ones will be handled in court."
We ask Hadar whether this is on the radar of the government. She answers: "It is, the former government was working on it, but we are in elections now so we will still have to await what the new government will do."

Privacy: a trend in the class action landscape

We are curious about whether Hadar thinks privacy claims are a trend in Israel. She believes that they are and explains that "the GDPR regulation in Europe is affecting the whole globe. Privacy is more of an issue now than it has been in recent years. You see this in the class action landscape as well. In comparison to the EU, the US is much more flexible with privacy rules. But even in the US there is a lot of public attention on privacy: not only regarding class actions, but in general, people talk more about it. Eventually this talking will also lead to an increase in lawsuits."

"The GDPR regulation in Europe is affecting the whole globe."

Hadar confirms our observation that it is difficult to quantify damages in privacy claims and she adds "Israel does not have a system to quantify damages in privacy claims. However, the Israeli courts are likely to follow if there is a quantification system found in the US or another prominent jurisdiction."

Influences from foreign jurisdictions

In Hadar's view, the US is the most important jurisdiction for Israel, regardless of the fact that the Israeli legal system is based on the UK system. "I think that the US is the jurisdiction that has the most influence on the Israeli law system. Usually the things that happen in the US are somehow imported here, five or ten years later."

Business Perspective

"In the last few years, I have seen more types of claims."

Europe has seen an increase in 'copycat' cases from the United States in recent years, so we ask Hadar if Israel has the same problems. She has not seen these types of cases in Israel yet but she does see a change in the type of claims. "In the last few years, I have seen more types of claims: securities law, competition, privacy. Maybe it is a natural evolution, but I think it is a result of what is happening in the world."

National and international settlements

With regard to the settlement options in Israel, Hadar tells us that she is satisfied with the current options. "I think that the settlement mechanism is quite reasonable. Once the lawsuit is filed, there is no settlement possible without court approval. In a lot of cases, the judge asks the general counsel of the government whether the settlement is justified." Hadar explains that this is to limit the risk that the claimants' lawyers might take too much and leave the individuals with low compensation. The downside is that the consumer gets their money slower. We are curious how long it takes to get a binding settlement. According to Hadar it depends on the case. "It can take a few months, to a year or two. It also depends on the complexity of the case."

Asked about her experience with international settlements, Hadar says she does not have experience with them. We ask her if it is possible to declare settlements binding internationally, but Hadar responds sceptically. "I think that it is very complicated for any national court to give a sensible assessment of an international settlement, especially with regard to the public interest aspects of it in other countries."

Alternative mechanisms for class actions

One of the points considered within Europe is alternative mechanisms for class actions, for example through an ombudsman. We are curious whether Hadar thinks it would be desirable to have an alternative dispute mechanism for handling class actions in Israel. Hadar says: "It is hard to say. I do not know how this would work. As a lawyer, I like to stick with the things I already know. However, the ombudsman sounds like an interesting concept if it is an easier, faster and cheaper way to resolve conflicts with consumers."

Class actions: part of doing business in Israel

It seems to us that Hadar is very experienced in class actions and has to deal with them practically on a daily basis. We ask her if our impression is correct. "Unfortunately, I am. It is not a choice in Israel." She explains: "We spend quite a lot of fees in this area. Especially compared to what the individual customer receives in damages in a class action. I do not know whether there are any aggregate calculations of what the individual eventually gets in this field, but my bet would be that in general the lawyers get most of the money." We continue speaking about the impact on the business of a "class action friendly" environment like Israel. In that respect, Hadar says "when you are doing business in Israel, you are immediately exposed to class actions." She believes that you always need to be careful when doing business in Israel. "You need to be aware of the fact that everything you do can result in a class action. Because of this, it is important to always set aside money in the business plan to deal with legal expenses in case you are sued. And of course, if a company has too many class actions, it can also lead to negative publicity."

"When you are doing business in Israel, you are immediately exposed to class actions."

Hadar explains that people accept that the legal cost of class actions is a substantial part of the cost of doing business in Israel and that the time you lose dealing with class actions is becoming part of the game too. She explains: "In general, the management of bigger Israeli companies do not get excited about class actions as much as they used to, in contrast to the initial years of the class action legislation. There are so many class actions now. The positive side of this is that, once you get used to it, you can deal with the class action just with the legal department without interfering too much with the business."

Hadar advises companies considering doing business in Israel not to be scared of lawsuits. "As long as your company is acting in accordance with the law, you should not be scared of lawsuits. Letting yourself be guided by fear is not the way you should do business. You should do things in a reasonable way and calculate the risks. But most importantly, just do it."

Landmark case

According to Hadar, the *Perrigo* case is the most important case of the last ten years.[1] This is because it was the most widely known class action in Israel and had a huge impact, even though it did not set any important legal precedents.

> The *Perrigo* case involved a pharmaceutical company that changed the manufacturing process of a drug but did not tell patients about it. The change caused a lot of side effects for many patients, including hair loss and depression. Many people heard about this case or were suffering from the side effects themselves. Perrigo agreed to pay out NIS 42.7 million Israeli shekel (USD 12.14 million) as compensation to the users of the drug.

Predictions for the future

We ask Hadar what in her view will be the most important development in the future of class actions in Israel. "It is a combination of my former answers. One desirable development would be higher court fees and a loser pays rule. But a more certain development is that the number of class actions in Israel will continue to be very big and will likely also involve privacy claims."

1 Class action 22182-10-11 *Peleg et al v. Perrigo Israel Agencies Ltd.*

The future of class actions in Israel from a defence perspective

NOAM ZAMIR | DEFENCE LAWYER | Partner at S. Horowitz & Co.

28 March 2019, interviewer: Isabella Wijnberg

Noam Zamir is a partner in the Dispute Resolution Practice Group of S. Horowitz & Co. in Israel. He specialises in class actions and has extensive experience representing international and Israeli clients before the entire range of Israeli courts, including the Israeli Supreme Court, as well as before arbitration tribunals. Noam and I speak in his beautiful office in Tel Aviv. The newly renovated space is filled with light, almost making you forget that you are in an office building. This interview was conducted in English.

The future of class action in Israel will likely be continuing what exists already

I begin by asking Noam to give me some background about class actions in Israel. Noam explains that Israel has the largest number of class actions per capita worldwide. It is a highly developed mechanism that can be applied to all kind of claims. It is based on an opt-out class certification with a lead claimant. Israeli courts are cautious to assume jurisdiction for parties who do not live in Israel or events that happened outside of Israel which could pave the way for a *forum non conveniens* defence. Therefore he concludes: "It seems that there is not a big development in the number of class actions to be expected for the near future. There could be a small decrease due to the fact court fees were introduced for class actions." In light of the fact that this class action system is so well developed, there are no alternative systems for collective redress.

Possible new area of claims: privacy and data breaches

Noam notes that Israel has recently adopted information protection regulations that are similar to the European GDPR regime and this could lead to new claims. Companies have a reporting duty if a data breach occurs and it is likely that this will give rise to class actions. "This is why, although the future is of course difficult to predict, a new development will likely be class actions with regard to data breaches and privacy." Noam expects that this will be influenced by whether we see a growth in these kinds of cases in Europe and the US, explaining that "litigation from abroad is often imported in Israel for Israeli inhabitants. We saw a similar trend with antitrust class actions that were imported into the Israel system."

Criteria for having a class certified

We continue to discuss the current criteria for class certification and I find out that the Israeli system has many similarities with the US system. Noam tells me: "In order to certify a class in Israel, the court must consider whether the material questions of law or fact are common to the class (commonality), whether a class action is the most efficient and fair way to settle the dispute and whether the class members' interests will be represented adequately and in good faith. Besides that, the class action must also have a reasonable prospect of success." Like in the US, in Israel most class actions that get past the certification barrier settle.

Limited number of abuses but a race against time

The American and the Israeli systems do differ in the abuses that take place, as Noam says: "Despite the fact that a large number of class actions concern relatively small amounts and claims without merit, abuse within the class actions is consistently decreasing." When I ask him about the reason for this, he points to the certification requirements but also to the fact that, since April 2018, claimants are required to pay court fees. This provides a financial barrier to bringing a class action which was also needed because Israel – and there again there is a difference – does not have an effective loser pays rule. "However," Noam continues, "certain class actions that serve a social objective such as prevention of discrimination, are still exempted from paying court fees and oddly enough there was a clear increase in those types of class actions... so, the number of such actions might well continue to increase in the coming years."

"So, the number of such actions might well continue to increase in the coming years."

Another trend that Noam hopes will develop is the courts' inclination not to allow claimants to amend their claims. He notes my surprised reaction and explains that there is usually a race against the clock for claimants to be the first to start proceedings. If there are multiple class actions filed that deal with the same subject, the first pending class action will generally prevail. As a result, the motion to get a class certified is often vague and not properly substantiated. "At the end of the day, courts will have no choice but to limit this practice by allowing only marginal alterations," Noam predicts.

No private third party funding

Although the number of class action claims would suggest otherwise, private third party funding is not popular in Israel and there is no detailed decision of the Israeli courts regarding its legality. Claimants that need funding can obtain it through public funds either instituted by the Class Action Law (providing mainly for the possibility of funding social and environmental class actions) or public fund instituted by the Israeli Securities Department that provides funding for shareholder claims. "This system will not change significantly in the near future and the research one of my colleagues, Adv. Amir Assaly, did shows that 80% of the latter class actions in which funding was provided were successful." At the moment, there are some initiatives to privately fund class actions through third party funding. "However, there are no regulations in place so it remains to be seen whether Israeli courts will allow this," Noam says.

Landmark case

I ask Noam what he considers to be the landmark Israeli case for class actions. He cites a case from 2011: *Kahana v. Macteshim Agan*.[1]

1 C.A. 26809-01-11 *Kahana v. Macteshim Agan*.

Kahana v. Macteshim Agan concerned a minority shareholder claim for approximately USD 200 million on the grounds that they were not treated equally to the majority shareholder that allegedly received a higher consideration for its shares through the provision of a parallel non-recourse loan.

Despite the fact that it is not an Israeli Supreme Court case, this is a landmark case. Firstly, because this decision showed that the then still very new financial department of the Tel-Aviv district court had the capacity and the will to handle complex cases. Secondly, it changed the litigation landscape because the claimant's attorney received a large amount of money (USD 2.25 million) thus increasing the appetite of lawyers to initiate these kind of claims.

Predictions for the future

I round off our discussion by asking Noam what he predicts will be the most important developments in the future of class actions. "I expect the total numbers of relatively small class actions to go down and that we will see more big sophisticated class actions, especially in the field of securities and antitrust class actions," he says without hesitation.

The future of class actions in Israel from a claimant perspective

SHACHAR BEN MEIR AND ISAAC AVIRAM | CLAIMANTS' LAWYERS | Ben Meir, law office and I. Aviram & co., law office

5 April 2019, interviewer: Isabella Wijnberg

Shachar and Isaac are Israeli lawyers who specialise in bringing class actions on behalf of claimants. They both own their own law firms: Ben Meir, law office and I. Aviram & co., law office. Although they run independent law firms, they often work together on big class action cases, including the Bezeg company class action about how Coca Cola was marketed in Israel and several Facebook class actions based on alleged privacy breaches and abuse of power. They have also separately initiated several other big class actions, including the Tnuva case decribed below. Due to their busy schedules, we were unfortunately unable to meet Shachar and Isaac to discuss class actions in person, but they provided us with their insights and answered our questions over email.

Class actions will be used more broadly

Although class actions in Israel are already very common, and are used in various fields (consumers, banking, securities etc.) Shachar and Isaac expect that class actions will be used more broadly in all areas of law in the future. In particular, they anticipate that class actions will become more popular against monopolies that violate competition laws and internet platforms. Besides an expansion of the areas in which class actions will be more popular, they also expect that the scope of class actions will be broadened. "It will become more and more common to apply Israeli privacy rules and consumer rights to

large international corporates who are active on the Israeli market. Class actions are the only answer when the government decides not to use its force. Many cases have no answer in the law, because they are new to everyone. There are moral as well as legal questions to answer." They anticipate seeing these developments in the next few years.

Public enforcement should assist private enforcement

According to Isaac and Shachar, the class action system is well put together, but has "some problems in practice". There are many difficulties and complications that come from handling and managing large legal procedures with many claimants. They believe that regulators taking an active role in managing procedures could provide a solution by giving a way of gathering the group and finding an easy way to give them the damages. For example, this could be done by assembling or contacting potentially harmed individuals. "In that way they assist in enforcing the laws and make up for the fact that they do not provide legal aid to individuals."

Settlements take too much time

Managing these procedures is very complicated. The court needs to approve a settlement, opposite sides do not always agree to settle and usually the Attorney General gives his opinion or rejects on the settlement. It can sometimes take as long as a year to get a settlement. Shachar and Isaac believe that "the approval of a settlement should go faster and be made easier."

Abuse of class actions

We ask Isaac and Shachar if they believe that class actions are abused in Israel. According to them, class actions are not usually abused. However, "It is reasonable to assume that there are and will be those who will seek to use the system for bad purposes." They believe that this abuse can mainly be expected from relatively small class actions with a limited number of claimants.

Third party funding not necessary

We ask whether third party funding is used in the Israeli system. Shachar and Isaac explain that third party funding in class actions is uncommon in Israel. They also expect that it will not become very popular either, since it has no business model that would earn a large amount of money for the funders. On top of that, the legal issues are complicated. They explain that "managing proceedings in Israel costs almost nothing compared to the US." This means that third party funding is not really required. "Usually the lead claimant is funding the procedure, and the costs are low. It is another issue when there is a need to use experts, then only claimants with 'deep pockets' should be the leaders. We should note that there are some governmental organisations that fund part of the costs in certain cases. And even if it was required, third party funders would probably not be very interested because there is no possibility of obtaining punitive damages."

European law not very relevant

We ask Shachar and Isaac which European jurisdictions they think are most relevant for them, but it turns out that they do not find any European jurisdiction particularly relevant for the way class actions are dealt with in Israel. "Unfortunately, European law is not directly applicable in Israel and European verdicts are not recognised." They explain that in some areas of law, like consumer protection and stock market regulation, Israeli law is far more advanced than European law. However, there are other areas where European law is more advanced, like privacy law, enforcing human rights and dealing with international internet platforms.

Israeli proceedings vs US proceedings

Comparing the US with Israel, Shachar and Isaac come to the conclusion that proceedings in Israel are better than in the US because of access to the courts. They note that court fees are relatively low in Israel. The US system, however, is much more advantageous for claimants who want to obtain substantial damages. Isaac and Shachar explain that "Israeli courts are too cautious in awarding damages. There are no

"Israeli courts are too cautious in awarding damages."

Claimants' Lawyers

punitive damages in the Israeli system and usually the court will seek to find the real damage and compensate only that. This diminishes the ability to really enforce a change of attitude by commercial businesses, because the maximum amount that they will have to pay equals the revenue that is accumulated by breaking the law, so they never lose."

Landmark case

The most important class actions of the past ten years, according to Isaac and Shachar, are the *Tnuva Company*[1] case and the *Makhteshim/ChemChina* case[2].

In the *Tnuva Company* case, Israel's most popular dairy company Tnuva was accused of overcharging for cottage cheese, a popular staple food in Israel. Tnuva was considered to be a legal monopoly by the Israel Antitrust Authority. After a successful Facebook event that called for a boycott of their cottage cheese, the price of cottage cheese dropped by approximately 24%. The difference in price of cottage cheese before and after the boycott was then used as evidence for excessive pricing in the claimant's motion to certify a class action against Tnuva. The amount claimed is ILS 103 million.[3] The Central District Court certified the class action in 2016.

It was the first time that a court certified this type of case and ruled that excessive pricing is unlawful under Section 29a(b)(1) of the Israeli Antitrust Law. Another interesting aspect of this case is the fact that Tnuva did not appeal the decision even though the Israeli Supreme Court had reversed court decisions about certification of class actions in the past.

1 Class action (Center) 46010-07-11 *Ophir Naor v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel.*
2 Case No COMP/M.6141 – China National Agrochemical Corporation/ Koor Industries/ Makhteshim Agan Industries.
3 Approximately EUR 26.5 million.

In the *Makhteshim/ChemChina* case a minority shareholder sued Makhteshim Agan Industries. Its parent company, Koor Industries, had agreed to sell Makhteshim Agan to the China National Chemical Corporation (ChemChina). The minority shareholder sued the company seeking damages and requested the transaction to be altered for a more rewarding construction for the shareholders since the deal included a non-recourse loan that could turn out very advantageously for Koor, a financial gain that the shareholders wouldn't receive.

The case ended in a settlement which was considered a historic victory for the shareholders. Koor agreed to pay minority shareholders USD 45 million, the biggest award in the history of class actions in Israel. The court also decided for the first time in Israel that deals have to be conducted with "fairness" for all shareholders.

Predictions for the future

According to Shachar and Isaac, the ideal class action is "easily accessible, fast and with one procedural system that applies to all possible cases. A class action is a solution where there are small problems for many people. It should not be a problem in itself. It should be fast and should deal with the merits of the cases instead of procedures."

EUROPEAN UNION

On 11 April 2018, the European Commission issued the 'New Deal for Consumers', a package of consumer protection measures. This includes a proposal for a directive on representative actions to protect the collective interests of consumers (COM(2018) 184 final). The draft directive is part of a follow-up of the EU Collective Redress Recommendation (2013/396/EU). It repeals the Injunctions Directive (2009/22/EC) and introduces further reaching possibilities for consumers to start redress actions against traders that have breached EU consumer protection law. The sectors concerned are financial services, energy, telecommunication, health, environment, data and transport. Member States have to make a list of qualified entities (in particular consumer organisations and independent public bodies) that can bring representative actions. The draft directive on representative actions contains several requirements regarding the financial resources of the qualified entity to prevent abuse of the litigation process. The qualified entity must be a non-profit organisation.

The European Parliament adopted an amended proposal on 26 March 2019 (first reading). This amended proposal was prepared by the Committee on Legal Affairs, which was advised by the Committee on the Internal Market and Consumer protection. The Council adopted its position on 28 November 2019. Currently, negotiations between the European Commission, the Council and the European Parliament are taking place. The adoption of the draft directive would, after implementation, create a national legal basis for collective redress within the EU.

Class actions | Draft directive on representative actions to protect the collective interests of consumers *(Proposal European Parliament 26-03-2019)*

Scope	Infringement of specific EU consumer protection law
Access granted to	Qualified representative entities
Opt-in or opt-out	It is up to the Member States if consumers must give a mandate; foreign consumers must do so, see Article 5(2), 6(1-2) and 16(2a) amended proposal
Declaratory relief or damages	Both
Frequently used	Remains to be seen
Regulatory framework	Draft directive on representative actions to protect the collective interests of consumers; amended proposal adopted by EP; interinstitutional file: 2018/0089(COD)
Alternatives	Remains to be seen

Class settlements

Binding class members after court approval	Yes, court approval for settlements reached in a collective action. It is up to Member States if this applies also to settlements reached out of court.
Opt-in or opt-out	Not clear (see Article 8(6) amended proposal)
Regulatory framework	Article 8 draft directive (amended proposal)

Third party funding

Regulated by law	Article 7 (amended proposal): the third party cannot influence the representative entity's decisions nor finance collective actions against a competitor or a defendant on whom it is dependent.
Frequently used	Remains to be seen

Good to know

The draft directive does not require commonality of claims. This means that questions of law or fact that are common to the class are not obligatory on a European level for a collective claim to be admissible.

The future of class actions in the European Union from a political perspective

DENNIS DE JONG | POLITICAL PERSPECTIVE | Former European Parliament member and rapporteur of the Committee on the Internal Market and Consumer Protection

30 April 2019, interviewers: Zeki Korkmaz and Isabella Wijnberg

Dennis de Jong has been involved in policy-making and politics on a national and international level for over 30 years. He is a member of the SP, the Dutch Socialist Party, and was a member of the European Parliament (MEP) between 2009 and 2019. He was involved in the legislative process of the 'New Deal' draft directive on representative actions[1] as a rapporteur for the Committee on the Internal Market and Consumer Protection. In that capacity, he published a draft opinion for the Committee on Legal Affairs. He was also involved in the internal decision-making process in the Committee on Legal Affairs, so he is well-versed in the preparatory work carried out before the amended proposal was approved in the European Parliament. We were delighted that he was kind enough to take the time to share his views on the future of EU class actions with us. This interview was conducted in Dutch and translated into English.

EU class actions: consumer protection v business model

From the start of the interview, Dennis makes it clear that 'European style' class actions are not designed to be a business model for law firms, claim organisations and third party funders. "The most important aspect of collective redress is that citizens can

1 Proposal for a directive on representative actions to protect the collective interests of consumers (COM(2018) 184 final).

more easily file a claim when they suffer damage. Protecting consumer rights is the reason why the 'New Deal' was proposed. It is also the reason why the 'New Deal' contains safeguards to ensure that claims will be filed for the right reasons. The tension between protecting consumer rights on the one hand and preventing entrepreneurial lawyering on the other hand has led to a lot of discussion during negotiations in the Committee of Legal Affairs."

Bringing class actions is in the public interest

We agree that it is difficult to balance protecting consumer rights and preventing abuse because bringing class actions will be hard if the organisations starting them cannot make a profit. "Well," Dennis replies, "it is very well possible to enable an organisation like the Dutch ACM (Authority for Consumers & Markets) to collect claims and bring them to court, provided that the government will give them the means to fulfil this task. Currently, most public bodies have only a limited budget. I certainly hope that they will be better equipped in a couple of years. This is of course a political issue that has the European Commission's attention."

In any case, according to the proposed directive on representative actions, only an approved, non-profit organisation (the 'qualified entity') can bring a collective claim. "Bringing class actions will thus be of public interest and commercial parties will have a limited say in it." Dennis elaborates on the non-profit character of the qualified entity: "We considered it key that the organisation cannot make any profit at all. That means that we have not only defined the type of organisation, but also required that the claimants' legal fees are reasonable and in line with market conditions. This is to prevent part of the fees actually concerning profit. A qualified entity cannot have a financial agreement with a law firm beyond a normal service contract. We also required that the qualified entity cannot be dependent on other entities who might have an economic interest in the outcome of the class action."

We ask Dennis what he thinks about claimants that demand a certain percentage of the damages to be set aside as reserves for future litigation, the so-called 'war chest'. "Costs can be compensated," Dennis answers, "but setting aside reserves seems to be a move

with a profit-making character. If that is the case, it will likely be in conflict with the proposed directive on representative actions. However, the financial stability of a claim organisation is important as well. Class actions being of public interest, the government will also have the task of facilitating organisations that build their reputation as qualified entities. It is up to the Member State whether a certain percentage can be claimed by a qualified entity. We just need to be wary of claim organisations becoming commercial enterprises."

Third party funding might be necessary to pay the costs

Speaking of commercial motives, we are curious to hear Dennis's view on third party funding: "We discussed third party funding during the negotiations of the 'New Deal'. We definitely do not want competing companies to fund class actions against each other; as this would leave the door open to abuse of collective actions for the benefit of damaging a competitor in an unfair way. However, we have been rather strict when it comes to the 'loser pays all' rule." The draft directive on representative actions not only requires that the loser pays all costs but also that they have to inform the consumers about the results of the class action. That can lead to huge expenses and negative publicity for the consumer organisations. Dennis states: "I think this is rather harsh, since the idea is that a qualified entity is a non-profit organisation. Also, we do realise that class actions need to be funded somehow and therefore I am not absolutely against a third party funder. However, this should not lead to abuse of the class action system."

We suggest that a neutral organisation like the Dutch Legal Aid Board might be an appropriate forum to fund EU collective actions. Dennis agrees. "Funding by such an organisation seems to be in line with the proposal and with the idea that effective legal aid must be available throughout the EU."

Consumer organisations should not team up with commercial parties

One of the amendments made by the European Parliament in the first reading was deleting the option to claim an amount of loss that is so small that it would be disproportionate to distribute the redress to consumers. These 'scattered damages'

would then have been given to fund a public purpose serving the collective interests of consumers, most probably through consumer organisations. Dennis is glad that this option was deleted. He acknowledges that consumer organisations throughout the European Union are not the wealthiest of organisations. Compensation for scattered damages might therefore be a welcome addition to their budget, but "this does not justify taking compensation from consumers to give it to consumer organisations." This option would also increase the risk that collective actions to obtain these scattered damages might be brought by the consumer organisations themselves for their own commercial purposes.

Dennis acknowledges that consumer organisations need some kind of funding to fulfil their task. In the Netherlands, the consumer organisation 'Consumentenbond' teamed up with a commercial claim foundation. In Dennis's opinion, this is not the way to go. "In that case, commercially driven motives might infiltrate a neutral organisation that should act only on behalf of consumers." A particular issue is that consumer organisations do more than just initiate class actions, for example publishing comparison tests. These activities might also be influenced by their ties with commercial third parties. "This would certainly be an undesirable development," he concludes.

Consumer class actions are just the beginning

We wonder why the proposed directive on representative actions is limited to consumer class actions. Dennis explains that this is a compromise. "It was a political choice to restrict the 'New Deal' to consumers. By doing so, a general regime of class actions would not be imposed on Member States that do not have such a system yet. However, Member States are allowed to broaden the scope of EU class actions to 'natural persons' (so that, for example, people suffering from health problems as a consequence of violations of environmental law could also be covered) since the proposed directive requires minimum harmonisation. Also, the directive will be evaluated in the future. If it becomes clear that cases other than consumer cases or other breaches of European law need to be included in the scope of the directive, this can be done after the evaluation. At that time, we will have ample experience with the directive and it can be adapted accordingly."

Commonality of claims is not required

The proposed directive on representative actions does not require commonality of claims, meaning that questions of law or fact that are common to the class are not obligatory on a European level for a collective claim to be admissible. We wonder why this is excluded and give an example from our own practice that basically boils down to a class action for a personal injury case that we feel should not be admissible as a class action. It is not difficult to set an amount of damages in the case of a uniform mis-selling of a specific product. However, it is much more difficult to set damages for a group of consumers with personal injuries because of a defective product. Dennis also regrets that, in the end, the commonality requirement was not included in the proposal. "The reason must be that the proposal also gives the possibility to ask for declaratory relief and this needs to be relatively quick and simple." That being said, Dennis stresses the fact that the discussions in the parliamentary committees primarily involved the possibility for collective redress and that inevitably in those cases commonality needs to be part of the discussion and probably also part of the national regulation.

"It was a political choice to restrict the 'New Deal' to consumers."

Legal basis for draft directive on representative actions

There is a discussion between scholars and practitioners in several Member States about whether the proposed directive falls within the boundaries of the legislative powers of the European Commission and respects the boundaries of EU competence. An argument that is often heard is that introducing some form of collective redress is a decision for each individual Member State. This is because Member States have procedural autonomy following the principle of indirect administration.[2] Dennis does not agree with that argument. "The European Commission finds a legal basis for the draft directive on representative actions in Article 114 TFEU. This is part of a general trend to broaden the scope of EU legislation to the enforcement measures that Member States take in fields relevant for the proper functioning of the internal market. Admittedly, this is something that might not originally have been foreseen. At the

2 See article 291(1) Treaty on the Functioning of the European Union ("TVEU"): "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*"

same time, the European Parliament did not contest this in other fields such as the legislation on consumer authorities and, in particular, the existing injunctions directive. Those MEPs who objected to the legal basis were opposed to the idea of collective representation in general. In any case, the European Parliament's final position on the directive contains a recital affirming the need for the directive in view of Article 114 TFEU."

European authorities will not proactively facilitate collective settlements

The conversation moves to the topic of settlements. We wonder if the MEPs discussed whether the European Commission or a national authority should be more proactive in either initiating a class action or encouraging a class settlement. We not only think of follow-on damages proceedings, for example after the Commission has fined a company because of anti-competitive behaviour, but also of the possibility that a supervisory authority forces a company to settle in return for a reduced fine. Dennis answers: "I can imagine that consumers could start collective actions in the wake of the Commission's decision, also outside the scope of competition litigation. With regard to more proactive European or national authorities, this has not been discussed at all in the committees. It is a full step further than the directive proposal. "

However, Dennis gives the idea some more thought. "I think that it is very important that consumers are fully compensated for their loss. And I do not particularly wish fines to be as high as possible. So, I cannot be against a class settlement that reduces the amount of fines if the result is that consumers then get compensation. At the same time, I do not think that this will happen from an EU perspective, since the barriers between the European Commission, having a public role, and the private collective actions are too high. You might organise this more easily on a national level."

Ad hoc entities should be allowed to start EU class actions

The European Parliament made another amendment to prevent ad hoc organisations starting collective proceedings. In the Commission proposal, the Member States could designate a qualified entity on an ad hoc basis for a particular representative action. This option was deleted by the Parliament, because MEPs thought it might make way for commercially driven organisations. Dennis is not convinced: "Organisations on an ad hoc basis can be useful in well-defined cases like mis-selling of insurance policies. Furthermore, if they are not qualified to start class actions, the national consumer organisations will practically have a monopoly in this matter. They will decide the future of EU class actions. All things considered, I think I would rather have ad hoc organisations be able to start class actions as well. Of course, they must be approved of and fulfil the requirements regarding safeguards such as transparency and the absence of a conflict of interest."

"Organisations on an ad hoc basis can be useful in well-defined cases like mis-selling of insurance policies."

Most important sector for class actions

As in all interviews, we ask Dennis what he considers the most important class action of the past ten years. This proves to be a difficult question, because the parliamentary negotiations were more about what did *not* happen in Europe, like awarding punitive damages, rather than what the EU achieved. However, after a moment of thought, he mentions a sector that plays an important role in collective actions: passenger transport. "I think that most claims and claim organisations can be found in this sector. It is beginning to look like a war, with carriers trying their best to avoid the claims to be effective. The question of whether passenger rights should be brought under the draft directive was part of the negotiations. We finally decided to do so, because it would be desirable to get more clarity on what passenger rights include, to concentrate the claims and to take them away from small claim organisations."

Predictions for the future

To round off the interview, we asked Dennis what he thinks will be the most important development in the future of class actions. Given his background, it was not surprising that he was focused on what he thought politicians should be doing: "My opinion is that the Member States and the European Parliament need to quickly agree on the draft directive, so consumers can effectively claim their rights in a collective action and we can evaluate the directive as soon as possible."

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