

PART X

COLLECTIVE LITIGATION (AND PROTECTION OF NON-LITIGANTS' INTERESTS)

CHAPTER 1

INTRODUCTORY CHAPTER

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1 NOTION OF COLLECTIVE LITIGATION

- 1 The expression 'collective litigation' is a very broad expression and is technically capable of encompassing all the several different tools conceived to solve typical problems of the societies shaped by the industrial revolution, the so-called mass societies. The growing access to consumer goods gave rise to the likelihood of the existence of tens, hundreds and thousands of individual lawsuits with identical subject matters or common essential characteristics.¹
- 2 It is also important to note, in order to establish a really accurate overview of the rights that can be encompassed by class actions, that the legal scenario changed considerably in the intellectual atmosphere of the Enlightenment, which inspired the eighteenth century revolutions.² The so-called fundamental rights arose inspired by the philosophical ideology that gave rise to the American revolution (1776) and to the

¹ See, eg, in EU N Sajn, European Parliamentary Research Service 2, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637978/EPRS_BRI\(2019\)637978_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637978/EPRS_BRI(2019)637978_EN.pdf): 'When faced with infringements of consumer law, EU consumers can get redress in a number of ways, which vary between Member States. Individual consumers can ask the seller directly to remedy the situation, use official alternative dispute resolution (ADR) mechanisms (including mediation, consumer ombudsmen, online dispute resolution (ODR) platforms), or seek help from European consumer centres (ECC). They can also file a lawsuit in court (although judicial redress can be very costly) or use the European small claims procedure. Collectively, consumers benefit from public enforcement of consumer law: public authorities can stop or prohibit an infringing practice, and in some cases, after their investigations have shown a breach of law, order compensation for affected consumers. Once the new Consumer Protection Cooperation (CPC) Regulation becomes applicable in 2020, consumer protection authorities in all Member States should have the power to obtain commitments from traders that they will cease the infringements they are responsible for and offer adequate remedies to the consumers that have been affected by such infringements. With regard to private enforcement, consumers can in some Member States request redress by taking companies infringing consumer rights to court (or start proceedings before an administrative authority). When consumers who are affected by an infringement bring a lawsuit themselves as a group of individuals, the Commission calls this a 'group action' and distinguishes it from a 'representative action', where the lawsuit or the administrative procedure is initiated in the name of the affected consumers, but not by the consumers themselves. Representative actions can be brought in the name of all affected consumers, with a possibility that individuals opt out of the action, or in the name of only those consumers that decide to opt in or join the action. With regard to representative actions, Member States are required currently to have procedures only for stopping or prohibiting infringing practices, but not for obtaining consumer redress'.

² A Haratsch, *Die Geschichte der Menschenrechte* (5th edn, Universitätsverlag Potsdam, 2020) 58,93: 'Eines der frühesten Beispiele einer menschenrechtsgeprägten Verfassung außerhalb Frankreichs ist die spanische Verfassung von Cadiz aus dem Jahr 1812. [...] Ende des 18. Jahrhunderts verstärkte sich in Deutschland – beeinflusst von den Ideen der Französischen Revolution, der aufklärerischen Philosophie Immanuel Kants und des deutschen Idealismus – die Forderung nach Grund- und Menschenrechten'. Loosely translated: 'One of the first examples of a constitution characterised by human rights outside of France is the 1812 Spanish Constitution of Cadiz. [...] At the end of the 18th century, in Germany – influenced by the ideas of the French Revolution, by the ideas of Immanuel Kant's philosophy of enlightenment and by German idealism – the demand for fundamental and human rights was intensified'.

French revolution (1789). They had markedly individualistic leanings (or features) that were only minimized by the nineteenth century social movements, with the emergence of so-called second-generation rights, social rights, *lato sensu*.³ The relationship between first- and second-generation rights is complementary rather than oppositional.⁴

- 3 In the second half of the twentieth century, rights that scholars called third-generation fundamental rights emerged. This third generation, rather than clashing with the first two, complements them. These third-generation fundamental rights comprise the right to health services, to housing, to the preservation of historical and cultural heritage, to

³ A E Pérez Luño. 'Las generaciones de derechos humanos'. (2013) 2 (1) Revista Direitos Emergentes na Sociedade Global, 167: 'Los derechos humanos como categorías históricas, que tan sólo pueden predicarse con sentido en contextos temporalmente determinados, nacen con la modernidad en el seno de la atmósfera iluminista que inspiró las revoluciones burguesas del siglo XVIII. Este contexto genético confiere a los derechos humanos unos perfiles ideológicos definidos. Los derechos humanos nacen, como es notorio, con marcada impronta individualista, como libertades individuales que configuran la primera fase o generación de los derechos humanos. Dicha matriz ideológica individualista sufrirá un amplio proceso de erosión e impugnación en las luchas sociales del siglo XIX. Estos movimientos reivindicativos evidenciarán la necesidad de completar el catálogo de los derechos y libertades de la primera generación con una segunda generación de derechos: los derechos económicos, sociales, culturales. Estos derechos alcanzan su paulatina consagración jurídica y política en la sustitución del Estado liberal de Derecho por el Estado social de Derecho'. Loosely translated: 'Human rights as historical categories, which can only be meaningfully predicated in specific temporal contexts, arose with modernity in the atmosphere of the enlightenment that inspired the 18th century bourgeois revolutions. This genetic context endows human rights with defined ideological profiles. Human rights originate, as is well known, with a distinctly individualistic character, such as individual freedoms that constitute the first stage, or generation, of human rights. This individualist ideological matrix underwent an extensive process of erosion and challenges in the social struggles of the nineteenth century. These protest movements would demonstrate the need to complete first-generation rights and freedoms with a second generation of rights: the economic, social and cultural rights. These rights progressively attained their legal and political recognition with the replacement of the liberal rule of law with the social rule of law'.

⁴ Ibid: 'La distinción, que no necesariamente oposición, entre ambas generaciones de derechos se hace patente cuando se considera que mientras en la primera los derechos humanos vienen considerados como derechos de defensa (*Abwehrrechte*) de las libertades del individuo, que exigen la auto limitación y la no injerencia de los poderes públicos en la esfera privada y se tutelan por su mera actitud pasiva y de vigilancia en términos de policía administrativa; en la segunda, correspondiente a los derechos económicos, sociales y culturales, se traducen en derechos de participación (*Teilhaberechte*), que requieren una política activa de los poderes públicos encaminada a garantizar su ejercicio, y se realizan a través de las técnicas jurídicas de las prestaciones y los servicios públicos'. Loosely translated: 'The difference, not necessarily antagonistic, between the two generations of rights becomes clear when one considers that, while the first generation human rights are deemed to be rights of protection (*Abwehrrechte*) of the individual's freedoms, which require self-restraint rather than the interference of the government in the private sphere, and are protected by the merely passive and supervisory stance of the state in terms of administrative policing; the second generation, corresponding to economic, social and cultural rights, results in participation rights (*Teilhaberechte*), which require an active policy by the government authorities in order to guarantee their exercise, realised by means of legal techniques of public benefits and services'.

a healthy environment, etc.⁵ This third generation of fundamental rights was already the product of a 'globalized' view of those rights.⁶

- 4 As we know, the moment when a right is created does not always necessarily coincide with the conception of a remedy by means of which this right could be enforced. This is what occurred with these so-called fundamental or human rights: when the state ceased to be absolutist – pardon our simplification of the idea – it was recognized that the individual had rights *against* the state. Yet, the individual was not immediately afforded a procedural tool to claim said rights.
- 5 So, recapitulating: scholars, influenced by ideas and by the intellectual mood of the American and French revolutions, started delving into the rights inherent to *the human condition*. This was the starting point. Rights were classified by scholars as being first, second and third generation rights.

⁵ I Sarlet. Eficácia dos direitos fundamentais (12th edn, Livraria do Advogado 2015), 48-49: 'Among the most commonly cited fundamental rights of the third generation are the right to peace, to the self-determination of peoples, to development, to the environment and quality of life, as well as to the right to the conservation and usage of historical and cultural heritage, and to the right of communication. It is, in fact, the outcome of new fundamental human demands generated by, among other factors, the impact of technology, the chronic state of war, as well as by the post-Second World War decolonisation process and its resounding consequences, causing profound repercussions in the sphere of fundamental rights'.

⁶ A Pollmann, Die Menschenrechte: teilbar und ungleichgewichtig! Die Menschenrechte: unteilbar und gleichgewichtig? - Studien zu Grund- und Menschenrechten (11 Universität Potsdam 2005) 32: 'Darüber hinaus läßt sich sogar von einer "dritten" Generation der Menschenrechte sprechen. Indem sich die kapitalistische Industrialisierung in der zweiten Hälfte des 20. Jahrhunderts global ausweitete, wurden zunehmend Forderungen nach „Gruppen-“ bzw. „Kollektivrechten“ laut, die einem wachsenden ökonomischen und ökologischen Raubbau an den politisch schwächeren Regionen dieser Welt entgegenwirken sollten'. Loosely translated: 'In addition, one can truly speak of a 'third' generation of human rights. As capitalist industrialisation expanded globally, in the second half of the twentieth century, the demands for 'group' or 'collective' rights increased so as to counteract the growing economic and ecological over-exploitation of the politically weaker regions of the world'.

- 6 Awareness of the existence of these rights (ie, the three generations of fundamental rights) did not come about at the same moment in history, nor were the procedural tools required to defend said rights conceived concomitantly with their perception.⁷
- 7 Certainly, class actions, mainly the North American model ones, are a powerful tool of 'collective litigation' used to concretize these third-generation rights and, as we know, are much more recent than representative class actions.⁸
- 8 Contemporary scholars associate the emergence of class actions of the representative type with the United States' Rule 23. Although there are some scholars who point to the remote origins of class actions in the Middle Ages,⁹ the vast majority of legal authors, when broaching the origins of class actions, begin in the United States, in 1938, when the first version of Rule 23 was approved. Rule 23 underwent several amendments over time, and its 1966 version introduced, for the first time, the current design of representative class actions. Since then, Rule 23 has undergone many changes.
- 9 As can be noted, representative class actions serve to protect individual rights belonging to groups, of different sizes, of people and also to protect intrinsically collective rights, such as the second and third-generation fundamental rights.
- 10 As we will see, other tools of collective litigation serve to resolve group disputes linked to individual rights. These are the aggregate litigation tools. Therefore, there are only a limited number of statements that could be made that would be true in relation to all of these tools.

⁷ A Haratsch (n 2) 54: 'Die klassischen staatsbürgerlichen und politischen Freiheits- und Abwehrrechte werden oftmals als „Menschenrechte der ersten Generation“ bezeichnet, während die wirtschaftlichen, sozialen und kulturellen Verbürgungen zu den „Menschenrechten der zweiten Generation“ gezählt werden. In jüngerer Zeit fasst man unter dem Begriff der „Menschenrechte der dritten Generation“ eine weitere Gruppe von – meist kollektiven – Rechten zusammen. Hierzu gehören etwa das Recht auf Entwicklung, das Recht auf eine gesunde, lebenswerte Umwelt, das Recht auf Frieden, Solidarität und Sicherheit sowie das Recht auf Teilhabe am gemeinsamen Erbe der Menschheit'. Loosely translated: 'The classical civil and political rights of freedom and protection are often referred to as "first-generation human rights", while economic, social and cultural assurances are considered to be "second-generation human rights". More recently, the expression "third-generation human rights" has been used to sum up another group of rights – mainly collective ones. These include the right to development, the right to a healthy and inhabitable environment, the right to peace, solidarity, and safety, as well as the right to share the common heritage of humanity'.

⁸ D Hensler, 'The global expansion of class actions: power, politics and procedural evolution', in B T Fitzpatrick and R S Thomas (ed), *The Cambridge International Handbook of Class actions: An International Survey* (Cambridge University Press 2021) 27-33.

⁹ S C Yeazell, 'Group Litigation and Social Context: Towards a History of the Class Action' (1977) 77 (6) *Columbia Law Review* 866-896.

- 11 In any case, we could affirm that collective litigation is not a primary construct of the theory of procedural law. The main concepts of classical procedural law were conceived circa 1850, the German legal writer Oskar von Bülow being considered one of the first legal authors to deal with procedural law in a scientific way, treating it as an independent branch of law that is not to be confused with substantive law. The concept of procedural legal relationship¹⁰ and of process' *Voraussetzungen* (requirements) were thought up on the basis of the scheme of individual rights¹¹. Notions such as standing, interest, *causae petendi*, *petitum* were all conceived based on an individualistic approach.¹²
- 12 So, naturally, the classical tools of civil procedure were, and still are, not able to solve certain types of disputes, mainly (i) those related to mass societies¹³ (ii) those related to rights that belong to everyone's intrinsic collective rights – most of them did not have their existence recognized before the second half of the twentieth century.¹⁴

¹⁰ J Kohler, *Der Prozess als Rechtsverhältnis Prolegomena zu einem System des Civilprozesses*, (Mannheim Besheimer 1888) 52.

¹¹ O von Bülow, *La teoria de las excepciones procesales y los presupuestos procesales*, (tr: Miguel Angel Rosas Lichtschein, Juridicas Europa-America 1964) 2.

¹² F Reuschle, Bestandsaufnahme und Reformvorschläge [BKR 2020 605] 606, elucidates: 'Die Zivilprozessordnung ist primär auf Einzelverfahren und das Geltendmachen von Individualansprüchen zugeschnitten.' Our translation: 'The Code of Civil Procedure is primarily tailored to individual proceedings and the assertion of individual claims'. C Hodges and A Stadler, *Resolving Mass Disputes* (Edward Elgar Publishing 2013) 9 explain: 'Collective actions thus do not fit readily into the European 'individualistic' civil justice systems, which are almost entirely based on the enforcement of individual claims in two-party litigation', accessed on 22 November 2022. Check further article below: F Reuschle, 'Mehr kollektiver Rechtsschutz' [NJW Editorial Heft 41 2017].

¹³ W Lüke, 'Der Musterentscheid nach dem neuen Kapitalanleger-Musterverfahrensgesetz: Entscheidungsmuster bei gleichgerichteten Interesse?' (2016) 119 (2) Zeitschrift für Zivilprozess 158 says: 'Manche dieser Neuerungen, die sich in der Praxis erst noch bewähren müssen, folgen letztlich aus dem Versuch des Gesetzgebers, eine aus Sicht des einzelnen Klägers zurückhaltende Lösung für das Massenproblem zu finden. Das Modell eines gemeinsamen Prozessvertreters etwa hätte es hier einfacher. Gleichwohl verdient die Ansicht des Gesetzgebers, die individualistischen Strukturen auch in diesen Fällen möglichst weitgehend zu erhalten, grundsätzlich Zustimmung. Selbst wenn es den Ertrag an Vereinfachung schmälert, greift ein solches Verfahren doch weniger weit in die Grundprinzipien des Zivilverfahrensrechts ein'. Loosely translated: 'Some of these innovations, which have yet to prove themselves in practice, ultimately follow from the legislator's attempt to find a solution to the mass problem that is limited from the point of view of the individual plaintiff. The model of a joint legal representative, for example, would have an easier time of it here. Nevertheless, the legislature's view that the individualistic structures should be retained as far as possible even in these cases deserves approval in principle. Even if it reduces the yield of simplification, such a procedure nevertheless encroaches less on the basic principles of civil procedural law'.

¹⁴ See, eg, F Reuschle (n 12): 'Massenschäden sind ein Phänomen unserer modernen Gesellschaft. Ob die Einnahme von Medikamenten, eine Vergiftung durch ausgasende Chemikalien oder Kindertee in

- 13 The need to find a procedural solution for these situations and for these new rights was not felt at the time when the classical civil procedure was conceived because (i) mass societies emerged in the second half of the twentieth century; (ii) several rights whose violation can justify the use of collective procedural tools were not yet recognized as rights: eg, rights against casteism¹⁵, racial discrimination, the jeopardizing of artistic or historical heritage. Thus, only a descriptive approach of the cultural context where collective litigation was born will enable us to better understand it.
- 14 Law has a very clear practical dimension, and it normally embodies answers to the problems it is meant to solve. The acknowledgement and the interpretation of the needs of a society normally give rise to the creation of legal tools to solve them: substantive law and the corresponding procedural tools. Procedural devices are, in fact, a reaction: the way a society finds to answer its needs.¹⁶

der Nuckelflasche, die Verwendung unzulässiger Thermofenster oder anderer Abschalteinrichtungen in Dieselfahrzeugen, das Spektrum der möglichen Schädigungen ist unbegrenzt. Massenproduktion sowie moderne Technologie sind unter anderem dafür verantwortlich, dass im Falle von Störungen nahezu immer eine Vielzahl von Beteiligten gleichermaßen betroffen werden. Die prozessuale Bewältigung von Massenschäden stellt dabei die Effizienz und Wettbewerbsfähigkeit von Justizsystemen auf die Probe'. Our translation: 'Mass tort is a phenomenon of our modern society. Whether it is the ingestion of medication, poisoning by gaseous chemicals or drinks poisoned in baby bottles, the improper use of double-glazed windows or defeat devices used in diesel-fuelled vehicles, the spectrum of possible damage is unlimited. Mass production as well as modern technology are responsible, among other things, for the fact that, in the event of malfunction, a large number of parties is almost always equally affected. In this context, the procedural management of mass damages puts the efficiency and competitiveness of judicial systems to the test'.

¹⁵ P Jain, Class action framework in India, National Report (not yet published) 3: '[...] the goal of the [Indian] Constitution in creating the Directive Principles seems to be of creating a forward-looking state, responsible for the eradication of poverty and casteism, improving the environment and public health, facilitating communication and ensuring national security'.

¹⁶ On this point, one should include the teachings of D Hensler, 'The global expansion of class actions: power, politics and procedural evolution', in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of class actions: an international survey* (Cambridge University Press 2021) 21: 'Policy-makers have established a variety of procedural mechanisms to respond to the challenge of mass legal claims. These procedures - all of which are represented in this volume - include: 'True' class actions in which a representative class member is authorized to file a lawsuit the outcome of which will bind everyone in a class of similarly situated people or entities without regard to whether they have filed legal claims and without them being present in court; Actions in which an association or special purpose entity (but not a class member) can litigate to obtain declaratory relief for its members or subscribers, allowing others subsequently to pursue claims for monetary relief, relying on the court's decision on liability in the initial case; Actions in which parties with claims arising out of the same law and facts can 'register' (or perhaps be required to register) their claims and then be bound by the decision on liability of a court-selected 'model' case when they subsequently pursue individual claims for compensation; and Settlement vehicles that allow claimants represented by associations or special purpose vehicles and putative defendants to approach the court together to seek approval of a binding settlement, including in instances where defendants have not been formally held liable by a court'.

- 15 In the last century, an increasing number of national and multinational corporations, whose success depends on their ability to market goods and services to vast populations, created the chance of mass injuries stemming from violations of law has naturally increased and class actions were seen as a possible path for a suitable solution.¹⁷
- 16 *Class actions*, a specific tool that renders concrete collective litigation, the subject of chapter 3 and 4, was a way the US found to solve these problems that, as previously mentioned, were not easily solved by traditional procedural devices.
- 17 It was, for example, not very difficult for the US to conceive a procedural device such as class actions because common law jurisdictions are usually less concerned with civil procedural theory, with steady concepts and categories. The pragmatic soul of English-speaking people led them to an easier path to solve practical problems, without feeling chained to old concepts.

¹⁷ D Hensler (n 16) 20-21, explains: 'What explains the proliferation of procedural options for group litigation in so many jurisdictions? Over the past fifty years, economic, political and cultural changes have increased the potential for mass claims for personal and financial injury. Arising out of the same factual circumstances, mass claims arrive at the court's doorsteps within a brief time, challenging even wealthy jurisdictions' courts' ability to deal with them expeditiously. Some attribute the rise of a so-called 'compensation culture' to whiney citizens and greedy lawyers seeking lucrative opportunities to litigate. However, the actual explanation is more complicated and implicates economic, social and cultural change. With the expansion of the global economy, there is an increased potential for defective products and fraud and other illegal behavior to affect large numbers of people. The rise of an accountability culture has made the idea of holding perceived wrongdoers to account for their actions more popular. Legislatures and courts have created new substantive legal rights, facilitating legal action to achieve accountability. The neoliberal mandate to reduce government regulation and recognition of the potential for regulated entities to suborn the regulators has made the notion of relying exclusively on public agencies to identify and sanction bad behavior less attractive. Social media permit rapid sharing of information (and misinformation) about mass harms and naming of wrongdoers. Although there is little evidence that people generally - wherever they reside - are more disputatious than in the past, there are numerous examples of large numbers of people coming forward when mass harms occur to claim compensation or restitution from perceived wrongdoers'. See also, eg, D Baetge, 'Class actions, group litigation & other forms of collective litigation: Germany' (2007) Stanford Law School 17, particularly 30 https://www.law.stanford.edu/wp-content/uploads/sites/default/files/event/261321/media/slspublic/Germany_National_Report.pdf; See also, eg, D Baetge, 'Class actions, group litigation & other forms of collective litigation: Germany' (2007) Stanford Law School 17, particularly 30 https://www.law.stanford.edu/wp-content/uploads/sites/default/files/event/261321/media/slspublic/Germany_National_Report.pdf accessed 19 June 2024, for what happened in Germany: 'Suits brought by consumer associations and organizations representing the interests of commerce and industry are the earliest and, still, the most important instruments of collective litigation in Germany. Traditionally, the influence of association suits is most strongly felt in unfair competition law and in the law of standard contract terms. In these two areas, association complaints have been of considerable importance. It is noteworthy that, as a result of association suits, mostly by consumer organizations, in the area of standard contract terms alone, more than 3,500 judgments were delivered between the late 1970s and 2001'.

- 18 This device also aimed at changing the behaviour of big enterprises. It is an expressive example of how legal rules, under certain conditions, can change culture.¹⁸
- 19 The same problems arose in Europe and there too, as we will see, attempts were made to create more efficient procedural tools. In Europe, care was always taken not to simply copy the North American model, which was already revealing flaws, such as the fact that it was a type of litigation conducted by lawyers.¹⁹
- 20 Despite this, the existence of this first model of collective litigation, the American class action, prompted reactions in many countries, in which there were attempts at establishing similar instruments.
- 21 Even if, in recent years, the U.S. Supreme Court has steadily closed the courthouse doors to class actions, an increasing number of foreign jurisdictions have adopted some form of representative group proceedings inspired by the American class action.²⁰

¹⁸ F Barberán, K Yuroda and F Ikabe (ed), *Introduction al derecho japonês actual*, (Thomson Reuters Aranzadi 2013); but sometimes legal changes are rationally planned, and not simply a ‘natural’ reaction of societies to new social needs. In this case, they may consist of legal transplants of a foreign legal system, as happened in Japan, just to be closer to western culture. Jurists consider that, at the end of the nineteenth century, with the proclamation of the Meiji Constitution, Japan began to set its course towards becoming a modern state. Japan’s transition to a modern state came about due to the impossibility of a traditional Japan, which revolved around the Power of the Shogun, in a semi-feudal regime, to resist political and economic pressure and the military threats of Western powers since the middle of the nineteenth century. This shift was reflected in the law and, in this context, it was decided to abandon *wakon-kansai* (Japanese spirit – Chinese talent) to embrace *wakon-yosai* (Japanese spirit – Western talent). The Meiji Constitution itself was drafted by Japanese *and foreigners*: it was Western Asia’s first Constitution. Japan, at that time, decided to import legal institutions and concepts from Europe, starting a new stage in its law, marked by its capacity to assimilate the legal principles of continental law, mainly French, German and Dutch, as well as Anglo-Saxon, blending them with the Japanese spirit. The authors remark on the curious phenomenon of the *exportation* that occurred subsequently, of what was produced in Japan to the rest of Asia – especially China, Korea and Vietnam. Then, after 1945 (after the 2nd World War) it was noted that there had been a certain Americanization of Japanese law.

¹⁹ See, eg, C Hodges and A Stadler (n 12) 9: ‘There is a wide consensus today that Europe should not simply copy the US class actions system with all the factors that are responsible for a “litigation culture” or “lawyer-driven” litigation’.

²⁰ D R Hensler, ‘From Sea to Shining Sea. How and Why Class Actions Are Spreading Globally’ (2017) 65 *Kansas Law Review* 965 ff.

- 22 The American class action had a *golden age* between 1966 and 1976.²¹ The golden age began with the amendment to Rule 23 of the Federal Rules of Civil Procedure, which

²¹ According to L Mullenix, 'Ending Class Actions as We Know Them: Rethinking the American Class Action' (2014) 64 Emory L. J. 399, 402 <https://scholarlycommons.law.emory.edu/elj/vol64/iss2/14>, accessed 11 June 2024: 'This golden age of class litigation lasted for approximately a decade after the 1966 class action amendments went into effect'. According to R Marcus, 'Bending in the breeze: American class actions in the twenty-first century' (2016) 65 (2) DePaul Law Review 499-500: 'That golden age characterization may involve what I have recently called the "heroic model" of litigation. In that, it may fit with other 'golden ages', such as the golden age of procedural rulemaking on which some commentators now cast an envious backward gaze. In terms of single events, the amendment of Federal Rule of Civil Procedure 23 in 1966 is about as golden as it gets; it was surely the "big bang" of modern class-action litigation'.

created mechanisms for the realization of rights.²² During the 1970s, the golden age came to an end, when the Supreme Court decisions restricted class actions.²³

- 23 The success story of the American class action began to change during the 1970s, when the Supreme Court handed down several restrictive decisions.²⁴ The era of success of federal mass tort class litigation effectively ended by the end of the twentieth century, when federal appellate courts and the Supreme Court put the brakes on innovative class

²² L Mullenix (n 21) 401-402 explains: 'The modern American class action rule emerged during a period of celebrated liberal legislative initiatives intended to expand the civil rights and liberties of ordinary American citizens. President Lyndon Johnson's historic first 100 days during 1964 spearheaded his Great Society legislative program. These legislative initiatives created new substantive rights that would have been rendered nugatory without some procedural mechanism to enforce those newly-created rights. Thus, in the early 1960s the Advisory Committee on Civil Rules embarked on a contemporaneous initiative to liberalize the Federal Rules of Civil Procedure. The amendment of the class action rule in 1966 represented a unique convergence with the creation of new substantive rights supported through a rulemaking that provided a procedural mechanism for the enforcement of those new substantive rights. Modern American class action practice, then, emerged as a consequence of the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure. The liberalized modern American class action rule has long been imbued with an idealized historical narrative in support of its merits. This narrative chronicles the deployment of the class action device in the late 1960s and early 1970s to accomplish landmark social justice reforms. During this so-called golden age of class litigation, public interest lawyers used the class action mechanism to integrate school systems, deinstitutionalize mental health facilities, reform conditions of confinement for inmates in prison systems, challenge discriminatory housing and public accommodation laws, and address various types of employment discrimination'.

²³ Ibid 402-403: '[...] the initial enthusiasm for class litigation eventually engendered a backlash, with the Supreme Court issuing several restrictive decisions during the 1970s that constrained the ability of class counsel to vigorously pursue class litigation. By the end of the 1970s, institutional reform litigation faded somewhat from the litigation landscape, replaced by mass tort cases. In this period mass tort litigation emerged as the new paradigmatic complex litigation, and mass tort cases dominated class action litigation throughout the ensuing two decades until the end of the 1990s. Spanning five decades, class action litigation has always been subject to a pendulum effect, with periods of expansion typically followed by periods of retrenchment. Thus, by the end of the twentieth century, federal appellate courts and the Supreme Court effectively put the brakes on innovative class action experiments, effectively ending the era of federal mass tort class litigation. As a consequence of judicial refinement of the threshold rigorous analysis standard and exacting application of Rule 23 requirements, federal class litigation has become more challenging to pursue. Reflecting on the Court's series of increasingly restrictive decisions, commentators declared that class action litigation effectively is dead. Nothing, however, could be further from the truth. Instead, in the late 1990s the plaintiffs' class action bar regrouped and retreated to state courts, which experienced an onslaught of class litigation until Congress enacted the Class Action Fairness Act of 2005'.

²⁴ Ibid 402: '*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79 (1974) (allocating costs of sending notice to class members on plaintiffs); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (requiring that all class members in diversity class actions individually satisfy the jurisdictional amount in controversy requirement), superseded by statute, Federal Courts Study Implementation Act of 1990, Pub. L. No. 101-650, tit. III, § 310, 104 Stat. 5104, 5113-14 (codified at 28 U.S.C. § 1367 (2012)), as recognized in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005)'.

action experiments.²⁵ The orientation, at that time was that settlement in class actions had to comply with the requirements of Rule 23.²⁶

In individual litigation, a court usually does not need to approve a settlement between the parties. In class actions, however, the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defences of a certified class (Fed R Civ P 23(e)(2)). That is because settlement of class actions implicates numerous parties, including the class representatives, class counsel, absent class members, defendants, defence counsel, and possibly defendants' insurers. Although the court need not approve a pre-certification settlement of individual claims, the court can still in some instances enquire into the circumstances behind such a settlement. To approve the settlement of a certified class, the court must:

- Conduct a hearing to evaluate the terms of the settlement.
- Find the settlement to be fair, reasonable and adequate considering whether the:
 - class representatives and class counsel adequately represented the class;
 - proposal was negotiated at arm's length; and
 - relief provided for the class is adequate, taking into account the costs, risks and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement made between the parties in connection with the proposal.
- Determine the extent to which notice must be provided to members of the class.
- (Fed R Civ P 23(e)(2).)
- Courts commonly weigh several factors including:
- The nature of the claims and possible defences.
- Whether the proposed settlement was fairly and honestly negotiated.
- Whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt.
- Whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.
- Whether the parties believe that the settlement is fair and reasonable.
- The defendant's financial viability.
- The number and objective merit of any objections received from the class members.
- The risks in establishing damages.
- The complexity, length, and expense of continued litigation.
- The stage of the proceedings. (Fed R Civ P 23(e)(3).)

Provisions of CAFA (28 USC §§ 1711-1715) provide procedures for greater scrutiny of class action settlements, including requiring that notice of the proposed settlement

²⁵ *Ortiz v. Fibreboard Corp.* (Court of Appeals, US) [527 U.S. 815 (1999)]; *Amchem Prods., Inc. v. Windsor* (United States Court of Appeals, US) [521 U.S. 519 (1997)]; *Cimino v. Raymark Indus., Inc.* (Court of Appeals, US) [151 F.3d 297 (5th Cir. 1998)]; *Castano v. Am. Tobacco Co.* (Court of Appeals, US) [84 F.3d 734 (5th Cir. 1996)]; *In re Rhone-Poulenc Rorer Inc.* (Court of Appeals, US) [51 F.3d 1293 (7th Cir. 1995)].

²⁶ See Rule 23. Class Actions USFRCP.

be provided to state and federal agencies depending on the type of case. However, because strong policy considerations favour settlement, courts often presume that settlements negotiated at arm's length are fair and reasonable.

The US Supreme Court recently vacated an appeals court's affirmation of a cypres only class settlement, remanding on the grounds that, before approving the settlement, federal courts must first determine whether any named claimant met the *Spokeo* standing factors such that the court has jurisdiction to consider it (*Frank v Gaos*, 139 S Ct 1041, No 17-961, 2019 WL 1264582 (Mar 20, 2019) (*per curiam*)). The US Court of Appeals for the Third Circuit recently followed suit in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, 934 F.3d 125 (3d Cir. 2019), disapproving of a settlement and remanded the action after the district court failed to sufficiently examine the relationship between the cypres settlement fund recipients and defendant.

If a defendant seeks to settle with all the putative class members before class certification, the court must still apply the factors set out in Rule 23, and certify a class for settlement purposes. The court must find that the settlement class meets all the Rule 23 requirements except manageability at trial (*Amchem Products v Windsor*, 521 US 591 (1997)). Determining whether to certify a settlement class is often less onerous than whether to certify a contested class, especially where all defendants favour the settlement. However, when the parties negotiate a settlement before a class has been certified, the district court must apply a heightened scrutiny for evidence of collusion or other conflicts of interest before approving the settlement as fair (*Roes, 1-2 v SFBSC Management*, 944 F.3d 1035 (9th Cir. 2019)).

If the court preliminarily approves the proposed class settlement, under Rule 23(e)(1), the court will then determine a schedule for notifying all absent class members who would be bound by the settlement, so that they can decide whether to:

- Opt out of the class.
- Object to the terms of the proposed settlement.

To satisfy the due process standard of Rule 23(c)(2)(B), notice to class members must be the "best notice that is practicable under the circumstances" (*Roes, 1-2 v SFBSC Management*, 944 F.3d 1035 (9th Cir. 2019)).

When objecting to a class settlement, class members must state whether the objection applies only to the objector, to a specific subset of the class or to the entire class. The objector must also state specifically the grounds for objection (Fed R Civ P 23(e)(5)). Where there is more than one defendant, individual defendants can, and often do, settle separately and at different points in the litigation. The effect is that

the settling defendant is out of the litigation and the remaining defendants may be jointly and severally liable for the claimant's full damages, including that proportion caused by the settling defendant. However, usually any judgment against the remaining defendants will be reduced by the amount of the prior settlements.

Similarly, before certification, one or more defendants can seek to settle with some but not all the named claimants, sometimes in an attempt to undermine the putative class. This raises the question of whether a pre-certification settlement offer to pay a claimant's full claim of damages moots (voids) that claimant's case, on the basis that a claimant no longer has constitutional standing to pursue its case if it has received an offer to pay its alleged damages in full. However, in *Campbell-Ewald Co v Gomez*, 136 S Ct 663 (2016), the US Supreme Court held that, in accord with Fed R Civ P Rule 68, an unaccepted settlement offer has no force and creates no lasting right or obligation.²⁷

- 24 An example is appropriate here: in the *Amchem Prods., Inc. v. Windsor* case, thousands of North American industrial workers had sustained (first in individual claims in 1960, and then in a class action) personal injury caused by asbestos, and for which many companies were held liable. Asbestos is a highly carcinogenic mineral.²⁸
- 25 The American courts came up with alternatives to solve the problems arising from the huge number of lawsuits filed on a daily basis. In the end, they decided to amend Rule 23 USFRCP in order to allow *class actions for damages*, which did not previously exist.
- 26 Prior to this event, there were only actions for declaratory judgments, but none for the award of monetary damages. This amendment also established the *opt-out* system Rule 23 (b) (3) USFRCP.²⁹

²⁷ K M Kliebard, M P Chiu, J W Rissier, J R Roellke, M A Cumming, H Nelson, M A Suehiro, P J Wiese and B R Howard, Morgan, Lewis and Bockius LLP, 'Class/collective actions in the United States: overview' (2020) Thomson Reuters [https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_pageContainer](https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer) accessed 13 November 2022.

²⁸ See E C Robreno, 'The Federal Asbestos Product Liability Multidistrict litigation (MDL-875): Black hole or new paradigm?' (2013) 23 Widener L.J. 97, 117-156.

²⁹ As explained in D R Hensler, 'A profile of U.S. class actions' (2020) manuscript made available on 23 December 2020, courtesy of the author 4: 'Rule 23 (b)(3) provides for class actions for money damages, the bogeymen of opponents of 'American-style' class actions. This category is frequently used by class plaintiffs when the amounts at stake for them individually are too small to make individual litigation viable. Supporters of this category of class actions argue that large corporations can secure substantial aggregate profits by engaging in rule violations that produce small losses for individual consumers.'

- 27 Another possible course of action considered for this specific case were actions for collective settlements, which are lawsuits whose aim is to obtain the ratification of a class action settlement, and which would be particularly useful in the case of damages arising from mass injuries.
- 28 In addition, multidistrict litigation (MDL) and bellwether trial were also established. Lawsuits were consolidated and negotiations were initiated aiming to reach a settlement that had the power to resolve all the lawsuits, defining the liability of the defendants all at once.³⁰
- 29 However, the situation of the defendants was profoundly different, both in respect of the initiative of having sought the courts – many had filed lawsuits and others not – and in respect of the injury to their health, which ranged from various types of cancer to non-

Allowing for damage class actions in such circumstances allows access to courts for ordinary citizens (recognized formally as a goal of class actions in Australia and Canada, but not the United States) and provides a mechanism for private enforcement of market regulations, which is particularly valuable when public enforcement is lax or non-existent. When they debated incorporating a damages class action in the revised Rule 23, however, the 1960s rule-makers were concerned about the possibility that plaintiffs with practically viable individual damage claims would unknowingly be caught up in a collective action and bound by its resolution. Rule 23 (b) (3) therefore contains heightened standards for certifying damages class actions, most importantly that common issues ‘predominate’ over individual issues, and that the class action offer a procedure ‘superior’ to individual litigation. In recent years, the USSC has ratcheted up the standards for assessing predominance. The rule-makers also included requirements that damage class action members receive notice of the pendency of a class action and have an opportunity to exclude themselves and go their own way - ie to ‘opt out.’ (Because logically the outcomes of all other categories of class actions apply to all - eg the statute is either unconstitutional or not, the defendant either has a limited fund available for compensation or not, the defendant is enjoined or not from discriminating against all female employees - the rule-makers did not require notice or an opportunity to opt out for these types of class actions.)’.

³⁰ See chapter 4; J Tidmarsh and D P Welsh, *The future of Multidistrict Litigation* (2019) 51 (3) *Connecticut Law Review* 769,778,779: ‘Multidistrict litigation has quietly become a central feature of federal litigation, sweeping one-third or more of all federal civil cases each year into aggregate proceedings. [...] The fourth factor in the rise of the modern MDL is the decline of the class action. During the 1980s, some courts began to take an expansive view of class actions, making them more available to handle mass litigation seeking damages. In the mid-1990s, however, influential appellate-court decisions substantially curbed this growth, and in the later 1990s a pair of Supreme Court decisions acted as further retardants. With some exceptions, the Supreme Court has maintained its dubious attitude toward the broad use of class actions ever since. And lower courts have followed suit. Pushing Rule 23 toward the sideline has not, however, ended the types of mass disputes that class actions might have addressed. Without the class action as a viable alternative in many cases, the MDL process has stepped into the breach – not as the ideal vehicle for aggregating related cases, perhaps, but as the only device with any reasonable prospect of achieving single-forum resolution of dispersed litigation’.

malignant conditions. Nonetheless, there was an undesirable outcome, ie, the conflict of interests among the petitioners themselves, who belonged to various groups.³¹

- 30 In the Supreme Court, it was acknowledged that the group was divided into subgroups with several different characteristics,³² which meant that they did not fulfil the requirement of the predominance of the common question (of law or fact), with regard to the assessment of the damages.
- 31 The Supreme Court's ruling led to the settlement being set aside. It was held that this decision would send a message to the world to the effect that the state is not allowed to engage in judicial politics thereby undermining individual rights.³³
- 32 After this landmark decision, procedural tools of aggregate litigation started being created around the world, as will be seen in chapter 4.
- 33 Aggregate litigation tools are also an efficient procedural tool to solve disputes arising from the actions of large national or multinational corporations that caused mass injuries stemming from violations of the law. Instruments of aggregate litigation may be very different from one another, but they are all different from the representative class

³¹ G P Miller, Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard, (2013) University of Chicago Legal Forum 608: 'Asbestos litigation has focused attention on the conflict between present claimants and future claimants. Present claimants have been exposed to a harmful agent and suffered an identifiable impairment of functioning, while future claimants have been exposed to the agent but suffer no present impairment. In *Amchem Products, Inc v Windsor*, the Supreme Court seemed to indicate that conflicts of this sort are per se disqualifying because of the differing interests in relief: current claimants want large compensation now, while future claimants want a generous, inflation-protected fund to pay claims if illness strikes. This view has received support from influential commentators [See, for example, Coffee, 95 Colum L Rev at 1445 (cited in note 4) (separate subclasses for present and future claimants are a 'necessary procedural innovation'); Koniak, 80 Cornell L Rev at 1156 (cited in note 4) (urging that subclasses could be mandatory in certain situations); Threadcraft, 25 J Legal Prof at 232 (cited in note 25) (stressing unmanageable aspects of large class actions); Brian Wolfman and Alan B. Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 NYU L Rev 439, 477-507 (1996) (advocating a change in class action rules mandating subclasses).], and has led to a perception that present and future claimants must automatically receive separate representation to satisfy the adequacy of representation requirement'.

³² Ibid 594: 'In securities fraud class actions, for example, class members may have different interests depending on the time of purchase, resulting in the potential for hundreds of different subgroups'.

³³ L Mullenix, 'Should Mississippi Adopt a Class-Action Rule - Balancing the Equities: Ten Consideration That Mississippi Rulemakers Ought to Take into Account Evaluating Whether to Adopt a State Class Action Rule' (2005) 24 (5) Mississippi College Law Review 237, note 117: 'The United States Supreme Court invalidated both the *Amchem* and the *Ortiz* nationwide asbestos class-action settlements on the grounds of inadequacy of class representation and impermissible conflicts of interest'.

actions, because (i) they require a certain number of individual actions to have been filed (ii) there is no 'representative plaintiff'.³⁴

- 34 Class actions have been seen throughout the world as a controversial procedural tool³⁵ which may represent a menace.³⁶ Those tools which deal with fundamental rights can be seen as a threat to governments.³⁷ Similarly, those which render it possible for a large group of people to litigate against companies,³⁸ when these claims were individually unfeasible because of their low value, may represent a threat to these companies.
- 35 Here, it is already perceptible that one has to make a distinction between two types of class actions: (i) those that deal with rights belonging to *everyone*, which are intrinsically collective, such as the right to breathe clean air, and (ii) those belonging to a large group of people, identical, individual, normally arising from contracts, yet affecting a large number of individuals. This will be elaborated on further ahead. In both cases, class actions may play the role of a powerful tool to correct bad conduct of the government or of companies: clearly, one of its main goals is really to change behaviours.
- 36 In Brazil, for instance, companies feel and are threatened. The same can be said of the Government which is why it has already created rules to forbid class actions related to tax matters.³⁹
- 37 Concern was manifested, for instance, in France before 2014, when group actions became a reality, with Act no. 2013-34L, March 2014 (*Loi Hamon*). However, it is currently recognized that collective litigation did not really jeopardize the French economy. As Alexandre Biard states, 'many fears expressed before 2014 have not

³⁴ See chapter 4.

³⁵ D R Hensler, 'The global landscape of collective litigation', in D R Hensler, C Hodges, I Tzankova (ed), *Class Actions in Context* (Edward Elgar Publishing 2016) 10: 'Collective litigation is a subject bound to generate controversies. Undeniably, it has vices and virtues. Sometimes controversies persist even in jurisdictions where class actions were adopted a long time ago'.

³⁶ A Biard, 'The group action in France: an UFO in French procedural law with still inconclusive effects after seven years' (2022) 324 *Revista de Processo*, S. Paulo 405-413.

³⁷ B Dellavedova, 'The role and impact of environmental class actions in Australia' (2021) 24 (1) *Asia Pacific Journal of Environmental Law* 7 states that class actions are able to shape norms of conduct promoting accountability, and especially those related to environmental litigation, which are politically charged.

³⁸ T Broodryk, 'Class Actions in South Africa: A Need for Certainty' in B Fitzpatrick and R Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge Law Handbooks) 481-502 explains that, in South Africa, the development of the procedural framework for class actions has depended exclusively on the courts. Maybe the fear of the harm that class action could cause to the economic sector has been preventing legislators from taking the initiative of regulating this procedural tool. Only legislation would bring predictability, control and efficiency to class actions.

³⁹ Act 7347/1985 (Brazil), Art 1, sole paragraph.

materialized in practice'.⁴⁰ For several reasons, group actions are still rare in France. Associations have a monopoly on standing and only 15 associations in the whole country meet the special requirements to have this standing. Out of 15, only five consumer organizations have initiated group actions.⁴¹

- 38 The need for collective litigation is not deeply felt by the population of countries of German culture, ie, Germany, Austria and Switzerland.⁴² One of the reasons why it happens is that many questions are previously solved on an administrative level, by *government oversight agencies*.
- 39 In general, the classic representative model of class actions was not easily adopted in Europe, for different reasons, one of them being the resistance to departing from models and concepts of traditional civil procedure of Continental law.⁴³
- 40 The European Law Institute and the International Institute for the Unification of Private Law (ELI and UNIDROIT) are working on a project on 'Principles of European Civil Procedure' that deals widely with collective litigation. At the beginning, it was inextricably linked to the traditional concepts of civil procedure, being very cautious not to open doors to abuse. Nevertheless, in the last version of this project a tendency to

⁴⁰ A Biard (n 36) 405-413.

⁴¹ Ibid.

⁴² Specifically on the situation in Switzerland, as explained by S P Baumgartner, 'Class actions and group litigation in Switzerland' (2006-2007) 27 Northwestern Journal of International Law & Business 327-328: 'In the Supreme Court, I have found nine opinions involving association suits between 1947 and 2006 (including the two discussed above), four of them handed down between 1995 and 2000 and none, not even downloadable unpublished opinions, since. In all of these cases, the standing of the association to sue was at issue, and the Supreme Court, with the exception of the damages claim discussed above, decided in favor of the plaintiff association. In addition to the two cases discussed above, there were four more, for a total of six, in the area of labor law, three of them handed down between 1995 and 1999. In one of these cases, the association sued for the removal by the defendant corporation of surveillance cameras installed to supervise its employees. The other three involved attacks on labor contracts and the right of employees to be consulted before a mass layoff. Of the remaining three cases, two involved the Unfair Competition Act, and one antitrust law (...) The relative spike in labor-related association suits between 1995 and 1999 may have originated in one of the most severe downturns of the post-World War II economy in Switzerland. One may further speculate from the relatively small number of association suits and from the fact that all of them have been decided in favor of the plaintiff associations since 1960 that associations and their lawyers have not exactly attempted to utilize the Verbandsklage aggressively'.

⁴³ See 2.2. of this chapter.

depart from decades of a hostile attitude towards collective litigation can already be noticed.⁴⁴

- 41 As previously mentioned, the two tools that render possible collective litigation at the disposal of contemporary societies are analyzed more deeply under (c) are: (i) representative class actions (to be dealt with in chapter 2) and (ii) aggregate litigation (to be dealt with in chapter 4).
- 42 An analysis of the types of class actions that exist throughout the world leads us to believe that they could be subdivided into two types: those actions whose goal is to get a court ruling to protect the rights that belong to everyone (ie, collective rights in their essence), including, but not exclusively, fundamental rights,⁴⁵ and those actions that aim to protect people against the violation of individual rights, with common characteristics (actions which could, in fact, be individually filed).⁴⁶

⁴⁴ J María Salgado and F Verbic, 'Los procesos colectivos en el Proyecto ELI- UNIDROIT sobre principios del derecho procesal civil europeo' (2022) 323 *Revista de Processo* 251 ff: 'The history of this project and the alterations that have been made to it show that the approach toward the topic 'collective litigation' changed considerably over time. At the beginning, there was a very clear attitude of rejection toward ideas underpinning the American representative class action. Maybe a sign of this rejection was, for example, that the word 'representation' is not used in it. Instead, the expression "qualified claimant" is employed. The qualified claimant may be a member of the group, of an "ad-hoc" interest group and of organizations authorized by statutes that have a connection with the case and that represent the interests of the members of the group in a particular field (Rule 207). Some of the rules of this project were conceived with the main concern of not opening, in a very exaggerated way, access to justice. Courts have the duty to analyse, on a case-by-case basis, the economic capacity of the claimant, the possibility of success and so on. Once the collective action has been registered in an electronic and open register, other courts have the duty to discourage other collective proceedings against the same defendants and related to the same damage. European civil procedure is strongly influenced by the principle of autonomy of the parties. This is why collective litigation in European countries is mainly based on mechanisms of acceptance and aggregation. Although this is in fact the existing tendency, the last version of the project tries to depart from it. Transnational issues, those that involve persons or affect persons whose domiciles are in more than one jurisdiction in the European Union (Rule 233), are dealt with in this project. Even if, at the beginning, this project was characterized by a very cautious approach, trying to avoid frivolous litigation and excessively broad access to justice, nowadays, it can be said that there is a trend to open its regime in order to reverse a history of rejection of collective litigation in Europe. Directive 2013 did not have a very positive impact in the state members. Some of them followed the non-recommended opt-out system. It was only the Directive of the European parliament and of council related to the protection of the collective consumers' interests that definitely changed the course of the project, which nowadays allows, for example, the coexistence of 'opt-in' and 'opt-out' mechanisms, deals with transnational conflicts, establishes the possibility of third-party funding, and establishes the interruption and stay of the statute of limitations'.

⁴⁵ S P Baumgartner (n 42) 301, uses the term 'human rights class action'.

⁴⁶ One of the legal authors that stresses this difference is A W Jongbloed, 'Las acciones colectivas en Holanda' in A Gidi and E Ferrer Mac-Gregor (ed), *Procesos Colectivos* (Editorial Porruá 2003) 167 ff. He says there are two types of collective actions: 'acciones de grupo y las acciones de interés general'.

- 43 Disputes that can be solved by this *second* kind of class action, which aims to obtain a single decision in identical disputes involving a considerable number of persons, could normally also be solved by means of aggregate litigation (see, in this chapter, item c and chapter 4).
- 44 In the two kinds of class actions, there had to be a detachment from traditional concepts and structures of individual/classical civil procedural law. Moreover, this is certainly a common characteristic of the origin of all collective litigation tools. Both types of class action arise from a special concern with *equality* and with a *good performance* of the Judiciary also, because the use of class actions leads to the observance of equality, promotes the credibility of the judiciary, and certainly generates greater efficiency.
- 45 In India, for example, there are class actions which, to some extent, follow the American class actions model. They are permitted under several statutes, eg, consumer law, competition law and company law. According to the differentiation made above, these claims belong to the second style of class actions.
- 46 Nevertheless, the *writ petition*, which can have the nature of a representative action and is called Public Interest Litigation (PIL), is extensively used.⁴⁷ In India, PIL is considered essential to maintain democracy and to meet the needs of citizens, leading to the protection of fundamental rights. Injunctive relief to prevent the infringement of fundamental rights, as well as compensation, can be granted by courts.
- 47 The Indian Constitution guarantees the protection of fundamental rights and provides for 'Directive Principles of State Policy'. These directives play a major role in the context of Public Interest Litigation. In fact, it is not typical adversary litigation but an opportunity for the government to assure social, economic, and political justice to the deprived and vulnerable sections of society, giving a practical meaning to the Constitution. So, this kind of class action is typical of the first kind, as per the abovementioned classification.
- 48 Currently, 'many legal systems are still searching for viable and efficient schemes of group litigation so as to strike a balance between a few peculiar features of the procedural law in force and the imperative of devising an action flexible enough to accommodate new situations, requiring novel forms of access to justice'. This is the case of Italy and the Russian Federation.⁴⁸

⁴⁷ V Upadhyay, *Public Interest Litigation in India: Concepts, Cases, Concerns* (1st edn, LexisNexis Butterworths 2007) *passim*.

⁴⁸ E Silvestri and D Tumanov, 'Updates on collective redress litigation: news from Italy and the Russian Federation' (2020) 10 (2) *International Journal of Procedural Law* 236 ff.

- 49 The Italian experience with collective actions, which has lasted almost two decades, cannot be considered a success. Collective actions for compensatory relief have existed since 2010 and, at the beginning, were considered a revolutionary step. Nevertheless, there were just a few positive results. Not only the choice of an opt-in system, but also the unreasonable length of judicial proceedings in Italy were probably among the several reasons for this disappointment.
- 50 In Italy, as from the 2019 law reform of collective actions, they became available to ‘all those who are interested’, to holders of ‘homogeneous individual rights’: that means that not only consumers and users are entitled to use these tools against, for instance, business entities and providers of public services for any possible kind of unlawful activity.
- 51 Already in the 1990s, certain laws provided for the right of a number of persons to bring a court action for the protection of the public at large. But no special procedure was provided for in the procedural codes with regard to cases of this kind.
- 52 In the Russian Federation, it is considered that, back in 2009, the first procedure for class actions was introduced, limited to the *Arbitrazh* Courts (Courts that are in charge of commercial disputes). Some reforms took place starting in October/2019, such as not limiting class actions to specific matters: private interest of multiple persons and public interests can be the object of these suits. As will be seen in Chapter 2, c.
- 53 The Russian Federation’s system is still under construction and the hope is the Courts will act creatively when applying provisions related to class actions, to develop law according to the fundamental right of access to justice, granted by the country’s Constitution.⁴⁹
- 54 In Argentina, the main problem regarding conflicts that involve large groups of people is the absence of a comprehensive procedural tool or mechanism in the federal system. The lack of such proceedings on the federal level is a problem mainly because of the 1994 constitutional reform that recognizes certain collective subjective rights (rights of collective incidence) and also standing to sue for certain social actors to promote actions in the defence of such rights.⁵⁰
- 55 As mentioned in paragraphs 27 to 37, given that class actions have gone through a phase of little prestige in the US, and as there is a certain prejudice against them in Europe, the

⁴⁹ Ibid.

⁵⁰ E Oteiza, ‘La constitucionalización de los derechos colectivos y la ausencia de un proceso que los “ampare”’ in E Oteiza (ed), *Procesos Colectivos* (Rubinzal-Culzoni 2006) *passim*.

adoption of aggregate litigation techniques has been increasingly frequent around the world.

- 56 These range from the ‘joinder’ of lawsuits from the start, to a form of joining cases dealing with the same issues at the appeal stage, such as ruling by sampling. There are also cases in which the Court opts for a legal theory, *in abstracto*, to be applied to all pending cases.
- 57 The techniques utilized to solve problems related to rights held by a large group of people are profoundly different: as previously mentioned, there is not only one kind of class action and there are also several methods to aggregate proceedings that had already been filed, so that they can be solved in the same way.
- 58 Although class actions and aggregate litigation really can be considered efficient tools to render viable access to justice and, in some cases, to grant human dignity, there is also another way to see collective litigation. It can also be viewed as a nuisance for parties and courts. So, what would be really desirable, according to this point of view, is to prevent this kind of litigation and to encourage parties to settle. Settlements are particularly important to those cases which could give rise to mass claims.
- 59 While their practice is already usual in *common law* jurisdictions, in Continental Europe it is still a dream.⁵¹

2 VALUES UNDERPINNING COLLECTIVE LITIGATION

2.1 Technical Advantages / Social Needs

- 60 This subject has to be dealt with from two points of view: legal values, ie, *technical advantages*, that can be achieved by this kind of procedural tool; and *social values* that may be reached.
- 61 Collective litigation is a generic concept and encompasses several unique tools, as previously said. However, all these tools have the common aim of solving, if not at once, in a more efficient way, a dispute which concerns a vast group of people instead of solving each dispute individually.

⁵¹ C Hodges and A Stadler, ‘Introduction’ in Hodges C and Stadler A (ed), *Resolving mass disputes: ADR and Settlement of mass claims* (Edward Elgar Publishing 2013) 1-37.

- 62 Class actions may have as a result: declaratory relief, injunctive measures or compensation. The interests of those who have been affected by unlawful conduct are protected in a more effective way if the legal system also provides compensation.⁵²
- 63 Another important feature that can differ from country to country is the areas of law where class actions exist. They can encompass all branches of law or only a few of them.
- 64 The same can be said of aggregate litigation.
- 65 In any case, collective litigation favours *procedural economy*: less effort and more results. Techniques may vary from country to country⁵³, but the *problem* (the disruption) is solved *at once* and the decision produces its effects towards a large group of people: normally everyone involved.
- 66 *Equality* may also be attained by collective litigation, for it renders possible the provision of equal solutions to identical or similar cases. The risk of providing different solutions is practically entirely avoided. That also means legal certainty.
- 67 *Technical efficiency* is also achieved through collective litigation techniques.
- 68 As a result of efficiency, the *performance of the Judicial branch can be improved*.
- 69 *Social values* are also inextricably linked to collective litigation, these being: (i) effective access to justice; (ii) efficacy; and (iii) ethical values, embodied in the will to alter the behaviour of the defendants and build a more ethical society.
- 70 *Access to justice* may refer to two different circumstances. It means that *new rights* such as those against discrimination, pollution, preservation of historical and artistic heritage can be heard by the courts. Therefore, in this case, citizenship and human dignity are prioritized.
- 71 It may also mean access to justice in the sense that claims and applications that have no significant monetary value, commonly referred to as *economically non-viable claims*, are rendered viable.

⁵² As will be seen in Chapter 2, c.

⁵³ An example is the spread of ADR around the world C Hodges, 'Models of ADR' at *The Hidden World of Consumer ADR: Redress and Behaviour* (2011) Conference at the Centre for Socio-legal Studies Oxford 1 <https://www.law.ox.ac.uk/sites/default/files/migrated/thehiddenworldofconsumeradr-conferencenote.pdf> accessed 12 June 2024: 'The ADR models operate within different national architectures, that present some challenges for harmonization'.

- 72 These goals correspond to the two previously mentioned kinds of class actions. Collective litigation (linked to the first kind of class actions) is that related to human rights, their conquest or maintenance. It has been seen and used as a means to render concrete ideas of citizenship, equality, specifically, but not only, the absence of any kind of discrimination, the right to housing, to *daycare* for the children of working parents, and the free distribution of medications by the health authorities.
- 73 The second kind of class actions is more intimately linked to values such as efficiency, avoidance of contradiction, and coherence of decisions, as well as the viability of claims which would not be individually filed because of their low value.
- 74 The same can be said of aggregate litigation, that is, the values underpinning both kinds of collective litigation devices are approximately the same.

2.2 Shift from the Classic Individual Model of Litigation to a Collective One

- 75 Civil procedure was conceived as being an essentially private phenomenon. The dominant values of classical civil procedure were the autonomy and the freedom of the parties to the proceedings. Obviously, it is not an ideologically neutral conception, on the contrary, it is the projection of a political ideology largely predominant throughout the nineteenth century.⁵⁴
- 76 The main concern of thinkers of the period was to depict man as an individual and a rational being. On that note, it was only very recently in history that ecology began to be seen as a problem of the community.⁵⁵ In fact, rational ideology had as one of its consequences the separation between man and nature.⁵⁶
- 77 The classical individual concepts and institutions of traditional civil procedure were conceived in the light of philosophical concerns that have changed considerably throughout the last two centuries.
- 78 What rendered this shift a more complex transition was that these traditional concepts were conceived as if they were *dogmas* ie, as if they were something that cannot be

⁵⁴ M Taruffo, 'Ideologie e teorie della giustizia civile' (2015) 247 *Revista de Processo* 49 ff.

⁵⁵ Authorities consider the petroleum crisis one of the first facts that made people think seriously about the consequences of very fast-growing economic development and the possibility of exhausting our natural resources.

⁵⁶ G Santana, 'Hard Hupfer' (2010) 60 *Revista de Direito Ambiental* 42 ff.

questioned or on which doubts should be cast. Savigny, for example, used to compare law with mathematics, more specifically with geometry.⁵⁷

- 79 So, procedural categories were conceived as if they were eternal, as if they were something *natural*. Law was seen as a *conceptual* branch of knowledge, unrelated to history, culture. Presumably, legal concepts could serve any human society, at any time, independently of its cultural characteristics and needs.
- 80 The dogmatic thought considers natural that legal concepts and structures of civil procedure conceived for the European society of the XIX century could be useful for the post-industrial society of the twenty-first century.⁵⁸
- 81 This is one of the reasons why the way to create collective techniques to solve disputes was not easy. Collective litigation implies a need for shifting from the classic individual concepts, related to the individual model of litigation, *Caius v. Ticius*, in the name of access to justice and of efficiency.⁵⁹
- 82 Everything that was mentioned in item 1 of this ‘introductory chapter’ (*Notion of collective litigation*) already clearly shows that many concepts of classical civil procedure will have to be ignored or at least adapted to the type of efficacy one aims to derive from using a collective litigation tool, but mainly if dealing with ‘representative class actions’.⁶⁰

⁵⁷ F C von Savigny, *De la vocación de nuestra época para la legislación y la ciencia del derecho* (Universidad Carlos III 2015) 25.

⁵⁸ O Baptista da Silva, *Processo e ideologia, o paradigma racionalista* (Forense 2004) 300-305.

⁵⁹ P G C Hidalgo, ‘Group Litigation in Spain’ (2007) National Report, Stanford University Law School, Global Class Actions Exchange 19 says that the group and collective litigation phenomenon can be an instrument for a great transformation, which he calls a Copernican revolution, in the Spanish justice system. He denies that it generated a litigation culture, as some people had predicted, but an ‘enforcement’ culture of consumer law and consumers’ rights and interests.

⁶⁰ L G Marinoni and S C Arenhart, ‘Collective litigation and due process of law: the Brazilian experience’ (21 July 2014) 4/2014/01 International Journal of Procedural Law 1 SSRN: <https://ssrn.com/abstract=2469345> accessed on 12 June 2024: ‘Issues such as legitimation, jurisdiction, *res judicata*, and decision enforcement receive rather different handling in the collective litigation area and deserve a new approach. The need to adapt traditional devices and create new concepts requires that one rethinks many of the ideas that founded civil procedure’.

- 83 *Actio* (action), *legitimatío* (standing), *res judicata* and enforcement are the four concepts that have to be dealt with in a different way to construct collective tools to solve disputes: class actions and techniques of aggregate litigation.⁶¹
- 84 When it comes to class actions, standing and *res judicata* had to be redesigned to fit a model whose impact extends beyond the sphere of the claimant. In fact, as we said before, one of the aims of collective litigation is the changing of the defendant's behaviour.
- 85 Classical civil procedure establishes a close relationship between substantive and procedural law to generate standing, in the civil law world. An example can make it clearer: if A and B were parties to a contract it is permitted that only these parties A and B can be claimant and defendant in proceedings where the validity of this contract is at stake (the *meritum causae*).
- 86 Even in the *common law* tradition, where these concepts are not so precisely formulated and where the notion of standing sometimes overlaps the idea of interest in the claim (*interesse ad agere*), it has been noticed by legal writers that rules of standing have been developed within a private law paradigm, ie, in the context of private litigation.
- 87 Class actions, on the other hand, necessarily imply a different approach to standing.⁶²
- 88 This concept of standing had to be drastically changed: in this context, we have just one claimant and a whole group of people who are pointed out as being the victims of unlawful behaviour. This claimant can be an official authority (eg, the Attorney General) or semi-official authority (eg, a trade union) that represents the persons who suffered the injury. This could be called extraordinary standing.
- 89 Litigation, according to the classical civil procedural rules, will not ordinarily affect people who are not parties to the proceedings.
- 90 In any case, and this is another important classical concept that had to be remodelled to adequately fit collective litigation, the *res judicata* effects of the decision affect a whole group of people or a community.
- 91 This new conception raises some intricate problems that are not always easily solved, such as a certain deficit of right to be heard, because people who are going to be affected

⁶¹ T Armenta Deu, *Acciones colectivas: reconocimiento, cosa juzgada y ejecución* (Marcial Pons 2013) 11.

⁶² C Plasket, 'Representative standing in South African law' (2009) (62) *Annals of the American Academy of Political and Social Science* 256-298.

by the decision very often have no opportunity to interfere in its outcome. Nevertheless, they may normally be affected.

- 92 In some jurisdictions, statutes solve this problem by creating the *res judicata in utilibus*, or *secundum eventus litis*. This regime means that if a class action is denied, the same pleading can be submitted again and those who did not take part in the proceedings are not affected by the denial of the claim/judgment for the defendant.⁶³
- 93 This theoretical shift from a traditional approach to civil procedure to a different one, which is able to give answers to the new needs of current societies, raised many doubts, on constitutional grounds, and caused a number of concerns.
- 94 Most of said concerns stem from the fact that standing had to be given to associations, sometimes in *opt-out* systems, which implies that the situation of individuals whose will was not manifested and who were maybe not even informed about the suit, may be affected by a judge's final decision.
- 95 Perhaps this is one of the reasons, as we said before, why in Europe there is still a great deal of resistance to adopting class actions, in the American representative model. In fact, aggregate litigation seems to depart to a lesser extent from traditional concepts and institutions of civil procedure than the American class action model.⁶⁴
- 96 In Germany, for example, Rudolf von Jhering's famous statement about the civil trial as a 'duel between two mature and equally skilled citizens' is still considered valid by most commentators, practitioners, and academics. The main purpose of civil justice is the determination and enforcement of private legal rights and obligations.⁶⁵
- 97 It is nevertheless recognized that this model does not work when it comes to plaintiffs with no resources and no incentive to litigate.
- 98 In cases where there are people in need and with a very low level of education, traditional rules can be seen as elitist and oppressive, and *extraordinary standing* can be considered the only good choice. Class actions have the potential to promote equality between *small* claimants and *big* defendants.

⁶³ Brazilian Consumer Code, Act 103, I, II and III.

⁶⁴ T Armenta Deu (n 61) 15-16.

⁶⁵ D Baetge (n 17) 30.

- 99 Nevertheless, this discipline is considered to depart from the *Dispositionsmaxime* (the principle of party disposition), in its classical version, from due process of law, and from the possibility that the parties involved may exert influence on the final decision.
- 100 For example, one of the most relevant principles in German civil procedure is the right to be heard. The so-called *Recht auf rechtliches Gehör* (right to be heard before a court) is guaranteed by the Constitution – *Grundgesetz* (GG) Art 103 (1) – and it is also the most frequently used grounds of appeals to the Constitutional Court. There is the corresponding duty of the judge: he or she has to take into account all the allegations and arguments brought by the parties. The right to be heard means, in fact, that parties have the right to influence the *decisum*.⁶⁶
- 101 This is probably one of the reasons why in Germany there are no class actions in the American style, that is, representative class actions, except in some specific areas.
- 102 But it is important to stress that, when it comes to collective litigation, there should not be any harm to individual autonomy. What really happens is that, in certain situations of substantive law, one can devise a great deal of *objectivity* concerning the right at stake. This objectivity prevents the use of personal arguments because, in this context, they are of no importance. So, as a result of this situation, a certain degree of fungibility must be seen among the members of the group. This kind of approach may help to prevent prejudice against these new techniques.
- 103 There have been a variety of tools of collective litigation, such as the *Verbandsklage* (association or interest group complaint), since 1896. They were introduced into German law by the Act against Unfair competition for associations whose purpose is to promote commercial interests. Later, it was extended to consumer associations.
- 104 Aggregate litigation also implies departing, to a certain extent, from traditional conceptions. There is more than one model of aggregate litigation: in any case, there must be several proceedings revolving around the same question of law or of fact.
- 105 The modern world has been witnessing a significant expansion of substantive law and, consequently, a considerable expansion of substantive legal obligations. Also, relationships between government and private individuals have been increasingly regulated by law.
- 106 Civil rights law, antitrust law, securities law, product liability law are products of these developments.

⁶⁶ Ibid.

- 107 Aggregate litigation was the way found to solve problems related to wrongdoings that give rise to injury on a mass scale that is less distant from traditional procedural concepts. It is a way of dealing with claims that take place not as an isolated event, but as a part of a larger phenomenon that requires a unique and uniform solution.
- 108 The term aggregate litigation encompasses the several procedural techniques used to solve civil claims on a mass or collective basis.
- 109 Of course, it produces socially positive effects such as judicial economy and predictability.
- 110 It seems that the consolidation, established in rule 42 of the US, is a kind of aggregate litigation: when actions before the court involve a common point of law or of fact, the court may join for trial any or all matters at stake in the actions; consolidate them; issue any orders to avoid unnecessary cost or delay.
- 111 There are also, so called by legal writers, model proceedings (*Musterverfahren*, in Germany). They were created to solve a very specific problem in Germany.
- 112 The *Musterverfahrensgesetz* was initially conceived to solve the *Deutsche Telekom* case, the most important investor suit in German history. Between 2001 and 2003, an enormous number of investors, represented by more than 754 Attorneys, filed suits against DT, on the grounds that this Company issued wrong information in two offering prospectuses in 1999 and 2000: the value of its real property was overstated by EUR 2 million.
- 113 The reaction of the German legislator was to enact the *Kapitalanleger-Musterverfahrensgesetz* (KapMuG) (*Lex Telekom*). It was meant to be in effect till 2010, but its validity could be prolonged, as it in fact was. One of the possibilities is that it be incorporated to the Code of Civil Procedure, so that this model proceeding would become generally available in civil litigation.⁶⁷
- 114 Also, the English Group Litigation Order (GLO) brought about by the Civil Procedural Rules of 1999 can be considered a special technique to aggregate several actions.
- 115 In the UK, multiparty actions such as securities claims are generally managed through Group Litigation Orders. In these proceedings, every claimant must make their own claim, otherwise he or she will not be entitled to participate in the litigation. It is an “opt in” procedure.

⁶⁷ Ibid 8.

- 116 Each claim within a GLO is an individual claim. The court manages those individual claims – the claims have common or related issues of fact or of law, referred to as the *GLO issues*. The GLO proceedings avoid a multiplicity of isolated claims, which creates the risk of inconsistent outcomes.
- 117 Normally, the GLOs are publicized so as to make it possible for other claims to be brought within the Group Litigation. The scope of the claims is crystallized once the limitations period expires: there is a cut-off date for the claims to be part of the GLO, or to proceed under the GLO – failing which, they are likely to be stayed. Judgments on the GLO issues (of fact and of law) will be binding on all other claims registered unless otherwise ordered by the court.
- 118 From this brief overview, it is clear that the various proceedings or methods of aggregate litigation depart more subtly from traditional rules of civil procedure.
- 119 This is because there must be several actions that will, in some way, be aggregated, which were previously filed, following the traditional procedural rules of standing. The moment at which there is a departure from these rules is the final decision, which will affect all of the individual situations. This can happen as an effect of *res judicata*, as happens with the *Musterverfahren* in Germany, or as a result of a binding precedent, as happens in Brazil. In any case, a common solution is given to all cases.
- 120 Certainly, another significant difference between traditional civil procedure and the new world of collective litigation is that the former presupposes a less active judge, not involved with managerial abilities, leaving to the parties the task of managing proceedings (as will be seen in Chapter 3, b).
- 121 The role of the judge in collective litigation has to be more visible and active for it to produce effective results. In fact, it is not limited to the simple scheme of *applying the law to the case at hand*.
- 122 Settlements have to be encouraged, and mediation and conciliation should be suggested.

3 MAIN MODELS

- 123 Collective litigation is brought to life mainly by two procedural tools: class actions and aggregate litigation.
- 124 Class actions are inspired by the American representative model. In the US, individual class members have standing to file a class action. The suit is filed by one or more plaintiffs, normally defending their own interests and the suit produces an award that affects the whole group of people: those who have a right or rights that have a point in common.

- 125 Interesting to notice that even in East Europe there are jurisdictions where it is allowed to class members to file class actions, vg, Poland, where the plaintiff files the action in the name of at least 10 people.⁶⁸
- 126 But this is not a general rule. In France, only associations may file class actions.
- 127 As previously mentioned, there are two kinds of class actions, the first having the aim of protecting individual rights in a collective way, and the second having as its goal to prevent violations of rights that belong to everybody, including human rights.
- 128 Aggregate litigation is the model that seems to be more suited to the cultural context of civil law jurisdictions, and it is normally adopted in continental Europe. Its goal is to protect individual rights in a collective way.
- 129 It normally implies the joining of proceedings (ie, individual suits that have already been filed) at some point, so that a common solution can be given to all cases at least in what concerns some specific issues.
- 130 2 Disputes that can be solved by models of aggregate litigation (and there are many of them) could theoretically also be solved by representative actions. Practically, the contrary is true. Not all the disputes solved by class actions can be solved by aggregate litigation, such as those that concern the protection of the environment from pollution, or historical heritage. Being these rights of the kind that belong to everybody, it is generally considered that representative class action is the best way to solve disputes that involve them.
- 131 Aggregate litigation normally involves the possibility that part of the question of law that constitutes all individual proceedings may be defined collectively by a judge.
- 132 One of the techniques of aggregate litigation employed in Europe is that of the *casi pilota*, *Pilotverfahren* or test claims. One or some of the cases are chosen and heard, and the decision is *binding* on the other cases (GLO 19.13(b) and UKCPR 19.15).
- 133 The technique has been adopted in Austria and in Brazil.⁶⁹

⁶⁸ A Trzaska, 'Poland' (2019) Class Action Law Review third edition 153.

⁶⁹ O J Ballon, *Einführung in das österreichische Zivilprozeßrecht – Streitiges Verfahren* (6th edn Leykam) 299, *Testprozess – in Arbeitsrecht*; Referred to by A do Passo Cabral, 'O novo procedimento-modelo (*Musterverfahren*) alemão: uma alternativa às ações coletivas' (2007) 147 *Revista de Processo* 123–146.

- 134 In Brazil, Articles 1.036-1.041 of the Civil Procedure Code establish the repetitive special appeal to the Superior Court of Justice and repetitive extraordinary appeal to the Supreme Court.
- 135 When it is verified that there is a reasonable quantity of pending actions based on the same facts and involving the same *quaestio iuris*, one or more appeals to the Supreme Court or to the Superior Court of Justice are selected and heard by the courts, and their decision is binding on all the other identical cases, past and future, involving the same question of law. This decision is considered a binding precedent.
- 136 There is a good example of aggregate litigation in Germany. It is the ‘Model Proceeding’, *Musterverfahren* (KapMuG) which applies to a very restricted area of substantive law: securities market.
- 137 The collective decision encompasses *quaestio facti* and *quaestio iuris*, and while it is not rendered, all individual proceedings are stayed. It is said that *res judicata* produced in the decision of the collective incident affects all individuals whose proceedings were stayed.

4 OTHER MODELS – SHORT DESCRIPTION: EG, MASTER PROCEEDINGS, OMBUDSPERSON, MASS JOINDER, ETC.

- 138 Aggregate Litigation, mainly Model proceedings, and class actions are the most common ways to solve disputes that involve a large number of people, based on the same questions of law and of fact.
- 139 But there are others, such as those that involve the assignment of the claimants’ rights to a third party that files and pursues the claim on his or her own. It was tested in Germany when a Belgian corporation, specialized in the private enforcement of damage claims against antitrust violations, was pursuing the claims of 29 clients who say they experienced serious damages derived from the Cement cartel, operating in Germany between 1989 and 2002. We still do not know whether it is going to produce good results. In fact, it has not yet been demonstrated that this commercial model is consistent with German Law.⁷⁰
- 140 Although the joinder of parties could theoretically be used to solve disputes between several claimants and several defendants, it is not an efficient tool to solve mass disputes. Even if the joinder of parties allows several persons to be claimant and defendant, normally when they have a common relationship concerning the object of

⁷⁰ D Baetge (n 17) 11.

litigation, or rights/obligations based on the same fact/legal grounds, parties are treated individually. So, it really lacks efficiency to manage mass litigation.

- 141 Even if for many years collective litigation was the first, and practically the only, answer envisaged as a solution for mass conflicts, these tools are now considered old technology by some legal writers.⁷¹
- 142 There are other mechanisms that deliver collective redress – known as ‘new technologies’⁷², eg, ADR mechanisms (including mediation/conciliation, consumer ombudsman, Online Dispute Resolution (ODR) platforms)⁷³, which will be dealt with below.
- 143 ‘The ADR models operate within different national *architectures*, that present some challenges for harmonization’, says C Hodges.⁷⁴ In Japan, eg, there is a combination of private and governmental ADR.⁷⁵ ‘However, the *techniques* that they adopt are very similar’.⁷⁶ The main techniques are (i) requiring direct contact between trader and

⁷¹ The term ‘old technology’ was used in 2018 C Hodges, ‘Collective redress: the need for new technologies’ (2019) 42 Journal of Consumer Policy 59.

⁷² Ibid.

⁷³ According to the 2019 EU Justice scoreboard, European Commission https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2019_en.pdf, accessed on 12 June 2024, ‘the number of Member States promoting the voluntary use of alternative dispute resolution methods (ADR) for private disputes continues to grow compared to previous years. This is mainly achieved by introducing more incentives for the use of ADR across different areas of law. Administrative disputes have also been taken into consideration and less than half of the Member States allow ADR in the field’; C Hodges (n 53) 1 states: ‘Consumer ADR systems have arisen in many EU Member States relatively recently, but remain unknown to many people’.

⁷⁴ C Hodges (n 53) 1.

⁷⁵ I Sugawara, ‘ADR for consumer protection in Japan, at *The Hidden World of Consumer ADR: Redress and Behaviour* (2011) Conference at the Centre for Socio-legal Studies Oxford 13 <https://www.law.ox.ac.uk/sites/default/files/migrated/thehiddenworldofconsumeradr-conferencenote.pdf> accessed on 12 June 2024: ‘Since the establishment of the Consumer Basic Act, Japan’s consumer policy has largely shifted its orientation, from government-centered prior control to judiciary-led retroactive control. The two ADR organizations for consumer disputes presented in the preceding section respectively represent on the one hand an example of a governmental ADR as a pillar supporting a retroactive control-oriented society and on the other hand, an example of a private-sector ADR introduced in such a way as not to compromise the industry’s independence in the financial field which essentially requires strict regulations. These examples suggest two interesting directions that provide clues as to how the government and private sectors should interact in the future. One commonality of the two systems is the fundamental concept of mitigation of the disparities between consumers and business operators in information and negotiation power, as stated in the Consumer Basic Act. It can be said that this concept has enabled a clear expression of the notion of neutrality in the two systems, leading to policy development squaring with consumer protection. This is an achievement that should be highly evaluated’.

⁷⁶ C Hodges (n 53) 1.

consumer as a first step; (ii) mediation/conciliation; (iii) recommendation for a solution (non-binding) or a (binding) determination by the neutral party.

- 144 In this category of ADR, the Consumer Ombudsman is a sophisticated form of ADR. One of the main benefits of the Ombudsman is its multifunctional nature: it may handle individual or mass claims, which can be contractual or non-contractual, as well as disputes of private or public law. A major advantage of the Ombudsman system is the possibility of solving complaints, as well as monitoring the regulating the market.⁷⁷
- 145 There are Consumer Ombudsman models in some Member States, which work closely with sectoral regulators, such as Financial Ombudsmen, Energy Ombudsmen, Communications Ombudsmen etc. This integration enables much faster solutions.⁷⁸ However, only a few jurisdictions have adopted this model.⁷⁹
- 146 There are lots of different Consumer Ombudsman models around the world. It is important to distinguish this usage of ‘consumer ombudsman’ from that found in Nordic countries, in which the consumer ombudsman is the sole national public CLER

⁷⁷ ADR/Ombudsman & Regulatory Redress, European Justice Forum <https://europeanjusticeforum.org/topics/adr-ombudsman/> accessed on 12 June 2024.

⁷⁸ C Hodges (n 71) 80: ‘The reality is that certain intermediaries (lawyers, funders) are only capable of addressing a small number of major issues, whereas others (regulators and ombudsmen, in countries where they are enabled to operate in particular ways, especially in combination) can address multiple consumer and trader issues on an ongoing basis. Indeed, the output of these two groups of intermediaries is facilitated precisely because of their speed of throughput: the regulators and ombudsmen deal with problems quickly, whereas the lawyers and courts take a far longer time over a smaller number of issues’.

⁷⁹ C Hodges and S Voet, ‘Delivering Collective Redress, Response to the European Commission’s Inception Impact Assessment “A New Deal for Consumers – revision of the Injunctions Directive” (2017) University of Oxford 4 https://www.law.ox.ac.uk/sites/default/files/migrated/1710_policy_on_collective_redress_3.pdf accessed on 12 June 2024.

(Consumer Law Enforcement Regulator).⁸⁰⁻⁸¹⁻⁸² Consequently, the Nordic Consumer Ombud's involvement in collective redress falls under the regulatory redress⁸³ category.

147 While some ombudsmen operate like an arbitration model (as has been done in Germany for insurance⁸⁴, transport, and energy), others have evolved to operate by deploying a number of dispute resolution techniques sequentially as part of an integrated pathway: providing impartial information to consumers; evaluating cases as triage; establishing a formal complaint; assembling the facts from each side; an assisted

⁸⁰ C Hodges (n 71) 63: 'In Denmark, the "Forbrugerombudsmanden", usually called "Consumer Ombudsman" in English, may bring a class action in the Market Court on behalf of affected consumers, on an "opt out" basis for claims up to EUR 270 and beyond that threshold on an opt-in basis only [Class Actions Act 2007, Act No 181 of 28 February 2007]'.

⁸¹ Ibid: 'In Finland, the equivalent "Consumer Ombudsman" has "merely" an opt-in class action power, but has still regularly used his authority to negotiate redress payments'.

⁸² H Lindblom, 'The Globalization of Class Action – National Report: Group Litigation in Sweden' (2007) Oxford Conference 12 December 2007, 28: in Sweden 'the consumer ombudsman has been able to bring "group actions" via the Public Complaints Board (PCB) for more than ten years, which is a significant factor when assessing the need for legal protection of group claims and the kinds of companies etc, that may appear as defendants. [...] The PCB is not a court; it is a state agency where a board made up of representatives of business and consumer interest assesses consumer complaints. The board is chaired by a jurist employed by the state. The board's decisions are recommendations only, and are not legally binding or executable. But most companies comply with the decisions because the defendants otherwise risk ending up on the "black list" or suffering other negative publicity'.

⁸³ C Hodges (n 71) 63: "Regulatory redress" describes where the involvement of a public regulatory or enforcement body (referred to here generically as a regulator) results in redress being paid to those who have been harmed. The situation is typically that the payer company is accused by the regulator of breach of trading law, which may include infringements in advertising, provision of information, product or service safety, acting in response to adverse information, and so on. The historical paradigm was that a regulator would either prosecute the trader for the breach or not do so. Nowadays, regulators increasingly aim to achieve a wider range of outputs'.

⁸⁴ G Starke, 'Redress through ADR: In what circumstances does ADR work – and work best?' at *The Hidden World of Consumer ADR: Redress and Behaviour* (2011) Conference at the Centre for Socio-legal Studies Oxford 3 <https://www.law.ox.ac.uk/sites/default/files/migrated/thehiddenworldofconsumeradr-conferencenote.pdf> accessed on 12 June 2024: 'Example of the Insurance Ombudsman in Germany, one of the most successful schemes. He deals with disputes between consumers and insurance companies. Costs – in Germany the 'loser pays' rule ensures that the successful plaintiff does not have to pay anything (except for attorney fees above the legal standard). For a Euro 1000 value of the claim with an attorney on both sides, the total risk is about Euro 717 for the first instance in Germany. Bringing a dispute before the Ombudsman is for free. Speed – Ombudsman took an average of 4,4 months to solve the complaint and in Berlin an average civil law case took 11,3 months to be resolved. Flexibility – ADR mechanisms are often more successful than courts in creating legal peace between parties. The Insurance Ombudsman will tell the consumer if their application is incomplete, the court will not help to make a claim conclusive'.

negotiation between the parties (mediation), or a non-legally binding decision with strong persuasive effects on the trader (but not on the consumer).⁸⁵

- 148 Often, ADR mechanisms are implemented through online dispute resolution (ODR) platforms, which are more efficient, effective, and often provide excellent user interfaces for consumers.⁸⁶
- 149 Consumer grievances can be effectively redressed through online dispute resolution (ODR), which enhances consumer trust in the market and promotes sustainable growth of e-commerce.⁸⁷
- 150 There is a provision in the Regulation (EU) No 524/2013 which requires all online retailers and traders in the EU, Iceland, Liechtenstein or Norway to provide an easily accessible

⁸⁵ C Hodges (n 71) 63; C Hodges and S Voet (n 79) 3.

⁸⁶ S Voet, 'Belmed – the new Belgian digital portal for consumer ADR' at *The Hidden World of Consumer ADR: Redress and Behaviour* (2011) Conference at the Centre for Socio-legal Studies Oxford 18 <https://www.law.ox.ac.uk/sites/default/files/migrated/thehiddenworldofconsumeradr-conferencenote.pdf> accessed on 12 June 2024: 'In April 2011, the Belgian Economy Minister (Mr. Vincent Van Quickenborne) launched Belmed: Belgian Mediation (<http://economie.fgov.be/belmed.jsp>) (available in Dutch, French, German, and English). Belmed is a digital portal (platform) for consumer ADR, which it wants to promote and make more accessible. It offers information and solutions for consumers and enterprises. Belmed only applies to consumer disputes (non-commercial disputes are excluded) and disputes between a consumer and an enterprise (disputes between consumers and between enterprises are excluded). Belmed consists of two parts: an informative part, and an online mediation part. On the one hand, Belmed offers a useful summary of all existing ADR tools in Belgium. It gives an overview of all mediation, arbitration and conciliation agencies, authorities and ombudsmen, and their contact information. This informative part also contains a consumer guide on how to settle a dispute in an amicable way (eg, examples of letters to send to an enterprise to report a problem). On the other hand, and this is the novelty, Belmed offers the possibility of making an online application for mediation. The idea is to create one uniform digital office for the consumer, so he or she doesn't have to bother, or find out, which agency, ombudsman, commission, etc. he or she has to go to. The consumer (or company) goes to the website of Belmed, and clicks on the 'online mediation' application. Two preliminary questions are asked: - Did you contact the company or consumer to report the problem? If not, you are told to do so, and how to do so. If so, you are sent to the next screen. - Did you start a court proceeding? If so, you cannot make an online application. If not, you will be able to make an application. The consumer has to register by using his electronic passport (eID)'.

⁸⁷ P Cortés and J Hörnle, 'ODR' at *The Hidden World of Consumer ADR: Redress and Behaviour* (2011) Conference at the Centre for Socio-legal Studies Oxford 22 <https://www.law.ox.ac.uk/sites/default/files/migrated/thehiddenworldofconsumeradr-conferencenote.pdf> accessed on 12 June 2024.

link to the ODR platform and an email address to enable the ODR platform to contact them.⁸⁸⁻⁸⁹

- 151 The growth of ODR has been lower compared to traditional ADR, resulting in a relatively low number of successful ODR providers. Business and consumer education and awareness campaign, free ODR platform coordinating ODR services are some of the strategies that can be put forward to enhance the use of ODR.⁹⁰
- 152 In Europe, in what concerns ADR in regulatory redress⁹¹, the Consumer Protection Cooperation Regulation (EC No 2006/2004 or the CPC Regulation) plays a crucial role *in the process*. The purpose of this regulation was to establish a framework of cooperation between national authorities throughout the European Economic Area in order to jointly address breaches of consumer law even if the trader and the consumer are from different countries.
- 153 In 2017, the Commission concluded that Regulation (EC) No 2006/2004 is not sufficient to effectively address the enforcement challenges of the Single Market, including the challenges of the Digital Single Market.
- 154 Thus, through the Regulation (EU) 2017/2394, the EU amended the Consumer Protection Cooperation (CPC) Regulation to give all Consumer Law Enforcement Regulators (CLERs) the power to 'seek or obtain' remedial commitments from the trader

⁸⁸ Article 14 of the Regulation (EU) No 524/2013.

⁸⁹ See, eg, P Cortés and J Hörnle (n 87) 22 'eBay and PayPal employ a tiered ODR process where parties first try to voluntarily settle their disputes by using assisted negotiation software; when they cannot reach a settlement the claim escalates to adjudication. PayPal freezes the money involved in the transaction of the dispute, thus ensuring the enforcement of the final decision. It resolves over 60 million disputes a year [...] CyberSettle uses blind-bidding negotiation to settle insurance and commercial disputes. Parties make confidential offers that will only be disclosed when both offers match certain standards (usually ranging from 30 to 5 percent) or a given amount of money. The settlement is the mid-point of the two offers. CyberSettle has been working online since 1998 settling over 200,000 disputes with an accumulated value of more than USD 1.6 billion'.

⁹⁰ Ibid 23.

⁹¹ C Hodges (n 71) 63: "Regulatory redress" describes where the involvement of a public regulatory or enforcement body (referred to here generically as a regulator) results in redress being paid to those who have been harmed. The situation is typically that the payer company is accused by the regulator of breach of trading law, which may include infringements in advertising, provision of information, product or service safety, acting in response to adverse information, and so on. The historical paradigm was that a regulator would either prosecute the trader for the breach, or not do so. Nowadays, regulators increasingly aim to achieve a wider range of outputs'.

for the benefit of affected consumers'.⁹² However, the authorities do not have the competence to enforce redress on their own.

- 155 'The idea behind the introduction of unified and comprehensive public enforcement powers for public enforcers is to introduce a one-stop-shop approach to consumer law where enforcement authorities will notify the businesses concerned of the issues, asking them to change their practices and, if necessary, to compensate the affected consumers. However, the Regulation is "without prejudice to the possibility of bringing further public or private enforcement actions under national law" [Art 2.6].'⁹³ The Regulation (EU) 2017/2394 provides additional powers for regulatory authorities.⁹⁴

⁹² C Hodges (n 71) 65.

⁹³ Ibid.

⁹⁴ Ibid 65-66: 'The power to shut down online offers [Art 9.4 (g) (i)-(iii)]; The power to adopt interim measures to avoid the risk of serious harm to the collective interests of consumers [Art 9.4 (a)]; the power to seek to obtain or accept commitments from the trader responsible for the infringement covered by this Regulation to cease that infringement [Art 9.4 (b)]; the power to receive from the trader, on the trader's initiative, additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation, or, where appropriate, to seek to obtain commitments from the trader to offer adequate remedies to the consumers that have been affected by that infringement [Art 9.4 (c)]; where applicable, the power to inform, by appropriate means, consumers that claim that they have suffered harm as a consequence of an infringement covered by this Regulation about how to seek compensation under national law [Art 9.4 (d)]; in a cross-border situation, one competent authority may request another to take necessary enforcement measures, and the requested authority shall take relevant action, and may receive from the trader, on the trader's initiative, additional remedial commitments for the benefit of consumers that have been affected by the alleged intra-Union infringement, or, where appropriate, may seek to obtain commitments from the trader to offer adequate remedies to consumers that have been affected by that infringement [Art 12]; the power to impose penalties, such as fines or periodic penalty payments, for infringements covered by this Regulation and for the failure to comply with any decision, order, interim measure, trader's commitment, or other measure adopted pursuant to this Regulation [Art 9.4 (h)]'.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
Art	Article/Articles
BKR	<i>Zeitschrift für Bank-und Kapitalmarktrecht</i>
CAFA	Class Action Fairness Act
CLERs	Consumer Law Enforcement Regulators
CPC	Consumer Protection Cooperation
DT	<i>Deutsche Telekom</i>
EC	European Commission
ECC	European Consumer Centres
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
eID	Electronic Identification
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GG	<i>Grundgesetz</i> (Germany)
GLO	Group Litigation Order (England)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
KapMuG	<i>Das Kapitalanleger-Musterverfahrensgesetz</i> (Germany)
MDL	Multidistrict Litigation
n	Footnote (internal, ie, within the same chapter)
no	Number
NJW	<i>Neue Juristische Wochenschrift</i>
ODR	Online Dispute Resolution
PCB	Public Complaints Board (Sweden)
PIL	Public Interest Litigation
p	page
para	paragraph/paragraphs
Sec	Section/Sections
trans/tr	Translated, translation/translator
UK	United Kingdom

UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US	United States
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vg	<i>verbi gratia</i>
vol	volume/volumes
ZZP	<i>Zeitschrift für Zivilprozess</i>

LEGISLATION

International/Supranational

Act no. 2013-34L, March 2014 (*Loi Hamon*)

Civil Procedural Rules of 1999 (UK)

Class Actions Act 2007, Act No 181 of 28 February 2007 (Denmark)

Class Action Fairness Act 2005 (US)

Consumer Basic Act (Japan)

Directive 2013 (EU)

Federal Rules of Civil Procedure (US)

Gesetz zur Einführung von Kapitalanleger (Germany)

Musterverfahrensgesetz (Germany)

Regulation 524/2013 (EU)

Regulation 2017/2394 (EU)

Regulation 2006/2004 (EC)

National

Código de Defesa do Consumidor 1990 (Brazilian Consumer Code) (Brazil)

Código de Processo Civil 2015 (Civil Procedure Code) (Brazil)

Lei nº. 7.347/1985 (Act 7.347/1985) (Brazil)

CASES

International/Supranational

Amchem Prods., Inc. v. Windsor (United States Court of Appeals, US) [521 U.S. 519 (1997)]

Caius v. Ticius

Campbell-Ewald Co v Gomez (Supreme Court, US) [136 S Ct 663 (2016)]

Castano v. Am. Tobacco Co. (Court of Appeals, US) [84 F.3d 734 (5th Cir. 1996)]

Cimino v. Raymark Indus., Inc. (Court of Appeals, US) [151 F.3d 297 (5th Cir. 1998)]

Eisen v. Carlisle & Jacquelin (Supreme Court, US) [417 U.S. 156, 177–79 (1974)]

Exxon Mobil Corp. v. Allapattah Servs., Inc., (Supreme Court, US) [545 U.S. 546, 562 (2005)]

Frank v Gaos (Supreme Court, US), Judgment 10 March 2019 [139 S Ct 1041, No 17-961, 2019 WL 1264582]

In re Google Inc. Cookie Placement Consumer Privacy Litigation, (Court of Appeals, US) [934 F.3d 125 (3d Cir. 2019)]

In re Rhone-Poulenc Rorer Inc. (Court of Appeals, US) [51 F.3d 1293 (7th Cir. 1995)].

Ortiz v. Fibreboard Corp. (United States Court of Appeals, US) [527 U.S. 815 (1999)]

Roes, 1-2 v SFBSC Management (Court of Appeals, US) [944 F.3d 1035 (9th Cir. 2019)]

Zahn v. Int'l Paper Co. (Supreme Court, US) [414 U.S. 291, 301 (1973)]

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