

PART X

COLLECTIVE LITIGATION

CHAPTER TWO

REPRESENTATIVE ACTIONS*

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<https://www.cplj.org/publications/10-2-representative-actions>

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* Authors’ note: paragraphs 1, 4, 5, 6, and 9 were written by Deborah Hensler; paragraphs 2, 3, and 7 were written by Theo Broodryk.

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1 HISTORY – AMONG OTHER SUBJECTS, MASS JOINDER

- 1 A comprehensive global history of representative collective litigation has yet to be written. The extant literature includes descriptions of the (mostly) recent adoption of class action procedures in specific jurisdictions and sparse commentary on global trends. Recent accounts have focused on the United States experience with Rule 23 class actions, which has been a topic of controversy particularly in European debates about the wisdom of adopting collective litigation procedures. Often, this experience is described inaccurately in order to serve political purposes.¹ A high point of serious scholarship on the evolution of collective litigation was Steven Yeazell's *Medieval Group Actions to the Modern Class Action* (1987) which posits that the history of representative litigation began in Courts of Equity in England and comprised efforts by serfs, guilds and other groups to secure rights and compensation from the local ruling class. Importantly for understanding modern class actions, these efforts arose from perceived communal harms, rather than focusing on individualized denials of rights or losses. Other scholars have pointed to the 17th century English 'Bill of Peace' procedure that allowed multiple individual parties with similar claims to secure a binding collective outcome via a representative procedure. Contemporary efficiency-oriented arguments for representative collective litigation share similar goals and certain features of this procedure.²
- 2 Notwithstanding these interesting historical accounts, the history of representative collective litigation in England seems to have petered out in the nineteenth century. Contemporary accounts of the evolution of representative class actions focus on the US, whose original colonies incorporated versions of collective procedures from their founding, presumably tracing back to the English history described by Yeazell and others. When US federal courts eliminated the distinction between courts of equity and courts of law and adopted the contemporary framework of civil procedure in 1938, Rule 23 emerged as the basis for representative class actions. However, the 1938 version of Rule 23 was different from today's rule in that it required parties to navigate a thicket of technical provisions, which significantly limited its use. In the 1960s, largely in response to the civil rights movement, a judicially appointed committee of practicing lawyers and academicians proposed a streamlined version of Rule 23, intended – according to committee members – to facilitate rights-oriented class actions but also paving the way for suits for damages that might not otherwise be viable for individuals to pursue.³
- 3 The 1966 version of Rule 23 provides the framework for class actions in the US today, although it has been amended significantly in recent years. Lost in political debates

¹ D Hensler, 'The Global Expansion of Class Actions: Power, Politics and Procedural Evolution' in B Fitzpatrick and R Thomas (ed), *The Cambridge International Handbook of Class Actions* (Cambridge University Press 2021).

² D R Hensler, N M Pace, B Dombey-Moore, E Giddens, J Gross and E Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand 2000) 10-11.

³ Ibid 11-15.

about adopting class actions outside the US is the fact that Rule 23 was not intended to be used to resolve large-scale personal injury claims typical of mass litigation today: as indicated in a famous Note to the Rule (non-binding but usually regarded as such by implementing courts), on the grounds that personal injury claims are too diverse to satisfy the commonality requirement of Rule 23 (a) (2). As mass torts grew in frequency and scope during the 1980s and 1990s, some lawyers and judges attempted to deploy Rule 23 to resolve them, but almost without exception, appellate courts vacated their rulings. Contrary to some histories, asbestos litigation, the longest-running and still one of the largest US mass tort litigations had little role in extending the application of Rule 23 to mass torts. When an innovative group of plaintiff and defence lawyers joined with a presiding judge in an attempt to use Rule 23 to produce a model for disposing of future asbestos litigation, the US Supreme Court struck down the effort. In *Amchem Products v Windsor*⁴, the court sounded the death knell not only for asbestos class actions but most other personal injury class actions, on the grounds that the diversity of such claims present insurmountable conflicts of interest that challenge constitutional due process. Today, in the US, Rule 23 class actions are rarely certified for personal injury litigation.

- 4 Perhaps because of its political and economic influence, the US has provided a model for representative class actions in other common law jurisdictions, most notably Australia and Canada which adopted class action procedures similar to Rule 23, 25 years after the adoption of the modern Rule 23 in the United States. As the US Supreme Court has systematically restricted the use of class actions in the US, Canadian and Australian federal and provincial courts have tended to facilitate their use domestically. As neo-liberal economics seemingly limited the power of the regulatory state in England and European jurisdictions, consumer rights advocates began pushing for adoption of representative collective litigation in these jurisdictions, and similar efforts emerged outside Europe in Latin America and Asia.⁵ In Europe, this culminated in the 2020 Representative Action Directive that required all member nations to adopt a

⁴ *Amchem Products v Windsor* (Court of Appeals, US), Judgment 25 June 1997 [521 US 591].

⁵ See, eg, D Hensler, C Hodges and M Tulibacka, 'The Globalization of Class Actions' (2009) 622 (1) *Annals of the American Academy of Political and Social Science* 7; and D Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016); and D Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 *Kansas Law Review* 965.

representative collective procedure for consumer claims by 2022. The results of this directive are still emerging.⁶

1.1 Joinder of Claims and Parties

- 5 Jurisdictions that have adopted collective litigation procedures in recent years have generally done so for one or both of the following reasons:
- 6 a) To provide an efficient mechanism for resolving mass claims that arise out of the same or similar factual and legal circumstances within a relatively short time period, within a concentrated geographical area; or
- 7 b) To facilitate access to the civil justice system when large numbers of similarly situated parties have suffered relatively small but legally cognizable individual losses as a result of another party's legal violation.
- 8 Mass catastrophes, such as structure collapses and ship collisions, and mass product defects, such as drugs and medical devices that are linked to disease and injury, are examples of the first category. Consumer claims arising out of false advertising or privacy breaches are examples of the second category. In the first instance, one or a few domestic courts may be overwhelmed by an unusually large number of claims that it has inadequate resources to address. As a result, claimants with significant losses may be unable to obtain compensation owed them under law within a reasonable time period. In the second instance, a wrongdoer may be able to escape liability for their actions because no single victim has the economic or social wherewithal to pursue a lawsuit. Traditionally, both common law and civil law regimes have provided special procedures for *joining* parties and claims in a single action. Generally, these regimes were designed to ensure efficiency and due process in civil disputes involving one or a few plaintiffs suing one or a few defendants. Joinder of claims rules encouraged plaintiffs to bring all of their claims against the defendant in a single action, resulting in less expense for parties and courts than if separate lawsuits for each claim were required. Joinder of parties rules sought to ensure that a third-party whose rights would be affected by the initial claim would have their interests represented in court and also that the court would be properly apprised of facts suggesting that the third-party (rather than the named defendant) bore some or all responsibility for the harms that the plaintiff was claiming.

⁶ P Masons, 'The Impact of the New EU Mass Action Directive', available at <https://www.pinsentmasons.com/out-law/guides/the-impact-of-new-eu-mass-actions-directive-across-europe> accessed 30 August 2024. Representative collective actions in Asia, generally restricted to shareholder or consumer litigation, have yet to gain much traction and the same appears to be true for Latin America. Interestingly, the recent global *Volkswagen* consumer litigation, has spurred the adoption and implementation of collective procedures in many jurisdictions, as consumer advocates have looked to the successful use of Rule 23 to compensate Volkswagen owners for vehicles that fail to satisfy domestic environmental regulations, allegedly as a result of consumer fraud. See, D Hensler, J Kalajdzik, P Cashman, A Halfmeier and I Tzankova, *The Globalization of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case* (Rand 2021).

Jurisdictions may specify rules both for compulsive joinder – when courts are instructed not to adjudicate a claim if an essential party is missing – and permissive joinder – when courts will allow but not require relevant third-parties to join a lawsuit. Separate rules may permit defendants to bring third-parties into a lawsuit. As a result of these party joinder rules, parties may simultaneously act as plaintiffs and defendants, with competing and contradictory claims. A key feature of all these rules is that all the parties whose rights are being adjudicated are formally before the court and their rights are decided in a single lawsuit, albeit one that incorporates multiple claims and cross-claims. Although on the surface rules regarding joinder of parties might appear relevant for mass claims, typically the volume of mass claims derives from the existence of large numbers of first parties of interest, not the existence of large numbers of third parties.

- 9 Some jurisdictions allow judges to consolidate separate but related lawsuits and treat them together, for some or all purposes. For example, in the US, Federal Rule of Civil Procedure 42 authorizes judges to consolidate similar claims for efficiency purposes. Unlike joinder, consolidation does not add claims nor third parties to any plaintiff's lawsuit. Instead, Rule 42 simply authorizes the court to decide identical issues that link multiple independently filed cases together. For example, a court might consolidate multiple claims to decide a contested discovery issue or admissibility of evidence question that pertains to all of those claims.
- 10 Consolidation rules have rarely, if ever, been used in US federal courts to decide mass claims. In some state courts in the US, consolidation rules have been used to try multiple independently filed claims arising out of the same facts and law. This practice was particularly popular during the 1990s in states with large asbestos personal injury caseloads. It has been widely criticized as threatening due process for defendants and is susceptible to the same critique regarding due process for plaintiffs. As a result, it is not generally regarded as an appropriate procedure for resolving mass claims.

2 SCOPE OF CLASS ACTION

- 11 The substantive scope of class actions tends to differ across jurisdictions.⁷ A jurisdiction's class action rules are either trans-substantive or substance specific. Trans-substantivity⁸ entails a single set of procedural rules that governs all civil litigation, regardless of the type of claim involved. In other words, a rule is trans-substantive if it applies equally to all cases regardless of the substance or type of the claim, and irrespective of the size or

⁷ D R Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 Kansas Law Review 971. See also M J Azar-Baud and A Biard, 'The Dawn of Collective Redress 3.0 in France?' in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 74; D R Hensler, 'The Global Landscape of Collective Litigation' in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 7.

⁸ Robert Cover coined the term in 1975. See R M Cover, 'For James Wm. Moore: Some Reflections on a Reading of the Rules' (1975) 84 (4) The Yale Law Journal 718. See also D Marcus, 'The Past Present, and Future of Trans-Substantivity in Federal Civil Procedure' (2010) 59 (2) DePaul Law Review 371, 375-76.

complexity of the case. Conversely, in non-trans-substantive class action jurisdictions, the use of class actions is usually limited to one or a few types of substantive claims.⁹

- 12 The impact of non-trans-substantive class actions is, for obvious reasons, more limited in scope compared to trans-substantive class actions, and they generally take longer to be incorporated into legal culture.¹⁰ Trans-substantivity arguably fosters better access to courts for litigants, regardless of their sophistication level or economic resources. The values of generality and flexibility underlie trans-substantivity. Generality entails that the beneficiaries of the rules are treated equally by the relevant processes.¹¹ Flexibility entails that the rules are designed to afford flexibility in its application. This, in turn, facilitates the integration of substance and procedure through court-made law and reduces the level of political interest in procedural rules.¹² Trans-substantivity also assists to enable general legal practitioners to practice in a wider array of contexts. It thus serves to lower the barriers to entry for areas of practice, as trans-substantive rules means that there are fewer advantages for legal specialists.¹³
- 13 However, trans-substantivity also arguably has its drawbacks. The one-size-fits-all approach to process in the civil litigation system may be unsuitable in a society that is increasingly complex, larger, and specialized. A trans-substantive approach may also have a negative disparate impact on certain substantive areas of law and types of cases.¹⁴ In certain circumstances equal treatment of legal processes involving different substantive claims may be undesirable, especially when the substantive claims can be better addressed through a specially tailored process.¹⁵
- 14 The US, Canada, Australia and South Africa are examples of jurisdictions with trans-substantive class action procedural rules. Their systems of civil procedure are of common

⁹ D R Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 Kansas Law Review 971.

¹⁰ D Hensler, 'Foreword' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) xxiii.

¹¹ D Marcus, 'Trans-Substantivity and the Processes of American Law' (2013) 5 BYU Law Review 1191, 1220-1221; P D Carrington, 'Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure' (1989) 137 (6) University of Pennsylvania Law Review 2067, 2079.

¹² P D Carrington, 'Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure' (1989) 137 (6) University of Pennsylvania Law Review 2067, 2082-2085.

¹³ D Marcus, 'Trans-Substantivity and the Processes of American Law' (2013) 5 BYU Law Review 1191, 1221.

¹⁴ S Malveaux, 'A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights' (2014) 92 Washington University Law Review 455, 458-459.

¹⁵ D Marcus, 'Trans-Substantivity and the Processes of American Law' (2013) 5 BYU Law Review 1191, 1221; G C Hazard Jr, 'Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure' (1989) 137 University of Pennsylvania Law Review 2237, 2238-2244; C Tobias, 'The Transformation of Trans-Substantivity' (1992) 49 Washington and Lee Law Review 1501; J Resnik, 'Failing Faith: Adjudicatory Procedure in Decline', (1986) 53 (2) The University of Chicago Law Review 494; S Subrin, 'Symposium: The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988' (1989) 137 (6) University of Pennsylvania Law Review 1873.

law origin.¹⁶ These jurisdictions all trace their origins to the unwritten practices of English Chancery. Today, however, except for South Africa,¹⁷ class actions in these jurisdictions are largely creatures of trans-substantive statute and rule.¹⁸

- 15 Class actions in the US are regulated by a comprehensive court rule that deals with class actions at a federal level.¹⁹ This rule forms part of the Federal Rules of Civil Procedure (the Rules) that govern the conduct of federal civil lawsuits in the US. Trans-substantivity has been a fundamental principle of the US civil litigation system since the Rules originated in 1938.²⁰ Rule 23 of the Rules – the US class action rule – thus applies broadly regardless of the nature of the underlying substantive claim.²¹ It applies to various claim types, including antitrust, consumer, insurance, and mass tort class actions.²² There are, however, instances where subject-specific statutes augment rule 23. For example, the Private Securities Litigation Reform Act (PSLRA)²³ contains various requirements that must be satisfied in addition to those in Rule 23 to pursue a securities fraud class action.²⁴

¹⁶ That is not to say that all common law jurisdictions have trans-substantive class actions. As indicated below, Israel is an example of a common law jurisdiction with non-trans-substantive class action procedural rules.

¹⁷ South African courts have been required to develop appropriate class action procedural rules through their inherent jurisdiction embodied in section 173 of the Constitution of the Republic of South Africa, 1996. These rules apply uniformly to all class actions, regardless of claim type.

¹⁸ R B Marcin, 'Searching for the Origin of Class Action' (1974) 23 Catholic University Law Review 515, 517. It is worth noting that, similar the position in South Africa, superior courts in Canada may create and manage class actions on their own authority, regardless of whether there is governing legislation in each of the provinces. See also J Kalajdzic, 'The State of Reform in First and Second Generation Class Action Jurisdictions' in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 305.

¹⁹ Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005 govern class actions in federal courts. Rule 23 makes provision for three categories of class actions: Rule 23(b)(1) provides for two types of so-called 'prejudice' class actions; Rule 23(b)(2) provides for declaratory and injunctive relief; and Rule 23(b)(3) provides for the opt-out damage class action. According to R H Klonoff, *Class Actions and Other Multi-party Litigation in a Nutshell* (4th edn, West Academic Publishing 2012) 75, most class actions are brought and certified under rules 23(b)(2) and 23(b)(3). Rule 23(b)(1) is used less frequently.

²⁰ S Malveaux, 'A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights' (2014) 92 Washington University Law Review 455, 459-462.

²¹ R G Bone, 'Walking the Class Action Maze: Toward a More Functional Rule 23' (2013) 46 (4) University of Michigan Journal of Law Reform 1097, 1123.

²² See M H Redish, 'Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals' (2003) University of Chicago Legal Forum 71, 75 describing 'virtually all of the Federal Rules of Civil Procedure' as well as 'Rule 23's class action device [as] inherently "trans-substantive"'.

²³ A Klement and R Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach' (2018) 19 (1) Theoretical Inquiries in Law 151, 155.

²⁴ A Klement and R Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach' (2018) 19 (1) Theoretical Inquiries in Law 151, 156.

- 16 All the provinces and territories in Canada are common law jurisdictions, except for Quebec. Quebec is a mixed civil and common law jurisdiction.²⁵ Although there are key procedural and substantive differences between the collective processes in Canada and the US, they are similar in many respects. There are also differences in the class action regimes between the Canadian provinces.²⁶ As is the case with the US class action, class actions in Canada are trans-substantive.²⁷ Class proceedings in Canada thus apply to all areas of civil law. Nevertheless, Canadian class actions are mostly instituted in relation to securities, consumer, competition, employment, environmental and product liability causes of action.²⁸
- 17 The Federal Court of Australia Act of 1976 (Federal Court Act) regulates Australian class proceedings.²⁹ Part IVA of the Federal Court Act contains detailed provisions for the commencement and conduct of class actions. The class action provisions apply to many different causes of action in diverse areas. The different areas in which the class action has been applied include anti-cartel class actions;³⁰ consumer class actions;³¹

²⁵ J Kalajdzic and C Piché, 'Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 109-110. Canada is a bi-juridical state. Quebec is predominantly a civil jurisdiction, at least insofar as the substantive law is concerned, and the Civil Code of Quebec is essentially a codification of all of Quebec's private law. The remaining Canadian provinces and territories are governed by the common law and their private law is found in a combination of statutes and court judgments. Insofar as procedural law is concerned, there is greater commonality across the Canadian provinces. All the Canadian provinces, except Prince Edward Island, have a class action system. See also C Piché and G Saumier, 'Consumer Collective Redress in Canada' (2018) 61 *Japanese Yearbook of International Law* 231, 234-239.

²⁶ J Kalajdzic and C Piché, 'Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 109.

²⁷ J Kalajdzic and C Piché, 'Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 110; C Piché, 'The 'New Normal' of Civil Procedure in Canada – Technological Efficiency over Proportionality and Accuracy of Outcomes' in B Krans and A Nylund (ed), *Civil Courts Coping with Covid-19* (Eleven 2021) 38.

²⁸ Y Martineau and A Lang, 'Canada' in P G Karlsgodt (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012) 76.

²⁹ An almost identical regime exists in the Supreme Court of Victoria since January 2000 as a result of the enactment of part 4A of the Supreme Court Act 1986 (Vic) (Part 4A). The New South Wales Parliament was the most recent Australian legislature to introduce – through the enactment in March 2011 of Part 10 of the Civil Procedure Act 2005 (NSW) (Part 10) – a comprehensive class action regime. Part 10 is also based on the federal regime. See V Morabito, 'Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?' (2015) 38(1) *University of New South Wales Law Journal* 146. Although Part 4A refers to representative proceedings, the two terms (class action and representative proceedings) are often used interchangeably (S S Clark, J Kellam and L Cook, 'Australia' in P G Karlsgodt (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012) 392, 406).

³⁰ See, for example: *Darwalla Milling Co Pty Ltd and Others v F Hoffman-La Roche and Others (No 2)* (Federal Court, Australia) [2006] 236 ALR 322 (settlement approved); *Wright Rubber Products Pty Ltd v Bayer AG (No 3)* (Federal Court, Australia) [2011] FCA 1172; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* (Federal Court, Australia) [2011] FCA 671.

³¹ See, for example: *Williams v FAI Home Security Pty Ltd (No 5)* (Federal Court, Australia) [2001] FCA 399; *Tropical Shine Holdings (trading as KC Country) v Lake Gesture Pty Ltd* (Federal Court, Australia)

environmental class actions;³² human rights class actions;³³ investor class actions;³⁴ personal injury as a result of food, water or product contamination;³⁵ personal injury as a result of defective products;³⁶ shareholder class actions;³⁷ and trade union class actions.³⁸ The most common types of class action are shareholder class actions, investor class actions, product liability class actions, mass tort class actions and employment class actions.³⁹

- 18 As mentioned, the procedural rules governing class action in South Africa are also trans-substantive. The class action is recognized in section 38(c) of the final Constitution of the Republic of South Africa, 1996.⁴⁰ It enables the utilization of a class action as a means to

[1993] 45 FCR 457; *Andrews v Australia and New Zealand Banking Group Ltd* (Federal Court, Australia) [2012] 247 CLR 205.

³² See, for example: *Cook and Others v Pasminco Ltd and Others* (Supreme Court of Victoria, Australia) [2000] VSC 534; *Wheelahan v City of Casey and Others* (Supreme Court of Victoria, Australia) [2011] VSC 215.

³³ See, for example: *Konneh v State of New South Wales* (Supreme Court New South Wales, Australia) [2011] NSWSC 1170.

³⁴ See, for example: *RiverCity Motorway Management Ltd (administrators appointed) (receivers and managers appointed) v AECOM Australia Pty Ltd* (Federal Court, Australia) [2012] FCA 1304; *O'Sullivan v Challenger Managed Investments Limited* (Supreme Court New South Wales, Australia) [2008] NSWSC 602; *Harrison v Sandhurst Trustees Ltd* (Federal Court, Australia) [2011] FCA 541.

³⁵ See, for example: *Butler v Kraft Foods and Another* (Federal Court of Australia) Proceeding No VG 393 of 1996 (settled); *Schokman v Sydney Water Corporation Limited* (Federal Court of Australia) Proceeding No NG 794 of 1998; *Ryan v Great Lakes Council* (Federal Court, Australia) [1999] FCA 177; *Sofia Pizza Class Action* (settled); *Lopez v Star World Enterprises Pty Ltd (in liq) and Others* (Federal Court, Australia) [1999] FCA 104 (settlement approved).

³⁶ See, for example: *Bates v Dow Corning (Australia) Pty Ltd* (Federal Court, Australia) [2005] FCA 927 (discontinued); *Nixon and Others v Phillip Morris (Australia) Ltd and Others* (Federal Court, Australia) [1999] 95 FCR 453; *Courtney v Medtel Pty Ltd and Another (No 5)* (Federal Court, Australia) [2005] 212 ALR 311 (settlement approved); *Bright v Femcare* (Federal Court, Australia) [2002] 195 ALR 574; *Casey v DePuy International Ltd (No 2)* (Federal Court, Australia) [2012] FCA 1370 (settlement approved).

³⁷ See, for example: *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029; *Kirby v Centro Properties Ltd (No 6)* (Federal Court, Australia) [2012] FCA 650.

³⁸ See, for example: *Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd* (Federal Court, Australia) [2009] FCA 572 (settlement approved); *Smith v University of Ballarat* (Federal Court, Australia) [2006] 229 ALR 343.

³⁹ J Schimmel, N Abbey and V Morabito, 'Perspectives on Product Liability Class Actions in Australia' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 394-395. See also V Morabito, 'An Empirical study of Australia's Class Action Regimes – Fourth Report: Facts and Figures on twenty-four Years of Class Actions in Australia' (Department of Business Law and Taxation, Monash University, July 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815777 accessed 30 August 2024; P Stevenson and M Saville, 'Class action litigation in Australia' in M du Plessis, J A Oxenham, I Goodman, L Kelly and S Pudifin-Jones (ed), *Class Action Litigation in South Africa* (Juta 2017) 155.

⁴⁰ Section 38(c) of the Constitution of the Republic of South Africa, 1996 provides as follows: '38. Enforcement of rights - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- [...] (c) anyone acting as a member of, or in the interest of, a group or class of persons[...]'.

enforce fundamental rights entrenched in the Bill of Rights.⁴¹ South African law also allows class actions to enforce non-constitutional rights,⁴² such as a claim for damages where no constitutional right was infringed.⁴³ The right to pursue class proceedings in relation to non-constitutional rights is derived from the common law and from certain subject-specific statutes, such as the Consumer Protection Act 68 of 2008. Unlike the position in the trans-substantive jurisdictions referred to above, there is no general South African statute or court rule that regulates class actions. South African courts have been required to develop appropriate class action procedural rules through their inherent jurisdiction embodied in Section 173 of the Constitution.⁴⁴ These rules apply uniformly to all class actions, regardless of claim type.⁴⁵ South Africa's class action has primarily been used in relation to employee benefit disputes and constitutional rights-related disputes. Considering the nature of the issues involved that have formed the subject of South African class actions to date, it is apparent that it has primarily been used to facilitate access to justice for vulnerable and marginalized individuals and to assist them in vindicating their rights, constitutional and otherwise.⁴⁶

⁴¹ Unlike Rule 23 of the Federal Rules, Section 38 of the Constitution does not contain a procedural framework in terms of which class actions must be conducted.

⁴² *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* (Supreme Court of Appeal, South Africa) 2013 1 All SA 648 (SCA).

⁴³ W De Vos, 'Judicial Activism Gives Recognition to a General Class Action in South Africa' (2013) 2 TSAR 370, 372.

⁴⁴ C Plasket, 'South Africa' in D R Hensler, C Hodges and M Tulibacka (ed), *The Globalization of Class Actions* (Sage Publications 2009) 256 261.

⁴⁵ See T Broodryk, 'Class action certification and constitutional claims: the South African case' (2020) 27 (5) Maastricht Journal of European and Comparative Law 636, regarding whether Bill of Rights class actions must be certified.

⁴⁶ See, for example: *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* (Superior Court, South Africa) 2001 (2) SA 209 (E) 622-623: 'There is evidence that many people in similar circumstances as the applicants are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid. Effectively they are unable to act in their own name.'; *Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* (Superior Court, South Africa) 2011 JDR 0498 (WCC) 41: 'Although the application was brought on behalf of an extremely wide class of persons, the primary intention of the applicants was clearly to benefit the poor and to promote access by all to sufficient food.'; *Magidiwana and others v President of the Republic of South Africa and others (No 1)* (Constitutional Court, South Africa) (2014) 1 All SA 61 (GNP) para 19: 'One can accept for the sake of this aspect of the matter that the applicants are indigent persons; they come from a poor background.'; *Pretorius v Transnet Second Defined Benefit Fund* (Constitutional Court, South Africa) (2014) (6) SA 77 (GP) 83: 'The situation in the present case seems pattern-made for class proceedings. This is so in that the class the applicants represent in this case is drawn from the very poorest within our society (old pensioners), those in need of statutory social assistance.'; *Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae)* (High Court Johannesburg, South Africa) (2016) 3 All SA 233 (GJ) 234: 'A further consideration in the present case was that for the mineworkers, who were poor and lacked the sophistication necessary to litigate individually, there was no realistic alternative to class action'. See also T Broodryk, 'An Empirical Analysis of Class Actions in South Africa' (2020) 24 Law, Democracy and Development 54-85 and T Broodryk, 'Access to Justice Through Class Action: The South African Case' in Z Boggenpoel and G Quinot (ed), *Law, Justice and Transformation* (LexisNexis 2021).

- 19 There are numerous jurisdictions with non-trans-substantive class actions.⁴⁷ In some of these jurisdictions, class action procedures that were adopted in respect of one or a few areas of substantive law, were subsequently expanded to apply to other types of substantive legal claims. For example, the Dutch collective settlement procedure⁴⁸ was initially adopted to resolve mass product defect claims within the pharmaceutical sphere but was later applied to shareholder and other financial claims.⁴⁹ Similarly, the scope of class actions in Israel has been extended over time.⁵⁰ Israel's class action procedure permits the institution of class proceedings in relation to a wide range of causes of action.⁵¹ Class action procedures have been incorporated into various Israeli substantive laws, starting with the Securities Law in 1988. There were similar subsequent amendments the Consumer Protection Law (1994), the Banking (Service to Customer) Law (1996), the Control of Financial Services (Insurance) Law (1997), the Prevention of Environmental Nuisances (Civil Actions) Law (1992), and the Male and Female Workers (Equal Pay) Law (1996).⁵² The Israeli Class Action Act (ICAA) was enacted in 2006. It is a general, comprehensive class action statute.⁵³ However, although the ICAA appears to be trans-substantive, it includes a closed list of specific areas in respect of which class actions are permitted.⁵⁴
- 20 France and Italy are further examples of jurisdictions where the scope of class action has been extended over time. Initially, the French *action de groupe* (class action)⁵⁵ was available in the competition and consumer law fields only. In 2016, the class action was extended to include inter alia causes of action based on health law, privacy and data

⁴⁷ For example, most collective redress mechanisms that EU member states have enacted or are in the process of enacting are largely restricted to consumer matters. See L S Mullenix, 'For the Defense: 28 Shades of European Class Actions' in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 58-59.

⁴⁸ The Dutch Collective Settlement of Mass Damage Act (WCAM 2005).

⁴⁹ D Hensler, 'Foreword' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) xxiii. See also I N Tzankova and X E Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 98.

⁵⁰ D Hensler, 'Foreword' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) xxiii. See also J Kalajdzic, 'The State of Reform in First and Second Generation Class Action Jurisdictions' in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 305.

⁵¹ Including consumer, securities, banking, antitrust, environmental, employment and discrimination class actions.

⁵² A Klement and R Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach', (2018) 19 (1) *Theoretical Inquiries in Law* 151, 171.

⁵³ S Lavie, 'Class Actions and the Regulatory State: Lessons from Israel' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 506.

⁵⁴ A Klement and R Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach' (2018) 19 (1) *Theoretical Inquiries in Law* 151, 173; S Lavie, 'Class Actions and the Regulatory State: Lessons from Israel' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 506.

⁵⁵ Act no 2014-344 of 17 March 2014 (France).

protection, environmental matters and class actions for individuals suffering from similar direct or indirect discriminatory practices from the same wrongdoer.⁵⁶

- 21 In Italy, on 19 May 2021, the reform of the Italian class action legal framework entered into force.⁵⁷ Silvestri states as follows regarding the expanded scope of class action in Italy:

[T]he availability of the actions has been extended so that, on the one hand, standing to sue is granted to unnamed individuals who claim ‘homogenous individual rights’ (whether or not they are consumers or users, as was required by Art 140-bis of the Consumer Code) and, on the other hand, the remedy (specifically, an injunctions or an award of damages or a restitution order) can be sought against any possible type of misconduct that is legally relevant (and not only, as the old rules provided for, in case of breach of contract, unfair or anti-competitive commercial practices and product or service liability). The changes just described are a positive feature, since they mean that now the scope of application of collective procedures is much wider than before.⁵⁸

- 22 There are numerous other jurisdictions with non-trans-substantive class action procedures where the class action is only available for specific types of substantive claims. For example, the Belgian class action, introduced by Act of 28 March 2014,⁵⁹ provides that the cause of action must be a potential violation of European or Belgian consumer regulations or acts which are specifically enumerated in the Code of Economic Law.⁶⁰ In Brazil, both general and special class actions exist. General class actions resemble the US-style class action. However, although Brazilian law drew inspiration from the US class action, the Brazilian general class action is more limited in scope. The 1985 Law of Public Civil Action (*Lei de Ação Civil Pública*, or LACP)⁶¹ initially limited collective litigation to specific areas. The law was gradually amended to cover any diffuse

⁵⁶ M J Azar-Baud and A Biard, ‘The Dawn of Collective Redress 3.0 in France?’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 77-80; A Biard and R Amaro, ‘France’ in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018) 68-71.

⁵⁷ The new rules were designed by Law no 31 and published on 18 April 2019 (Law no 31/2019). These class action rules are now included in the Italian Civil Procedure Code and no longer in the Code of Consumers. E Silvestri, ‘Rebooting Italian Class Action’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 204.

⁵⁸ E Silvestri, ‘Rebooting Italian Class Action’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) at 201 states that ‘the new perimeter of class actions encompasses any claims arising out of both contract liability and tort liability, which signals another significant change aimed at designing class actions as general remedies’. See also D Vecchi, ‘Italy’ in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018) 89.

⁵⁹ Law inserting Title 2 ‘Rechtsvordering tot collectief herstel’ in Book XVII ‘Bijzondere rechts procedures’ of the Economic Law Code and inserting the definitions specific to Book XVII in Book I of the Economic Law Code (Official Belgian Gazette 29 March 2014, 35.201).

⁶⁰ In this regard, see S Voet and P Gillaerts, ‘Belgium’ in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018) 44.

⁶¹ Federal Law No 7.347 of 24 July 1985 (Brazil).

or collective interest and more specific issues, such as urban policies, racial, ethnic or religious issues, etc. The Consumer Defense Code Law No 8078/90 complemented the system for collective rights defence that the LACP created and the the Federal Constitution of 1988 expanded on the protection of collective rights, including enhancing collective consumer protection. Brazilian special class actions include the *Ação Direta de Inconstitucionalidade* (Direct Action of Unconstitutionality or ADI), *Arguição de Descumprimento de Preceito Fundamental* (the Claim of Non-Compliance with a Fundamental Precept or ADPF), and *Ação Declaratória de Constitucionalidade* (the Declaratory Action for Constitutionality or ADC), among others.⁶²

- 23 On an EU level, in 2018, the European Commission proposed a directive on representative actions to protect the collective interests of consumers.⁶³ The proposal ultimately resulted in the adoption of Directive 2020/1828 (the EU Directive), which provides for representative actions for the protection of the collective interests of consumers.⁶⁴ This means that Member States must adopt representative actions for redress measures such as ‘compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid’.⁶⁵ The EU Directive covers both domestic and cross-border representative actions.⁶⁶ The scope of the EU Directive is limited to representative actions that pertain to an infringement committed by traders that harms, or has the potential to harm, the collective interests of consumers in any of the sectors covered therein.⁶⁷ The specific provisions which may be enforced by means of representative actions are listed in Annex 1 to the EU Directive: at present (May 2024), the Annex includes 66 European Union regulations and directives, but more normative instruments are expected to be added to the list in the future.⁶⁸

⁶² See C P Gouvêa and H C Refosco, ‘Class Action in Brazil: Overview, Current Trends and Case Studies’ in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 129. Examples of other jurisdictions with non-trans-substantive class actions include Chile, Japan, Taiwan, and South Korea. Germany’s group litigation procedure (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*), which is not a class action, is authorized for shareholder claims. See D R Hensler, ‘From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally’ (2017) 65 *Kansas Law Review* 971.

⁶³ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184.

⁶⁴ Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ 2020, L 409/1 (EU). See B Gsell, ‘The new European Directive on representative actions for the protection of the collective interests of consumers – A huge, but blurry step forward’ (2021) 58 (5) *Common Market Law Review* 1365-1400. Member states are afforded until 25 December 2022 to ensure that they adopt it in their national laws and Member States must apply the respective national law from 25 June 2023. See Art 24(1) of Directive 2020/1828.

⁶⁵ See the definition contained in Art 3(10) of Directive 2020/1828 and see also Art 1(2) 2nd sentence, Art 3(3), (5), Art 7(4)(b) and Art 9 of Directive 2020/1828.

⁶⁶ See Art 2(1) sentence 3 and Art 4(1) and (2) of Directive 2020/1828.

⁶⁷ Art 2(1) of Directive 2020/1828. F G Inchausti, ‘A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November’ (2021) 2 *GPR* 61, 66.

⁶⁸ See, generally, S Voet and A Biard, ‘Collective Redress in the EU: Will it Finally Come True?’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 287-299.

3 AVAILABLE REMEDIES

- 24 Although jurisdictions' class action procedures tend to differ globally, they share a common feature in that they allow one or a few persons or entities to represent many similarly situated claimants in a legal action seeking a substantive remedy. It is generally possible to obtain injunctive or declaratory relief as a remedy in jurisdictions that provide for collective litigation. However, various jurisdictions do not permit the recovery of monetary relief through collective litigation.⁶⁹ Collective litigation to obtain declaratory or injunctive relief serves an important purpose as it may clarify the application of law, and it may prevent harmful behaviour from occurring. However, where a jurisdiction limits remedies in collective litigation to declaratory and injunctive relief, it limits the extent to which the collective redress mechanism is used. This is because, if class representatives cannot receive monetary rewards for their collective actions, options for litigation funding are limited and fewer collective actions proceed. Conversely, where it is possible to claim monetary compensation through collective action in a specific jurisdiction, that jurisdiction is likely to witness a higher incidence of collective actions.⁷⁰
- 25 In those jurisdictions whose class action rules are trans-substantive, it is generally possible to claim declaratory, injunctive, and monetary relief. This rings true, for example, in the US, Australia, Canada, and South Africa.⁷¹ As mentioned, Rule 23 of the United States Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005 govern class action in federal courts. Rule 23 makes provision for three categories of class actions: Rule 23(b)(1) provides for class actions where a decision on the substantive claim necessarily impacts relevant individual claims; Rule 23(b)(2) provides for declaratory and injunctive relief for 'common' claims of law and fact and Rule 23(b)(3) provides for damages claims, on an opt-out basis. In the US, various types of damages can be claimed generally, including through collective litigation. Economic or non-economic compensatory damages are aimed at compensating an injured party for harm suffered because of the defendant's conduct.⁷² Nominal and exemplary damages (also referred to as punitive damages) may also be claimed.⁷³ Regarding the distribution of

⁶⁹ D R Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 *Kansas Law Review* 975.

⁷⁰ D Hensler, 'Foreword' in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) xxix.

⁷¹ D R Hensler, 'The Global Landscape of Collective Litigation' in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 16.

⁷² Economic damages are those damages that are susceptible to a monetary valuation. They include, for example, hospital bills and lost profits. Non-economic damages include, for example, damages for emotional distress and pain and suffering.

⁷³ Nominal damages entail an award for damages for minimal amounts of money. Such an award is intended to serve as a symbolic victory for a party who proves their claim but cannot prove any significant injury. Exemplary damages are aimed at punishing a defendant for especially reprehensible misconduct and to deter future misconduct. See P Karlsgodt, 'The United States' in P G Karlsgodt (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012) 3.

damages, the US, Australia, Canada, and South Africa all recognize a range of mechanisms for distributing the benefits of a successful class action to the members of the class. These can range from direct payment to class members to indirect payment mechanisms, including *cy-près* distribution.⁷⁴

- 26 As mentioned, in Australia it is also possible to obtain declaratory, injunctive, and monetary relief.⁷⁵ Section 33Z of the Federal Court Act of 1976 provides that courts have the power to grant any equitable relief or make an award of damages in class actions. Where an award of damages is made, the court must also provide for the allocation and distribution of such damages to the designated group members.⁷⁶ Further, where the court awards damages in the aggregate, without specifying amounts allocated to individual members or sub-groups, a reasonable division of the damages must be ascertainable.⁷⁷ The courts may direct how group members are to assert their entitlement to damages and how disputes over damages distribution are to be determined.⁷⁸ There is no specific power to award a *cy-près* remedy in the Australian regimes, but *cy-près* type remedies have been handed down by the Federal Court in some instances.⁷⁹
- 27 In Canada, the same remedies that are available in ordinary civil actions are available in class actions, including declaratory, injunctive, monetary, and other forms of relief.⁸⁰ The exception is, however, class action in Quebec where injunctive relief is not possible. The assessment of damages on an aggregate basis, where liability can be established at the common issues trial, are also permitted. There are various ways in which general damages may be assessed. This includes proportional division of a lump sum among class members, mini-trials, individual assessment based on a formula, and other forms of assessment. The Supreme Court of Canada has held that an entitlement to punitive damages may also be considered as a common issue in a class proceeding.⁸¹ As mentioned, *cy-près* distribution is also permitted.⁸²
- 28 In South Africa, it is similarly possible to obtain declaratory, injunctive, and monetary relief. J A Wallis in Trustees for the time being of the *Children's Resource Centre Trust v*

⁷⁴ R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing 2004) 408.

⁷⁵ D R Hensler, 'The Global Landscape of Collective Litigation' in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 14.

⁷⁶ Section 33Z(2) of the Federal Court Act of 1976.

⁷⁷ Section 33Z(3) of the Federal Court Act of 1976.

⁷⁸ Section 33Z(4) of the Federal Court Act of 1976.

⁷⁹ *Mobil Oil Australia Pty Ltd v Victoria* (High Court, Australia) [2002] 211 CLR 1; *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (Supreme Court of Victoria, Australia) [2000] 1 VR 545.

⁸⁰ D R Hensler, 'The Global Landscape of Collective Litigation' in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 14.

⁸¹ *Bank of Montreal v Marcotte* (Supreme Court, Canada), Judgment 19 September 2014 [2014 SCC 55].

⁸² J Kalajdzic, 'The 'Illusion of Compensation': Cy près Distributions in Canadian Class Actions' (2013) 92 (2) Canadian Bar Review 135.

*Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*⁸³ (*Children's Resource Centre Trust*) listed as a certification requirement that the relief sought or damages claimed must be ascertainable and capable of determination, and if the claim is for damages, there must be an appropriate procedure for allocating damages to the class members.⁸⁴ In South Africa, the most common remedy in a class action is an order for the payment of damages. In addition to the payment of common-law damages, other possible remedies include constitutional damages, declaratory relief, interdictory relief and structural orders.⁸⁵ There are, as is the case in the US, Australia and Canada, various approaches available to quantify damages. For example, different categories of class members may be established, and a quantum may be attached to each category, or the decision may identify criteria that will govern the quantification of damages. Quantification may also be deferred to separate proceedings. It is also possible to, for example, use a special master⁸⁶ or an independent trust or other structure.⁸⁷ In South Africa, there is no law addressing the distribution of unclaimed funds in class actions, although the courts are likely to address this issue in the future.⁸⁸

- 29 On an EU level, there have been significant recent developments insofar as the remedies available to claimants in collective litigation are concerned. In terms of the EU Directive 2020/1828 (Representative Actions Directive), relief under representative actions is no longer limited to injunctive relief as was the case with the Injunctions Directive.⁸⁹

⁸³ *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* (Supreme Court of Appeal, South Africa) [2013] 1 All SA 648 (SCA).

⁸⁴ *Ibid* para 26. Regarding the certification 'requirements' mentioned in *Children's Resource Centre Trust*, Jafta J in *Mukaddam v Pioneer Foods (Pty) Ltd* (Constitutional Court, South Africa) [2013] 10 BCLR 1135 (CC) para 35 stated as follows: 'In *Children's Resource Centre*...the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise'.

⁸⁵ J Brickhill and J Bleazard, 'Bill of rights class actions' in M Du Plessis, I Goodman, L Kelly, J A Oxenham, S Pudifin-Jones (ed), *Class action litigation in South Africa* (Juta 2017) 76-78.

⁸⁶ *Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others* (High Court Cape Town, South Africa) [2021] 4 All SA 219 (WCC) para 58.

⁸⁷ In *Linkside & Others v Minister of Basic Education* (High Court, South Africa) [2015] JDR 0032 (ECG), a firm of registered chartered accountants was appointed as claims administrators to receive funds from the defendant, to assess claims by class members and to distribute funds to them. See J Brickhill and J Bleazard, 'Bill of rights class actions' in M Du Plessis, I Goodman, L Kelly, J A Oxenham, S Pudifin-Jones (ed), *Class action litigation in South Africa* (Juta 2017) 76-77.

⁸⁸ J Brickhill and J Bleazard, 'Bill of rights class actions' in M Du Plessis, I Goodman, L Kelly, J A Oxenham, S Pudifin-Jones (ed), *Class action litigation in South Africa* (Juta 2017) 104.

⁸⁹ Art 9(6) of Directive 2020/1828. In 1998, the European Parliament and the Council of the European Union for the first time introduced representative actions through Directive 98/27, which was subsequently replaced by the Injunctions Directive 2009/22, which regulates collective injunctions to protect consumers' interests (Injunctions Directive). Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests. It has since been replaced by the Injunctions Directive 2009/22. This directive is still in force. The list in the Annex to the Directive was extended from the initial nine to 13 directives, while otherwise the provisions of both directives are almost identical. See A Vlahek, 'Development of Consumer Collective Redress in the EU: a Light at the End of the Tunnel?' (2020) 18 (1) *Baltic Yearbook of International Law* 134, 141.

Member States are obliged to ensure that qualified entities can obtain injunctive and redress measures. Injunctive relief includes provisional or definitive measures to cease or prohibit a practice.⁹⁰ Redress measures are defined to mean measures that require traders ‘to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law’.⁹¹ Recital 42 prohibits awarding punitive damages: ‘This Directive should not enable punitive damages being imposed on the infringing trader, in accordance with national law’. The exclusion of punitive damages can therefore be deduced for each member state from the reference to national legislation. If the relevant member state prohibits the awarding of punitive damages, which is usually the case for most member states belonging to the civil law tradition,⁹² it may not be awarded in terms of the new framework of a representative action for redress. This does, however, give rise to a risk for forum shopping in the context of cross-border representative actions.⁹³

- 30 The ability to obtain injunctive, declaratory and compensatory recourse through collective litigation is not limited to jurisdictions whose class action rules are trans-substantive.⁹⁴ For example, it is possible to claim injunctive and declaratory relief through the Netherlands’ more traditional collective action regime (WCA) that was introduced in 1994, and to obtain collective damages through the new Dutch statutory regime that was enacted on 1 January 2020 (The Act on Collective Damages in Class Actions, WAMCA).⁹⁵ Examples of other jurisdictions that also enable the recovery of

⁹⁰ Article 8 of Directive 2020/1828.

⁹¹ Article 3, L 409/6. F G Inchausti, ‘A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November’ (2021) 2 GPR 61, 71.

⁹² According to L S Mullenix, ‘For the Defense: 28 Shades of European Class Actions’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 64, 68, punitive damages are alien to the majority of EU member states in their domestic law. Only Greece and England and Wales admit some form of punitive damages in limited form.

⁹³ F G Inchausti, ‘A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November’ (2021) 2 GPR 61, 72.

⁹⁴ It generally appears to be the case that, in jurisdictions whose class action rules are non-trans-substantive, where the scope of class action in these jurisdictions has been expanded over time, so have the available remedies. For example, in France, it was initially only possible to obtain injunctive relief through data protection group actions, but in 2018 group actions for compensatory purposes was adopted with Act no 2018-492 of 20 June 2018. See M J Azar-Baud and A Biard, ‘The Dawn of Collective Redress 3.0 in France?’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 84.

⁹⁵ I N Tzankova and X E Kramer, ‘From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 98.

monetary relief, in addition to providing injunctive or declaratory relief, include Belgium,⁹⁶ Brazil,⁹⁷ Israel,⁹⁸ Sweden,⁹⁹ and Taiwan.¹⁰⁰

- 31 There are several jurisdictions with collective litigation mechanisms that do not enable the recovery of monetary relief. In this regard, EU member states have generally been slow to introduce compensatory relief collective redress actions and, where they have done so, they have also been limited in scope and application.¹⁰¹ For example, the German *Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten* (Capital Markets Model Procedure Law, *KapMuG*), provides for a liability decision in binding test case proceedings caused by wrong, deceptive or omitted public capital market information or by the use of such information. The decision applies to all cases registered for the proceeding.¹⁰² If liability is found through a declaratory judgment, claimants may pursue damages individually.¹⁰³ The German model declaratory lawsuit was established on 1 November 2018. It was implemented in Sec 606-14 of the German Code of Civil Procedure (GCCP). The law was essentially passed to protect purchasers of Volkswagen vehicles from the tolling period which would have ended in 2018, which is the reason why the law was critically dubbed ‘Lex Volkswagen’.¹⁰⁴ Through the model declaratory suit, consumer protection associations could have facts and legal issues determined in court, which in turn has a binding effect on the individual processes of registered consumers.¹⁰⁵ The lawsuit was aimed at clarifying factual and legal preliminary questions that were relevant in all individual cases. The model declaratory lawsuit did not end with

⁹⁶ D R Hensler, ‘The Global Landscape of Collective Litigation’ in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 14. S Voet and P Gillaerts, ‘Belgium’ in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018) 44-48.

⁹⁷ D R Hensler, ‘The Global Landscape of Collective Litigation’ in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 14.

⁹⁸ D R Hensler, ‘The Global Landscape of Collective Litigation’ in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 15. As in the United States and Canada, *cy-près* payments are common in Israel. See J Kalajdzic, ‘The State of Reform in First and Second Generation Class Action Jurisdictions’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 313.

⁹⁹ P Hammarö and S Törnsten, ‘Sweden’ in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018) 138.

¹⁰⁰ D R Hensler, ‘The Global Landscape of Collective Litigation’ in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 15.

¹⁰¹ L S Mullenix, ‘For the Defense: 28 Shades of European Class Actions’ in A Uzelac and S Voet (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 60.

¹⁰² Section 1(2) *KapMuG*.

¹⁰³ D R Hensler, ‘The Global Landscape of Collective Litigation’ in D R Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 15.

¹⁰⁴ A Stöhr, ‘The implementation of Collective Redress – A Comparative Approach’ (2020) 21 (8) German Law Journal 1606, 1611.

¹⁰⁵ C Meller-Hannich, ‘Germany’ in B Gsell and T M J Möllers (ed), *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Intersentia 2020) 104; A Stöhr, ‘The implementation of Collective Redress – A Comparative Approach’ (2020) 21 (8) German Law Journal 1606, 1611.

a judgment for payment but with a binding declaration on common factual or legal elements that were part of the individual lawsuits.

- 32 On October 13, 2023, the Act on the Transposition of the Representative Actions Directive entered into force. Its most relevant part is *Verbraucherrecht durchsetzungsgesetz* (the Consumer Rights Enforcement Act, *VduG*), which integrates rules regarding the model declaratory actions with the new action for redress measures. In principle, actions for redress measures are available in all civil disputes arising out of consumers' claims against traders, that is a scope of application wider than the one envisaged by the RAD Directive. Actions must be instituted before *Oberlandesgericht* (the higher regional court) of the defendant's residence. Standing is granted to qualified consumer organizations, provided that they comply with specific requirements. The action, once lodged with the court, must be inscribed with a special electronic register; consumers allegedly affected by the action, on their turn, must register their claims with the electronic register. The procedure follows three distinctive steps, and it is quite complex: it includes a preliminary redress judgment, followed by an attempt at settlement if the court has found for the qualified claimant; a final judgment on redress; and an implementation proceeding, opened by the appointment of a trustee, whose task is to determine whether the consumers are eligible to receive compensation.
- 33 As far as the model declaratory action, it has been emphasized that its purpose 'was and is not to provide an enforceable judgment but to clarify factual or legal questions common to claims or the legal relationship between the consumers who have opted in and the defendant trader'.¹⁰⁶ The rules on the model declaratory action were included in the Code of civil procedure, but now they have become part of the Consumer Rights Enforcement Act, and they conform to a notable extent to the rules applicable to actions for redress measures

4 NEED FOR APPROVAL

- 34 Because representative class actions resolve claims of plaintiffs who are not before the court (and may not be aware of the proceeding and their right to participate in certain aspects of it), many jurisdictions require that a court approve of litigation moving forward in class form. In common law jurisdictions, this approval process is termed *certification*. In civil law jurisdictions, if claimants must satisfy statutory requirements or special rules before proceeding in collective form, the court decides this issue in the *admissibility* phase.
- 35 In the US, Rule 23 requires court approval, and Rule 23(a) specifies in detail the criteria for court approval, namely 'numerosity' (ie, so many claims that it would be impractical for the litigation to proceed individually), 'commonality' (features of law or fact that the

¹⁰⁶ H Schlafke and T Luhmann, 'Collective Redress in Germany and the Transposition of the Representative Actions Directive' (2023) 2 Mass Claims 67, 77-78.

claims share), ‘typicality’ (a requirement that the named representative(s) have claims that are similar to or ‘typical’ of the claims of other class members), and ‘adequacy of representation’ (a requirement that those leading the litigation have the capacity to serve the interests of the class). Often this latter requirement is interpreted to include the competence of the proposed class attorney to litigate class actions and that attorney’s ability to adequately fund the litigation (in the US regime, where the attorney must cover all costs up-front). Rule 23(b) sets forth different situations in which class actions may be certified. The most controversial of these in modern time has been when class members claim damages. Because the rule-drafters assumed when damages were possible, plaintiffs might have practical means to pursue their claims individually, they required in Rule 23(b)(3) that the proposed class action meet heightened standards, namely that common issues outweigh individual claim characteristics (‘predominance’) and that proceeding in class form will be superior to requiring individual litigation.

- 36 Canadian provinces have quite similar requirements for certification, but Australia – unusually among common law jurisdictions with class actions – does not require certification. There, plaintiffs may file their complaints in class form without prior court approval, but if the claims do not satisfy the criteria for class status – which are quite similar to the US rule – defendants may challenge plaintiffs’ class complaint, and a court must then rule on whether the litigation satisfies these criteria.
- 37 As class actions have aroused increasing opposition from corporate lobbies in common law jurisdictions, the class certification process has been a target for reform. In the United States, a pro-business Supreme Court has imposed increasingly stringent interpretations of Rule 23 certification requirements, focusing particularly on the ‘commonality’ requirement. Similar efforts to restrict approval of damage class actions have taken place in Canada and Australia but have to date met resistance from more progressive courts.
- 38 Battles over class certification policies frequently rest on normative contentions. However, as a practical matter, heightening the standards for class approval increases the cost of bringing class action litigation, with the effect of limiting such litigation to specialized class action firms that have substantial lines of credit to fund the costs of certification battles or firms that are able to secure third party litigation funding. Sophisticated funders play an important role in policing class action filings, as they are unwilling to invest in litigation that is unlikely to pass certification tests.
- 39 Although civil law jurisdictions have not traditionally required courts to pre-approve representative collective action proceedings, relying instead on other admissibility criteria, there are some recent signs that the expansion of representative class actions in the EU is incentivizing courts to treat admissibility of such actions somewhat similarly to certification. In two recent joined cases, in which special purpose vehicles were acting on behalf of investors in Airbus, a Dutch court rejected representative collective litigation on the grounds that the proposed special purpose vehicles did not adequately

represent the class.¹⁰⁷ Dutch commentators have also noted that since the amendments of the Dutch collective litigation statute in 2020, courts are requesting disclosure of the terms of litigation funding agreements, a development that has surprised some Dutch practitioners given that third-party litigation funding has long been accepted in the Netherlands.¹⁰⁸

5 STANDING AND REPRESENTATION IN REPRESENTATIVE COLLECTIVE ACTIONS AND AGGREGATE PROCEEDINGS

5.1 Overview

- 40 Permitting one or a few persons or entities to represent the interests of a large number of claimants who are not themselves formally before the court – the central distinguishing feature of representative collective litigation – raises significant due process concerns. Who should be given this responsibility (often referred to as ‘standing’ to represent the collective)? Who should have the authority to select the representative? What decisions should the representative be authorized to make? What protections should be associated with the representative’s role? Should the representative receive special compensation for taking on the task? Although statutes and rules regarding representative collective litigation vary considerably across jurisdictions, all specify the requirements for representation. Generally speaking, three models have emerged:
- 41 1) The common law model adopted first by the United States and shared by other common law jurisdictions, which grants standing to represent a class to a class member;
- 42 2) The civil law model, which denies standing to class members and grants it instead to pre-existing associations (eg, consumer protection associations), special entities authorized by the government (as in some Asian jurisdictions) or special entities deemed eligible because they satisfy specified requirements (termed ‘qualified entities’ in EU law);
- 43 3) the government model, which authorizes government agencies or officials to bring collective actions.
- 44 In some jurisdictions, mixed models have emerged.

¹⁰⁷ Case number C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313 (District Court of The Hague), Judgment 20 September 2023. See J Klein, ‘Groundbreaking Judgement in Dutch Collective Opt-Out Proceeding Against Airbus: Both Claim Foundations Declared Inadmissible’ (2023) *Deminor*, <https://www.deminor.com/en/blog/groundbreaking-judgement-in-dutch-collective-opt-out-proceedings-against-airbus-both-claim-foundations-declared-inadmissible> accessed 02 September 2024.

¹⁰⁸ C J M Klaassen, ‘De afwikkeling van massaschade op de voet van de Wamca. Werkt het?’ (2024) 25 (1) *Aansprakelijkheid Verzekering en Schade* 5-15 (Mass Tort Settlement on the Foot of the WAMCA, AV&S, February 2024. [Translated by a language algorithm]).

- 45 In aggregate proceedings, claims are filed and prosecuted individually, so at first blush, the issue of representation does not arise. But as described in Section X, in many jurisdictions, judges select a single ‘model case’ to be the subject of judicial decision-making and action in the other claims that constitute the aggregate is stayed. In some aggregate models, decisions on defendant liability in the model case have binding effect on all of the individual claims that have been formally aggregated; in others, the model case decisions simply suggest how the individual claims might be resolved. In both instances, there is an element of representativeness akin to representative collective litigation but often the sorts of formal rules that cabin standing in representative actions are lacking in aggregate proceedings.

5.2 The Common Law Model: One or More Class Members Represent the Class

- 46 In US class actions and class action procedures in other common law jurisdictions that emulate it, class members are deemed the proper persons (or entities) to represent the class. In federal and state class actions in the US, a class complaint (pleading) is filed by one or more class members. However, it is up to the judge assigned to the case to determine whether that person is a proper representative, as part of the process of certifying the class. Determining the appropriateness of the proposed class representative is intimately related to determining that the proposed class meets the formal requirements of the class action rule. Specifically, the proposed class representative must have claims that are *typical* of the entire class and must be able to adequately represent the class.
- 47 ‘Commonality,’ the second prerequisite for class certification,¹⁰⁹ provides grounds for typicality, as if claims are very heterogeneous it is unlikely that one or even a few class members’ claims could be typical of the entire class. Similarly, a single proposed class representative will not be able to adequately represent a class comprising very diverse claims. Indeed, under Rule 23 (b)(3) damage class actions, it is not sufficient for class members to share common issues: these common issues must predominate over other issues that distinguish claims. The widely known 1997 US Supreme Court decision in *Amchem Products v Windsor*¹¹⁰ de-certified an asbestos personal injury damage class on the grounds that the class members’ interests were too diverse to be adequately represented by the proposed class representatives. Subsequently, few personal injury class actions have been certified on the understanding that personal injuries are inherently so different from each other – even when traced to the same cause – that common issues will not predominate.¹¹¹ Although adequacy of representation formally relates to the issues of commonality and predominance, as a practical matter, judges are

¹⁰⁹ The four requirements for certification under Rules 23 are numerosity, commonality, typicality and adequacy of representation.

¹¹⁰ *Amchem Products v Windsor* (n 4).

¹¹¹ *Amchem* did allow for the possibility that *sub-classes* each with their own representative(s) and own counsel might be created within a class such that adequacy of representation might be satisfied and over the past 25 years some courts have certified personal injury damage class actions with sub-classes.

also attentive to whether the class has counsel that is both competent to prosecute complex class litigation and has sufficient resources to do so. Sufficiency of resources is important because there is no formal retention agreement between class representatives and class counsel: under Rule 23(g), the judge appoints the class counsel, who is expected to invest their own (or third-party) resources in the litigation, with no guarantee of payment. In most class action litigation, class counsel will only receive payment if the class prevails, and under Rule 23(h), the amount of fees will be determined by the judge.

- 48 Inevitably, class litigation is shaped by the class counsel, acting on behalf of the entire class. The class representative(s) has the ability to direct counsel, but in reality, is unlikely to do so. Rather, the role of class representatives is to provide evidence (eg, documents, depositions and, in personal injury litigation, undergo medical examinations). In return, the class representative is permitted to receive a modest premium over whatever class members might ultimately receive if the class prevails. Paying class representatives substantial compensation is viewed as creating potential for significant conflicts of interest between the representatives and other class members. In addition, the fact that counsel is not acting only for the class representative diminishes the potential for conflicts of interest between the representative and other class members. Interestingly, in other common law jurisdictions that share many features of US class actions, class counsel is retained by the class representative, who also must pay lawyer fees and expenses, and bear adverse cost risks, unless these are assumed wholly or in part by third-party funders. To protect against conflicts of interest, in Ontario the judge assigned to the case reviews the retention and any third-party agreements.
- 49 By turning over practical control of class actions to class counsel, the structure of US class actions is seen by many outside the US as incentivizing class action lawyers to bring frivolous litigation that benefits them more than it benefits class members. However, in reality, US class action rules and case law impose myriad guardrails on lawyers who are tempted to merely line their own pockets. Like pleadings in individual litigation, class action pleadings must survive defendants' motions to dismiss, discovery disputes and motions for summary judgment and although the rules suggest otherwise, class certification usually follows rather than precedes these pretrial decisions. In contrast to ordinary litigation, class certification, although interlocutory in nature, is appealable (albeit with some restrictions). Moreover, proposed class action settlements must be reviewed and approved by the judge assigned to the case, after a public *fairness* hearing at which any class member (not just the class representative) may appear, with or without counsel. Class members may also object in written submissions, without appearing. After settlement approval or a trial verdict, a class member or defendant may appeal the certification as well as the settlement approval or trial outcome.
- 50 In common law jurisdictions such as Australia and many Canadian provinces that maintain cost-shifting in class litigation, class representatives also face significant risk of having to pay defendants' expenses if the class does not prevail and may also need to

post bail at the beginning of the litigation. Until the emergence of public and private schemes for shifting this risk, this aspect of civil litigation dissuaded most potential class representatives from stepping forward, demonstrating that multiple legal factors influence the likelihood of class litigation.

5.3 The Civil Law Model: Pre-existing Associations, Government Authorized Entities, or Special Purpose ‘Qualified Entities’ Represent the Class

- 51 Apparently out of a belief that authorizing class members to represent the class in collective litigation incentivizes frivolous litigation and creates conflicts of interest between the class representative, class counsel and class members, most civil law jurisdictions prohibit class members from coming forward to represent a class and instead assign this role to various types of organizations. Turning to pre-existing associations, such as consumer protection or investor groups, to represent a class is consistent with a long tradition in European jurisdictions such as Germany of relying on social associations to promote public interests. In the Netherlands, *Consumentenbond*, the consumer protection association and VEB, which represents ‘mom and pop’ investors, have both acted as representatives (usually in collaboration with others) in collective settlements and – more recently – representative collective litigation. As representatives, associations are required to hire lawyers and pay fees and expenses and assume the risk of adverse costs. They may use revenues from regular membership dues or *crowd fund* the litigation by soliciting their members for support. The latter approach has proved popular with environmental protection organizations that have brought ground-breaking climate change litigation in the Netherlands and Germany.
- 52 A more popular approach in Asia has been for the government to authorize a special purpose entity to represent consumers or shareholders in collective litigation. These organizations may be subsidized by the government. This approach has the perceived advantage of maintaining indirect government control over the inception of litigation since the organizations rely on government approval for their existence and often their funding.
- 53 In Europe, particularly in EU Member States, the preferred representative in collective litigation is a special purpose vehicle, termed a *qualified entity*. The 2020 EU directive on representative collective actions for consumer claims, effective in 2023, instructs EU Member States to adopt domestic civil procedures for collective representation that conform to certain general principles. Regarding domestic proceedings, the directive says little about the criteria for such qualified entities but with regard to cross-border proceedings the directive specifies that qualified entities must be non-profit and have at least a year of experience representing consumer interests. Some Member States have yet to comply with the directive to establish representative procedures, and practitioners anticipate that requirements for qualified entities will vary. The Netherlands, which has a longer experience with collective proceedings than most other member states, has adopted a set of requirements for special purpose vehicles acting as

qualified entities regarding governance, financing and representativeness, intended to ensure that the entities are disinterested and capable of effectively representing the class. How to ensure that these requirements are met is not fully spelled out but presumably, a defendant (in an adversarial proceeding) or a competing special purpose vehicle where several are vying to represent a class can challenge the appropriateness of a proposed entity in the court proceeding. The emerging practice is for the court to address the acceptability of proposed special purpose vehicles as part of the admissibility proceeding.

- 54 The notion that separating class representation from class members and assigning it exclusively to different types of organizations eliminates conflicts of interest and assures faithful representation of class members' interests deserves closer analysis than it appears to have received in jurisdictions that have adopted this model. Both preexisting and ad hoc organizations have their own interests to protect: organizations that depend on members' support for their existence must be careful not to run afoul of these members' preferences, which will not necessarily match those of class members, not all of whom are members of the organization. Special purpose entities are led by officers who inevitably have personal interests that may challenge their fiduciary responsibilities. Moreover, a significant fraction of collective proceedings in EU Member States are subsidized by third-party financiers who are motivated solely by the potential for profit from their investments.
- 55 In some jurisdictions, a government official or agency has sole or primary responsibility for representing collectives in litigation. In Brazil, where consumer class actions were authorized several decades ago, the Attorney General is authorized to represent collective interests. In Chile, *Servicio Nacional del Consumidor* (SERNAC), the consumer protection agency, is authorized to represent consumers in class litigation. And in Denmark, the national ombudsman has the authority to represent a class. Where standing is assigned to a public official, there is the potential for legislatures to facilitate or limit collective litigation through the power of the purse; a government official might also be subject to political pressure to initiate or refrain from bringing litigation.

5.4 Mixed Models

- 56 In some jurisdictions, multiple entities have the ability to bring collective litigation. In the US, the government does not bring class actions under Rule 23, but state attorneys' general may bring *parens patriae* actions on behalf of their consumers or other citizens and regulatory agencies may bring civil enforcement actions that result in fines that are used to compensate injured parties. In Chile SERNAC brings most consumer class actions but individual class members also have standing to bring collective actions (which may incentivize SERNAC to act when it might otherwise be disinclined to do so).

5.5 What Models are Most Effective?

- 57 Notwithstanding vigorous debate over models of representation, there has been no systematic empirical research comparing the effectiveness of different models, including each model's ability to minimize conflicts of interest. Because of the multiplicity of factors encouraging and discouraging collective litigation, it seems likely that assuring the integrity of all of these processes requires strict scrutiny and ongoing case management by judges.

6 OPT IN VERSUS OPT OUT SYSTEMS

- 58 Representative litigation raises the question of how to assure that those who are represented in court, whose claims may be definitively decided by the outcome of the litigation, understand and agree to the procedure. In principle, this concern pertains both to procedures where class members have standing to represent the class and procedures in which standing to represent the class is assigned to the government, a pre-existing association or a special purpose entity. The obvious answer to this challenge is to require that everyone whose claims will be decided by the litigation come forward and proactively agree to be bound by the outcome of the litigation, win or lose – the so-called *opt-in* requirement.
- 59 While opt-in requirements protect the autonomy of claimants, as a practical matter they may exclude some meritorious claimants – those who are not aware of the litigation or face impediments to coming forward – from any benefits the litigation may produce for class members. If the litigation's outcomes are *res judicata* these non-participants will have no future recourse for securing remedies for their injuries. To avoid such consequences, some jurisdictions have established *opt-out* regimes, in which all those who do not come forward to affirmatively *decline* to participate are deemed part of the class and eligible for whatever benefits the litigation produces but are also subject to negative outcomes – ie, if defendants prevail. As a practical matter, opt-out regimes tend to lead to larger classes (because little or nothing is required to become a class member), which defendants often object to. Moreover, if – as is often the case – defendants have a limit on what they are prepared to pay to resolve the litigation, larger classes will likely lead to smaller average compensation amounts for class members. Notwithstanding their frequent political opposition to opt-out class action regimes, as a practical matter, once defendants have decided it is in their interest to resolve litigation through settlement, they frequently prefer opt-out procedures, as these procedures have the capacity to extinguish future claims arising out of the same law and facts.
- 60 Because of the possibility that the class will not prevail and that the pro-defendant outcome will be *res judicata*, in opt-out regimes it is important that substantial efforts are made to inform potential class members of the pendency of a class action. In common law jurisdictions that adopt opt-out regimes, courts may require extensive notification campaigns to assure that eligible class members exercise their right to

proceed individually, rather than as part of the class. Under the federal rules in the United States, lawyers for the class were long required to attempt to notify all eligible class members using the *best* approach *practicable*. A recent amendment to the rule clarifies that notice may be by electronic communication and substitutes *appropriate* for *best practicable*. Advisory committee notes to the amended provision (which are hortatory rather than binding) suggest that the intention is for judges to pay more attention to form and content of the notice. It is common for class counsel to mount multi-million-dollar advertising campaigns on mass and social media – sums that will be uncompensated if defendants prevail. The judge overseeing the class action must review and approve the notification plan to assure its effectiveness.

7 SETTLEMENTS OF CLASS ACTIONS

- 61 Class action settlements are different to settlements that are concluded during the ordinary course of civil litigation. This is because, in a class action, there are absent class members involved who may carry no knowledge of the proceedings and who may be bound by the settlement. Settlement carries significant consequences for the class, including that class action members will generally no longer be able to sue the defendant who chooses to settle the dispute. In a class action, the terms of settlement may be driven by class counsel and outside funders (if present), to the detriment of some or many class members. It is possible also that a class representative's incentives to settle diverge from other class members. As a result, in common law jurisdictions, judges are charged with reviewing and approving proposed settlements.¹¹² This divergence from normal one-on-one litigation, where settlements are generally viewed as almost wholly within the purview of the parties themselves, is notable. As a result, some judges are uncomfortable playing the role of settlement approver and judicial attention to settlement details varies, with some content to *rubber stamp* settlement terms and others demanding substantial detail and analysis of the consequences of terms.
- 62 Various common law jurisdictions, including the US, Australia, Canada and South Africa, have developed specific rules that require judicial oversight in respect of the conclusion of class action settlements.¹¹³ Outside the United States, judicial approval of settlements is also the norm in many civil law jurisdictions. However, although most jurisdictions require that judges review and approve settlements, the scope and standards for approval vary, as do the ability of class members to object to settlement provisions.
- 63 The United States Federal Rule of Civil Procedure 23(e) regulates class action settlements. It regulates various issues relating to class action settlement, including notice to the class, court approval of the proposed settlement and class member objections. Regarding court approval of the proposed settlement, Subrule (2) provides that the proposal may only be approved after a hearing and only on finding that it is fair,

¹¹² J Brickhill and J Bleazard, 'Bill of rights class actions' in M Du Plessis, I Goodman, L Kelly, J A Oxenham, S Pudifin-Jones (ed), *Class action litigation in South Africa* (Juta 2017) 83-84.

¹¹³ 82.

reasonable, and adequate after considering various factors. These factors include whether the class representatives and class counsel have adequately represented the class, whether the proposal was negotiated at arm's length and whether the proposal treats class members equitably relative to each other. Since the implementation of the Class Action Fairness Act of 2005, defendants in federal class actions must notify relevant state and federal officials of a proposed class action settlement.

- 64 In Australia, Section 33V of the Federal Court of Australia Act provides that class action settlements and the withdrawal of class action proceedings require judicial oversight. It provides that a representative proceeding may not be settled without court approval and, if the court gives such approval, it may make any just order regarding the distribution of any money paid under a settlement or paid into the court. Section 33V does not provide any guidance as to the factors that the courts consider when evaluating a settlement agreement, nor the procedure that is to be followed by parties seeking approval of a settlement agreement. Class Actions Practice Note (GPN-CA) gives content to the provisions of section 33V. The Practice Note provides that the court will usually not determine an application for approval of a settlement unless a notice, approved by the court, has been given to the class members. Furthermore, in preparing documentation recording a settlement of a class action which will be the subject of an application for approval, the applicant's lawyers should be conscious that the applicant has a duty to not take steps to act contrary to the interests of class members connected with the conduct of the class action, and that the representation by an applicant of class members is for a limited purpose.¹¹⁴ The Practice Note also, in detail, regulates the settlement procedure.¹¹⁵
- 65 The Canadian approach to settlement is also that class action settlement requires court approval. This principle carries legislative recognition in Canada.¹¹⁶ Class actions that are settled before they are certified will typically be formally certified for the purpose of settlement, even in the absence of an admission as to fault. Thereafter, members of the class will be notified in the prescribed manner and the class will be formed for the purpose of settlement. The courts will play a supervisory role during settlement implementation. To determine whether to approve the settlement, courts will consider whether the settlement is fair, reasonable and in the best interest of the potential class members. The court will take various factors into account, including the experience of counsel and the quality of their consultation with members of the class.¹¹⁷ The court

¹¹⁴ Practice Note Section 14.

¹¹⁵ Practice Note Section 15.

¹¹⁶ Section 29 Ontario Class Proceedings Act 1992, SO 1992, c 6; Art 1025 Quebec Civil Code of Procedure; Rule 334.29(1) Federal Court Rules, SOR/98-106. On the need for court review and approval of class settlements, see eg, *Knisley v Network Associates Inc.* (Court of Appeals, US) [312 E3d 1123, 1125].

¹¹⁷ J Brickhill and J Bleazard, 'Bill of rights class actions' in M Du Plessis, I Goodman, L Kelly, J A Oxenham, S Pudifin-Jones (ed), *Class action litigation in South Africa* (Juta 2017) 191. In the United States, this standard is contained in rule 23(e)(1)(C). In Canada, there is no equivalent statutory provision, such that

must evaluate the proposed settlements and either approve or reject them, without modifications or formal amendments.¹¹⁸

- 66 In South Africa, the law regulating class action settlement is still relatively novel. It appears that the court will need to consider whether a settlement concluded after certification is fair, reasonable and adequate and whether it protects the interests of the absent class members. This issue is not regulated legislatively; it is regulated through case law. In this regard, in *Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae)*¹¹⁹, the court held as follows regarding the need to obtain prior court approval in respect of class action settlements:

The SALC recommended that a settlement reached after the class action is certified should be approved by the court for it to be valid. Neither the SCA in *Children's Trust*, nor the CC in *Mukadam* addressed this issue. In the present case, as appears later in this judgment, such approval is obligatory as the provisions of the Contingency Fees Act 66 of 1997 ('CFA') are applicable. *We hold that it is in any event correct that any settlement agreement reached after certification of the class action should be subject to the approval of the court and that it should only be valid once approved by the court. This is to ensure that the settlement reached is fair, reasonable, adequate and that it protects the interests of the class*'.¹²⁰ [Emphasis added].

- 67 One of the procedural mechanisms that policymakers have established to respond to the challenge of mass legal claims in civil law regimes is settlement vehicles. These settlement vehicles allow claimants to be 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.¹²¹ The vehicles are especially prominent in Europe. The Netherlands is the first jurisdiction to have adopted a collective settlement procedure, namely the 2005 *Wet Collectieve Afwikkeling Massaschade* (Act on the Collective Settlement of Mass Damages, WCAM). The WCAM was enacted for the primary purpose of enabling pharmaceutical manufacturers to resolve mass product defect claims, which was later extended to apply to shareholder and other financial claims. The Amsterdam Court of Appeal is empowered to evaluate the collective settlement and to declare the settlement universally binding. Hensler states that the legislative designers of the Dutch

courts have had to develop a similar standard for the judicial oversight of class action settlements. See for example *Dabbs v Sun Life Assurance* (Court of Justice Ontario, Canada) [1998] OJ No 1598, para 10ff.

¹¹⁸ See for example *Sawatzky v Soc. Chirurgicale Instrumentarium Inc.* (Supreme Court of British Columbia, Canada) [1999] 71 BCLR (3d) 51 (SC), para 20. See also C Piché, 'Judging Fairness in Class Action Settlements' (2010) 28 (1) Windsor YearBook on Access to Justice 111, 130-131.

¹¹⁹ *Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae)* (High Court Johannesburg, South Africa) [2016] 3 All SA 233 (GJ).

¹²⁰ *Ibid* para 39.

¹²¹ Pioneered by the Dutch *Wet Collectieve Afwikkeling Massaschade* adopted in 2005 and since emulated by other Western European jurisdictions.

collective settlement scheme seem not to have considered the sorts of conflict-of-interest issues with which common law judges presiding over opt-out damage class actions are often concerned. Although the special purpose vehicles and defendants pursuing settlement must submit their proposed settlement for review and approval in order to secure a binding agreement, Dutch judges do not inquire very deeply into the details of settlements and until recently have given little consideration to the funding agreements and fees that accompany proposed settlements.¹²²

68 These settlements vehicles do not, however, present everywhere throughout the European continent. For example, Italy's approach to class action settlement differs significantly from the Dutch position. On 23 March 2023, Italian Legislative Decree No 28 was published. Its provisions entered into force on 7 April 2023 and apply with effect from 25 June 2023. The Decree transposed into Italian law the Representative Actions Directive. The Decree inserts 12 new articles into the Consumer Code.¹²³ In relation to settlement, it provides that a qualified entity and trader may, either voluntarily or at the invitation of the court and until the hearing of the case, reach a settlement agreement. The consumers concerned will remain free not to accept such an agreement.¹²⁴ The settlement agreement, to be published in the Telematic Services Portal, will be effective only with respect to consumers who have joined the representative action.¹²⁵

69 The situation in Brazil is a further example of the different approaches adopted around the globe insofar as the nature and degree of judicial oversight of class action settlements are concerned. Unlike in the common law jurisdictions discussed above, in Brazil there is no systematic regulation of settlements in class actions involving diffuse, collective, or homogeneous individual rights. Article 5, Section 6 of Law 7,347 of 1985 and Article 107 of the Consumer Protection Code only deal with settlement in scant terms. The terms of agreement and consumer collective agreements implicated through these articles may be executed out of court, but recognition may also be obtained from the courts, especially when a class action has already been brought. Perhaps because in Brazil's original version of a representative collective action a government official (the Attorney General) was responsible for bringing the class action, the judge's role in recognizing a settlement in a class action differs from the role generally fulfilled by a common law judge. Brazilian judges do not analyse the merits of a settlement or assess whether the interests of the class have been properly satisfied in the agreement. A formalist approach is adopted ie, whether formal aspects of a settlement, such as the parties' standing, have been complied with. Settlements in class actions follow the opt-in system and are not automatically binding upon all interested parties, who may file

¹²² I Tzankova and D Hensler, 'Collective Settlements in the Netherlands: Some Empirical Observations' in C Hodges and A Stadler (ed), *Resolving Mass Disputes: ADR and Settlement and Mass Claims* (Edward Elgar Publishing 2013). For a discussion of the Dutch law on opt-out collective settlements and the applicable standards of EU law see A Halfmeier, 'Recognition of a WCAM Settlement in Germany' (2012) 2 *Nederlands Internationaal Privaatrecht* 179.

¹²³ From 140-ter to 140-quaterdecies.

¹²⁴ See Article 140-decies Consumer Code.

¹²⁵ See Article 140-decies, fifth paragraph Consumer Code, which refers to the rules on class actions.

individual lawsuits regardless of the agreement (unless they have expressly opted in). Also, most legal doctrines and court rulings hold that the execution of a settlement is not binding on other parties that have legitimate cause to file class actions to consider the same collective dispute covered by the agreement.

8 ENFORCEMENT OF CLASS AND GROUP ACTION OUTCOMES

8.1 Overview

- 70 Enforcement of class and group action outcomes are subject to the same rules that govern the enforcement of the outcomes of individual actions *plus* rules arising from the unusual form of these actions. In both individual and collective contexts, rules may also vary depending on whether the action resulted in a consensual settlement, or a decision delivered by a court. If the latter, enforcement is often in the form of giving *res judicata* effect to the judgment, whereas enforcement of settlements is akin to enforcement of other types of contracts.

8.2 Settlements versus Court Decisions

- 71 Many, if not most, jurisdictions celebrate disputants who resolve their claims through negotiation. Anecdotal evidence suggests that today, court systems in many jurisdictions more actively promote settlement than may have been true in the past, perhaps because of the perceived overload on courts. In the US, many federal and state courts mandate that litigants attempt to mediate their disputes before they will be scheduled for trial. Whether for this reason or others, court statistical reports in the US reveal that the fraction of civil claims of all sorts that are tried to a resolution has been dropping for decades. Today, in the US, less than 5% of civil claims proceed to trial. Not all claims that are not resolved by a judicial decision on the merits (or in the United States, a jury verdict) are settled; some are dropped or dismissed formally by various court actions. Still, it appears that settlement is more likely than formal court judgment in a majority of US civil legal disputes.
- 72 In individual litigation, a settlement is memorialized by a formal contract, stating whatever monetary or other remedies and other outcomes the parties have agreed to as a condition of settlement. Settlement contracts are generally enforceable if and only if the contract satisfies normal contract principles: an offer and consideration freely exchanged in a situation free of coercion or corruption; in rare (and usually well-defined circumstances) agreements might be deemed substantively *unconscionable* as a matter of public policy and hence unenforceable. (For example, a murder for hire contract would not be enforceable in a court of law, nor in most jurisdictions, a contract to sell one's child.) Very recently, in the US, there has been a move to deem non-enforceable contractual provisions that prohibit disclosure of settlement terms in disputes arising out of sexual harassment; anecdotally, it appears possible that over time, this principle might extend to other types of disputes as well.

- 73 Just as a court judgment issued in one jurisdiction might be deemed unenforceable in another – the situation that has led to the widespread endorsement of international arbitration conventions that explicitly bind signatory nations to enforce arbitration decisions reached outside their countries – it is possible that a settlement agreement deemed enforceable in the jurisdiction where it was negotiated might not – if challenged – be deemed enforceable in another jurisdiction. For example, an enforceable contract negotiated in one jurisdiction might be deemed inconsistent with another jurisdiction’s public policy and hence unenforceable there. Non-enforcement is a particular concern in trans-national disputes that are characteristic of contemporary global commerce. Although there is no systematic evidence that such non-enforcement is common, concern about potential non-enforcement has motivated adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2019. Although the language of the Convention applies specifically to settlement of international commercial disputes resulting from mediation, one might anticipate that its principles over time would be more broadly applied to settlement of international commercial disputes generally.
- 74 Within jurisdictions, appellate law specifies the conditions under which trial court decisions can be appealed to a higher court, and the procedures to be followed. However, as noted above, the possibility of non-enforcement has long been a concern in trans-national disputes, where non-prevailing parties may seek to bar enforcement of a decision rendered in one jurisdiction in other jurisdictions. After World War II, as the edifice of the neo-liberal economy was being put in place, international organizations pressed for countries to bind themselves to enforce each other’s legal decisions in civil disputes through adoption and implementation of international conventions. Until recently this effort had not had much success with regard to court decisions, but most countries have endorsed and implement with few exceptions international conventions regarding the enforcement of arbitration decisions such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention on Arbitration) and the 1965 ICSID (International Centre for the Settlement of Investment Disputes) Convention promulgated by the World Bank. In 2019, the Hague Conference on Private International Law adopted the Hague Convention on Recognition and Enforcement of Foreign Judgment in Civil or Commercial Matters. Although a substantial number of jurisdictions, including the European Union and the United States, are signatories to the convention, only two have ratified it to date. However, that number was sufficient for the Judgment Convention to enter into force in September 2023.¹²⁶

¹²⁶ Hague Conference on Private International Law (HCCH), ‘Judgment Section’ <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments> accessed 3 September 2024.

8.3 Enforcement of Outcomes of Domestic Class Actions and Aggregate Litigation

- 75 Resolution of class actions and aggregate litigation raise additional issues; again, the issues are somewhat different for settlements and judgments.
- 76 Typically, statutes and rules that provide for collective and aggregate litigation incorporate special rules, usually intended to protect due process in these unusual dispute resolution contexts. The presence of such rules means that outcomes may be appealable on the grounds that these procedural rules were violated. Under federal class action rules in the United States, settlements must be reviewed and approved by the judge at the court of first instance. Class members who choose not to opt-out when they receive notice of certification may object to the settlement terms (and sometimes may have a second opportunity, post-settlement, to opt-out). Objecting class members may also appeal the settlement up the appellate ladder on the grounds that it does not satisfy the requirements for settlement approval specified in the class action rule. Once appeals are exhausted, a settlement binds all class members who did not opt-out; as a negotiated outcome, it has no claim or issue preclusive effect on others. In the United States, negotiated settlements of aggregate claims – eg, under the multi-district litigation statute – are not subject to judicial review and approval, although in rare instances judges have conducted such reviews, asserting their ‘equitable’ power. As in settlements of conventional cases, in aggregated proceedings, only parties who formally agree to the terms of the settlement are bound by it.
- 77 The situation is more complex when a class action is tried to verdict. Under US law, the verdict has res judicata effect for all non-opt-out class members, but courts have divided over whether and when it has issue preclusive effects in subsequent actions. Moreover, class members may collaterally attack judgments (or settlements) subsequently in the same or a different court on the grounds of inadequate representation or inadequate notice in the earlier case.¹²⁷

8.4 Trans-National Enforcement of Class Action and Group Action Outcomes

- 78 The stickiest enforcement issues arise when parties seek enforcement of the outcomes of class action and aggregate litigation reached in one jurisdiction in another jurisdiction. On top of the issues, one might expect to arise with trans-jurisdictional enforcement of individual litigation, the question may arise: does public policy in the second (or any subsequent jurisdiction) recognize *the legitimacy of outcomes reached on a collective basis* in another jurisdiction?

¹²⁷ A Tulumello and M Whitburn, ‘Res Judicata and Collateral Estoppel Issues in Class Litigation’ in M Greer and A Nassili (ed), *A Practitioner’s Guide to Class Actions* (3rd edn, American Bar Association 2021) Ch 23.

- 79 Prior to the US Supreme Court's 2010 decision in *Morrison v Australia National Bank*¹²⁸, US federal judges were often confronted with the question of the enforceability of class action trial outcomes or settlements against foreign claimants. With many jurisdictions outside the United States rejecting opt-out class actions (and indeed representative collective actions of any type) as a public policy matter, the answer was frequently negative (leading judges to exclude foreign claimants from the US class). However, in a series of settlements under the 2005 Dutch Act on Collective Settlements (WCAM), Dutch judges not only took account of US class actions in approving opt-out settlements of related non-US securities litigation, but approved paying US class counsel fees for their role in helping to reach global settlements.¹²⁹ With the implementation of the EU Representative Actions Directive for Consumer Claims requiring Member State's adoption of collective litigation procedures in 2022, one might anticipate that barriers to enforcing outcomes of US class actions in EU Member States might diminish over time.

¹²⁸ *Morrison v Australia National Bank* (Supreme Court, US) [561 US 247].

¹²⁹ D Hensler, 'A Class Action Mash-Up: In Re Royal Dutch Shell Transport Securities Litigation' in D Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics And Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) [describing how the settlements of US and Dutch securities class actions against Royal Dutch Shell were formally linked and noting similar resolution of *In re Converium Holding Securities Litigation*].

ABBREVIATIONS AND ACRONYMS

ADC	<i>Ação Declaratória de Constitucionalidade</i> (Declaratory Action for Constitutionality) (Brazil)
ADI	<i>Ação Direta de Inconstitucionalidade</i> (Direct Action of Unconstitutionality) (Brazil)
ADPF	<i>Arguição de Descumprimento de Preceito Fundamental</i> (Claim of Non-Compliance with a Fundamental Precept) (Brazil)
ADR	Alternative Dispute Resolution
Art	Article/Articles
CC	Constitutional Court of South Africa
CFA	Contingency Fees Act
ch	Chapter
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
etc	et cetera
EU	European Union
ff	Following
GCCP	Code of Civil Procedure (Germany)
GPN-CA	Class Actions Practice Note
Ibid/idem	<i>ibidem</i> (in the same place)
ICAA	Israeli Class Action Act
ICSID	International Centre for the Settlement of Investment Disputes
ie	<i>id est</i> (that is)
IVA	Part IVA – Representative Proceedings, Federal Court of Australia Act 1976 (Australia)
KapMuG	<i>Das Kapitalanleger-Musterverfahrensgesetz</i> (Germany)
LACP	<i>Lei de Ação Civil Pública</i> (Law of Public Civil Action)
no	number/numbers
NSW	Civil Procedure Act 2005 (New South Wales)
para	paragraph/paragraphs

PSLRA	Private Securities Litigation Reform Act (US)
pt	Part
RAD Directive	Representative Actions Directive - Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance)
SALC	Southern Africa Litigation Centre (South Africa)
SCA	Supreme Court of Appeal (South Africa)
Sec	Section/Sections
SERNAC	<i>Servicio Nacional del Consumidor</i> (Consumer Protection Agency)
trans/tr	translated, translation/translator
UK	United Kingdom
UP	University Press
US / USA	United States of America
USFRCP	Federal Rules of Civil Procedure (US)
v	Versus
vol	volume/volumes
WAMCA	The Act on Collective Damages in Class Actions
WCA	<i>Wet collective actie</i> (Collective Actions Act) (The Netherlands)
WCAM	<i>Wet collectieve afwikkeling massaschade</i> (Act on the Collective Settlement of Mass Damages) (The Netherlands)

LEGISLATION

International/Supranational

Directive 2009/22/EC, COM (2018) 184.

Directive 2020/1828.

Directive 98/27.

Directive 2009/22/EC, O.J. 2020, L 409/1.

Directive (EU) 2020/1828 of 25 Nov. 2020.

National

Act no 2014-344 of 17 March 2014.

Act no. 2018-492 of 20 June 2018.

Art 1025 Quebec Civil Code of Procedure.

Civil Procedure Act 2005.

Italian Code of civil procedure, Articles 840 *bis* – 840 *sexiesdecies*.

Italian Consumer Code, Articles 140-*decies*.

Italian Consumer Code, Articles 140-*ter* – 140-*quaterdecies*.

Decreto legislativo 10 marzo 2023, n. 28. Attuazione della direttiva (UE) del Parlamento europeo e del Consiglio, del 25 novembre 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE (Italy).

Federal Law No. 7.347 of July 24, 1985.

German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

L 409/6.

Law n. 31 and published on 18 April 2019 (Law n. 31/2019).

Rule 334.29(1) Federal Court Rules, S.O.R./98-106.

Section 29 Ontario Class Proceedings Act 1992, S.O. 1992, c. 6.

Section 38(c) of the Constitution of the Republic of South Africa, 1996.

Section 33Z of the Federal Court Act of 1976.

Supreme Court Act 1986.

CASES

National

Amchem Products v Windsor (Court of Appeals, US), Judgment 25 June 1997 [521 US 591].

Andrews v Australia and New Zealand Banking Group Ltd (Federal Court, Australia) [2012] 247 CLR 205.

Bank of Montreal v Marcotte (Supreme Court, Canada), Judgment 19 September 2014 [2014 SCC 55].

Bates v Dow Corning (Australia) Pty Ltd (Federal Court, Australia) [2005] FCA 927 (discontinued).

Bright v Femcare (Federal Court, Australia) [2002] 195 ALR 574.

Butler v Kraft Foods and Another (Federal Court of Australia) Proceeding No VG 393 of 1996 (settled).

Casey v DePuy International Ltd (No 2) (Federal Court, Australia) [2012] FCA 1370 (settlement approved).

Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae) (Supreme Court of Appeal, South Africa) [2013] 1 All SA 648 (SCA).

Children's Resource Centre Trust v Pioneer Foods (Pty) Limited (Superior Court, South Africa) 2011 JDR 0498 (WCC).

Mukaddam v Pioneer Foods (Pty) Ltd (Constitutional Court, South Africa) [2013] 10 BCLR 1135 (CC).

Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd (Federal Court, Australia) [2009] FCA 572.

Cook and Others v Pasminco Ltd and Others (Supreme Court of Victoria, Australia) [2000] VSC 534.

Courtney v Medtel Pty Ltd and Another (No 5) (Federal Court, Australia) [2005] 212 ALR 311.

Dabbs v Sun Life Assurance (Court of Justice Ontario, Canada) [1998] OJ No 1598.

Darwalla Milling Co Pty Ltd and Others v F Hoffman-La Roche and Others (No 2) (Federal Court, Australia) [2006] 236 ALR 322.

Case number C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313 (District Court of The Hague), Judgment 20 September 2023.

Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19.

Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (Federal Court, Australia) [2011] FCA 671.

Kirby v Centro Properties Ltd (No 6) (Federal Court, Australia) [2012] FCA 650.

Knisley v Network Associates Inc. (Court of Appeals, US) [312 E3d 1123, 1125].

Konneh v State of New South Wales (Supreme Court New South Wales, Australia) [2011] NSWSC 1170.

Linkside & Others v Minister of Basic Education (High Court, South Africa) [2015] JDR 0032 (ECG).

Lopez v Star World Enterprises Pty Ltd (in liq) and Others (Federal Court, Australia) [1999] FCA 104.

Magidiwana and others v President of the Republic of South Africa and others (No 1) Constitutional Court, South Africa) (2014) 1 All SA 61 (GNP).

Mobil Oil Australia Pty Ltd v Victoria (Supreme Court of Victoria, Australia) [2000] 1 VR 545.

Morrison v Australia National Bank (Supreme Court, US) [561 US 247].

Ngxuzza v Permanent Secretary, Department of Welfare, Eastern Cape (Superior Court, South Africa) 2001 (2) SA 209 (E) 622-623.

Nixon and Others v Phillip Morris (Australia) Ltd and Others (Federal Court, Australia) [1999] 95 FCR 453.

Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae) (High Court Johannesburg, South Africa) [2016] 3 All SA 233 (GJ).

O'Sullivan v Challenger Managed Investments Limited (Supreme Court New South Wales, Australia) [2008] NSWSC 602.

Harrison v Sandhurst Trustees Ltd (Federal Court, Australia) [2011] FCA 541.

P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029.

Pretorius v Transnet Second Defined Benefit Fund (Constitutional Court, South Africa) (2014) (6) SA 77 (GP) 83.

RiverCity Motorway Management Ltd (administrators appointed) (receivers and managers appointed) v AECOM Australia Pty Ltd (Federal Court, Australia) [2012] FCA 1304.

Ryan v Great Lakes Council (Federal Court, Australia) [1999] FCA 177.

Sawatzky v Soc. Chirurgicale Instrumentarium Inc. (Supreme Court of British Columbia, Canada) [1999] 71 BCLR (3d) 51 (SC).

Schokman v Sydney Water Corporation Limited (Federal Court of Australia) Proceeding No NG 794 of 1998.

Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd (Supreme Court of Victoria, Australia) [2000] 1 VR 545.

Smith v University of Ballarat (Federal Court, Australia) [2006] 229 ALR 343.

Sofia Pizza Class Action (settled).

Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others (High Court Cape Town, South Africa) [2021] 4 All SA 219 (WCC).

Tropical Shine Holdings (trading as KC Country) v Lake Gesture Pty Ltd (Federal Court, Australia) [1993] 45 FCR 457.

Wheelahan v City of Casey and Others (Supreme Court of Victoria, Australia) [2011] VSC 215.

Williams v FAI Home Security Pty Ltd (No 5) (Federal Court, Australia) [2001] FCA 399.

Wright Rubber Products Pty Ltd v Bayer AG (No 3) (Federal Court, Australia) [2011] FCA 1172.

BIBLIOGRAPHY

- Azar-Baud M J and Biard A, 'The Dawn of Collective Redress 3.0 in France?' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).
- Biard A and Amaro R, 'France' in Hodges C and Voet S (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018).
- Bone R G, 'Walking the Class Action Maze: Toward a More Functional Rule 23' (2013) 46 (4) University of Michigan Journal of Law Reform 1097.
- Brickhill J and Bleazard J, 'Bill of rights class actions' in Du Plessis M, Goodman I, Kelly L, Oxenham J A, Pudifin-Jones S (ed), *Class action litigation in South Africa* (Juta 2017).
- Broodryk T, 'Access to Justice Through Class Action: The South African Case' in Boggenpoel Z and Quinot G (ed), *Law, Justice and Transformation* (LexisNexis 2021).
- , 'An Empirical Analysis of Class Actions in South Africa' (2020) 24 Law, Democracy and Development 54.
- , 'Class action certification and constitutional claims: the South African case' (2020) 27 (5) Maastricht Journal of European and Comparative Law 636.
- Carrington P D, 'Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure' (1989) 137 (6) University of Pennsylvania Law Review 2067.
- Clark S S, Kellam J and Cook L, 'Australia' in Karlsgodt P G (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012).
- Cover R M, 'For James Wm. Moore: Some Reflections on a Reading of the Rules', (1975) 84 (4) The Yale Law Journal 718.
- De Vos W, 'Judicial Activism Gives Recognition to a General Class Action in South Africa' (2013) 2 TSAR 370.
- Gsell B, 'The new European Directive on representative actions for the protection of the collective interests of consumers – A huge, but blurry step forward', (2021) 58 (5) Common Market Law Review 1365-1400.
- Gouvêa C P and Refosco H C, 'Class Action in Brazil: Overview, Current Trends and Case Studies' in Fitzpatrick B T and Thomas R S (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021).
- Halfmeier A, 'Recognition of a WCAM Settlement in Germany' (2012) 2 Nederlands Internationaal Privaatrecht 179.
- Hammar skiöld P and Törnsten S, 'Sweden' in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018).
- Hazard Jr G C, 'Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure' (1989) 137 University of Pennsylvania Law Review 2237.

Hensler D R, 'The Global Landscape of Collective Litigation' in Hensler D R, Hodges C and Tzankova I (ed), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016).

Hensler D R, Pace N M, Dombey-Moore B, Giddens E, Gross J and Moller E, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand 2000).

-----, 'A Class Action Mash-Up: In Re Royal Dutch Shell Transport Securities Litigation' in Hensler D, Hodges C and Tzankova I (ed), *Class Actions in Context: How Culture, Economics And Politics Shape Collective Litigation* (Edward Elgar Publishing 2016).

-----, 'Foreword' in Fitzpatrick B T and Thomas R S (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021).

-----, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally', (2017) 65 Kansas Law Review 965.

-----, 'The Global Expansion of Class Actions: Power, Politics and Procedural Evolution' in Fitzpatrick B and Thomas R (eds.) *The Cambridge International Handbook of Class Actions* (Cambridge University Press 2021).

-----, Hodges C and Tulibacka M, 'The Globalization of Class Actions', (2009) 622 (1) Annals of the American Academy of Political and Social Science 7.

-----, Hodges C and Tzankova I (eds.), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016).

-----, Kalajdzic J, Cashman P, Halfmeier A and Tzankova I, *The Globalization of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case* (Rand 2021).

Inchausti F G, 'A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 2 GPR 61.

Kalajdzic J and Piché C, 'Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform' in Fitzpatrick B T and Thomas R S (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021).

Kalajdzic J, 'The "Illusion of Compensation": Cy près Distributions in Canadian Class Actions' (2013) 92 (2) Canadian Bar Review 135.

Kalajdzic J, 'The State of Reform in First and Second Generation Class Action Jurisdictions' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

Karlsgodt P, 'The United States' in Karlsgodt P G (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012).

Klaassen C J M, 'De afwikkeling van massaschade op de voet van de Wamca. Werkt het?' (2024) 25 (1) Aansprakelijkheid Verzekering en Schade 5-15 (Mass Tort Settlement on the Foot of the WAMCA, AV&S, February 2024. [Translated by a language algorithm]).

Klein J, 'Groundbreaking Judgement in Dutch Collective Opt-Out Proceeding Against Airbus: Both Claim Foundations Declared Inadmissible' (2023) Deminor

<https://www.deminor.com/en/blog/groundbreaking-judgement-in-dutch-collective-opt-out-proceedings-against-airbus-both-claim-foundations-declared-inadmissible> accessed 02 September 2024.

Klement A and Klonoff R, 'Class Actions in the United States and Israel: A Comparative Approach' (2018) 19 (1) *Theoretical Inquiries in Law* 151.

Klonoff R H, *Class Actions and Other Multi-party Litigation in a Nutshell* (4th edn, West Academic Publishing 2012).

Lavie S, 'Class Actions and the Regulatory State: Lessons from Israel' in Fitzpatrick B T and Thomas R S (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021).

Malveaux S, 'A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights' (2014) 92 *Washington University Law Review* 455.

Marcin R B, 'Searching for the Origin of Class Action' (1974) 23 *Catholic University Law Review* 515, 517.

Marcus D, 'The Past Present, and Future of Trans-Substantivity in Federal Civil Procedure' (2010) 59 (2) *DePaul Law Review* 371.

-----, 'Trans-Substantivity and the Processes of American Law' (2013) 5 *Byu Law Review* 1191.

Martineau Y and Lang A, 'Canada' in Karlsgodt P G (ed), *World class actions: a guide to group and representative actions around the globe* (Oxford University Press 2012).

Masons P, 'The Impact of the New EU Mass Action Directive', available at <https://www.pinsentmasons.com/out-law/guides/the-impact-of-new-eu-mass-actions-directive-across-europe> accessed 30 August 2024.

Meller-Hannich C, 'Germany' in Gsell B and Möllers TMJ (ed), *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Intersentia 2020) 104.

Morabito V, 'An Empirical study of Australia's Class Action Regimes – Fourth Report: Facts and Figures on twenty-four Years of Class Actions in Australia' (Department of Business Law and Taxation, Monash University, July 2016)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815777 accessed 30 August 2024.

Morabito V, 'Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?' (2015) 38(1) *University of New South Wales Law Journal* 146.

Mulheron R, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing 2004).

Mullenix L S, 'For the Defense: 28 Shades of European Class Actions' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

Piché C and Saumier G, 'Consumer Collective Redress in Canada', (2018) 61 *Japanese Yearbook of International Law* 231.

Piché C, 'Judging Fairness in Class Action Settlements' (2010) 28 (1) Windsor YearBook on Access to Justice 111.

-----, 'The 'New Normal' of Civil Procedure in Canada – Technological Efficiency over Proportionality and Accuracy of Outcomes' in Krans B and Nylund A (ed), *Civil Courts Coping with Covid-19* (Eleven 2021).

Plasket C, 'South Africa' in Hensler D R, Hodges C and Tulibacka M (ed), *The Globalization of Class Actions* (Sage Publications 2009).

Redish M H, 'Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals' (2003) University of Chicago Legal Forum 71.

Resnik J, 'Failing Faith: Adjudicatory Procedure in Decline' (1986) 53 (2) The University of Chicago Law Review 494.

Schimmel J, Abbey N and Morabito V, 'Perspectives on Product Liability Class Actions in Australia' in Fitzpatrick B T and Thomas R S (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021).

Schlafke H and Luhmann T, 'Collective Redress in Germany and the Transposition of the Representative Actions Directive' (2023) 2 Mass Claims 67.

Silvestri E, 'Rebooting Italian Class Action' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

Stevenson P and Saville M, 'Class action litigation in Australia' in Du Plessis M, Oxenham J A, Goodman I, Kelly L and Pudifin-Jones S (ed), *Class Action Litigation in South Africa* (Juta 2017).

Stöhr A, 'The implementation of Collective Redress – A Comparative Approach' (2020) 21 (8) German Law Journal 1606.

Subrin S, 'Symposium: The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988' (1989) 137 (6) University of Pennsylvania Law Review 1873.

Tobias C, 'The Transformation of Trans-Substantivity', (1992) 49 Washington and Lee Law Review 1501.

Tulumello A and Whitburn M, 'Res Judicata and Collateral Estoppel Issues in Class Litigation' in Greer M and Nassili A (ed), *A Practitioner's Guide to Class Actions* (3rd edn, American Bar Association 2021).

Tzankova I and Hensler D, 'Collective Settlements in the Netherlands: Some Empirical Observations' in Hodges C and Stadler A (ed), *Resolving Mass Disputes: ADR and Settlement and Mass Claims* (Edward Elgar Publishing 2013).

Tzankova I N and Kramer X E, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

Vecchi D, 'Italy' in C Hodges and S Voet (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018).

Vlahek A, 'Development of Consumer Collective Redress in the EU: a Light at the End of the Tunnel?' (2020) 18 (1) *Baltic Yearbook of International Law* 134.

Voet S and Biard A, 'Collective Redress in the EU: Will it Finally Come True?' in Uzelac A and Voet S (ed), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

Voet S and Gillaerts P, 'Belgium' in Hodges C and Voet S (ed), *Delivering Collective Redress: New Technologies* (Hart/Beck 2018).