

# CONTENTS

<i>Editors</i>	xiii
<i>Contributors</i>	xv
<i>Table of Cases</i>	xxiii
<i>Table of Legislation</i>	xxxiii

## I COLLECTIVE REDRESS MECHANISMS IN A COMPARATIVE PERSPECTIVE

### 1. Class Actions and Collective Actions

*Diego Corapi*

I. Introduction	1.01
II. The United States Model and Its Influence on Other Regimes	1.09
III. Developments Within the United States Model	1.36
IV. Conclusion	1.40

### 2. Collective Redress Procedures: European Debates

*Duncan Fairgrieve and Geraint Howells*

I. Introduction	2.01
II. Developments at a National Level	2.13
III. The EU Response	2.66
IV. Conclusion	2.81

### 3. Collective Action Reform in England and Wales

*John Sorabji*

I. Introduction	3.01
II. 1987–2004: The Long Road to Reform	3.02
III. 2004–10: Flattering to Deceive, Reform's False Dawn	3.22
IV. Conclusion	3.45

### 4. Class Actions and Class Settlements Going Global: the Netherlands

*Ianika Tzankova and H el ene van Lith*

I. Introduction	4.01
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II. The Dutch System of Collective Redress	4.03
III. Cross-border Mass Disputes—The WCAM Going Global	4.37
IV. The Complementary Role of the WCAM	4.48
V. Unanticipated Problems with Going Global	4.53
VI. Recognition and Enforcement of United States Judgments	4.69
VII. Conclusion	4.76
<b>5. Collective Redress: Policy Objectives and Practical Problems</b>	
<i>Alexander Layton</i>	
I. Introduction	5.01
II. Policy Objectives	5.02
III. Practical Problems	5.16
IV. Conclusions	5.47
<b>II PRIVATE INTERNATIONAL LAW AND COLLECTIVE REDRESS</b>	
<b>6. A Coherent Approach to European Collective Redress</b>	
<i>Burkhard Hess</i>	
I. Introduction	6.01
II. Different Perspectives and Objectives of Law-making	6.09
III. Conclusion	6.30
<b>7. The Trouble with Cross-Border Collective Redress: Issues and Difficulties</b>	
<i>Horatia Muir Watt</i>	
I. Introduction	7.01
II. Sources of Resistance	7.07
III. New Directions?	7.12
<b>8. Cross-Border Collective Redress and Jurisdiction under Brussels I: A Mismatch</b>	
<i>Eva Lein</i>	
I. Introduction	8.01
II. One Court for All: Concentration of Jurisdiction under Brussels I	8.07
III. Too Many Courts Spoil the Broth: Dispersed Jurisdiction under Brussels I	8.16
IV. The Magic Trick? Article 6(1) Brussels I Regulation	8.25

V. Can the Parties Decide?	8.31
VI. Conclusions and Perspectives	8.33
<b>9. Parallel Litigation and Cross-Border Collective Actions under the Brussels I Framework: Lessons from Abroad</b>	
<i>Justine N Stefanelli</i>	
I. Introduction	9.01
II. <i>Lis Pendens</i> and Related Actions under the Brussels I Regulation	9.05
III. Collective Actions and Parallel Proceedings	9.13
IV. Proposed Amendments to the Brussels I Regulation	9.23
V. Suggestions for Reform	9.31
VI. Conclusion	9.72
<b>10. The Impact of the Brussels I Enforcement and Recognition Rules on Collective Actions</b>	
<i>Duncan Fairgrieve</i>	
I. Introduction	10.01
II. The Scheme of Brussels I	10.04
III. The Notion of <i>Ordre Public</i> under Brussels I, Article 34(1)	10.18
IV. Approach in Individual Member States: Public Policy and Collective Redress	10.26
V. Article 34(2): Procedural Issues	10.55
VI. Article 34(3): Irreconcilability	10.58
VII. Conclusion	10.62
<b>11. Conflicts of Laws in Multinational Collective Actions— a Judicial Nightmare?</b>	
<i>Astrid Stadler</i>	
I. Introduction	11.01
II. Choice of Law and European Mass Litigation	11.11
III. Possible Solutions	11.35
IV. Conclusion	11.57
<b>12. Extraterritoriality of Evidence Gathering in US Class Action Proceedings</b>	
<i>Andrea Pinna</i>	
I. Introduction	12.01
II. The Scope of Extraterritoriality of United States Discovery	12.08

III. The Conflict between Extraterritorial United States Discovery Rules and Foreign Laws	12.38
IV. Conclusion	12.55
<b>13. The ILA Rio Resolution on Transnational Group Actions</b> <i>Catherine Kessedjian</i>	
I. Introduction	13.01
II. The Resolution of the 2008 ILA Rio de Janeiro Conference	13.04
III. Factors Determining the Type of Procedure	13.08
IV. Analysis of the Resolution	13.20
V. Conclusion	13.41
<b>14. In Defence of the Requirement for Foreign Class Members to Opt In to an English Class Action</b> <i>Rachael Mulheron</i>	
I. Introduction	14.01
II. The Draft Statutory Framework	14.04
III. Requiring Non-domiciled Class Members to Opt In: Key Canadian Precedent	14.15
IV. Further Support Derived from Some Key United States Decisions	14.33
V. Conclusion	14.55
III RECEPTION OF FOREIGN COLLECTIVE REDRESS AND PUNITIVE DAMAGES DECISION IN NATIONAL JURISDICTIONS	
<b>15. Foreign Punitive Damages Decisions and Class Actions in Italy</b> <i>Francesco Quarta</i>	
I. Introduction	15.01
II. Compatibility of US Class Action Procedure with European Jurisprudence	15.03
III. Conclusion	15.40
<b>16. The Perils of Certifying International Class Actions in Canada</b> <i>John P Brown</i>	
I. Introduction	16.01
II. Traditional Judgment Recognition Rules Are Inadequate for Enforcing Multi-jurisdictional Class Action Judgments	16.10

III. Why the ‘Real and Substantial Connection’ Test Should Not Be Applied to Absent Foreign Claimants	16.15
IV. The ‘Real and Substantial Connection’ Test— Applied Rigorously	16.28
V. Canadian Courts Should Not Certify Multi-jurisdictional Opt-out Classes	16.47
VI. Conclusion	16.75
<b>17. Collective Redress in Spain: Recognition and Enforcement of Class Action Judgments and Class Settlements</b> <i>Marta Requejo Isidro and Marta Otero Crespo</i>	
I. Introduction	17.01
II. Collective Redress in Spain	17.04
III. Recognition and Enforcement in Spain	17.22
IV. Conclusion	17.65
IV EXTRATERRITORIALITY AND US LAW	
<b>18. <i>Morrison v National Australia Bank</i>: The US Supreme Court Limits Collective Redress for Securities Fraud</b> <i>Thomas A Dubbs</i>	
I. Introduction	18.01
II. The Facts of <i>Morrison</i>	18.05
III. The Court’s Opinion and the Presumption Against Extraterritoriality	18.48
IV. Conclusion	18.86
<b>19. <i>Morrison v National Australia Bank</i>: Implications for Global Securities Class Actions</b> <i>Linda J Silberman</i>	
I. Introduction	19.01
II. Background of <i>Morrison</i>	19.02
III. The <i>Morrison</i> Decision	19.03
IV. The Presumption Against Extraterritoriality in <i>Morrison</i>	19.07
V. The Influence of Comity Concerns in <i>Morrison</i>	19.12
VI. Implications for Global Class Actions Post- <i>Morrison</i>	19.17
VII. Conclusion	19.39

<b>20. <i>Morrison v National Australia Bank</i>: Foreign Securities and the Jurisdiction to Prescribe</b>	
<i>Adam Johnson</i>	
I. Introduction	20.01
II. Choice of Law and Jurisdiction	20.05
III. International Jurisdiction	20.06
IV. Extraterritorial Application of United States Law	20.14
V. International Comity and the Approach in England	20.20
VI. Conclusion	20.28
<b>21. ‘Bridging the Gap’: Contrasting Effects of US Supreme Court Territorial Restraint on European Collective Claims</b>	
<i>Vincent Smith</i>	
I. Introduction: <i>Morrison</i> and <i>Empagran</i>	21.01
II. How Might this New Situation Affect Collective Claims in Europe?	21.21
III. Conclusion: Increasing Collective Claims in Europe?	21.33
<b>22. Transnational Issuer Liability after the Financial Crisis: Seeking a Coherent Choice of Law Standard</b>	
<i>Wolf-Georg Ringe and Alexander Jellgardt</i>	
I. Introduction	22.01
II. International Securities Class Actions	22.09
III. Classification of Primary Capital Markets Duties	22.15
IV. Current State of the Conflict of Laws Discussion	22.23
V. Suggested Solution: Synchronism between Duties and Liability	22.42
VI. Implications	22.69
VII. Conclusion	22.75
<i>Index</i>	431

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## CLASS ACTIONS AND COLLECTIVE ACTIONS

*Diego Corapi*

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I. Introduction	1.01	III. Developments Within the United States Model	1.36
II. The United States Model and Its Influence on Other Regimes	1.09	IV. Conclusion	1.40

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### I. Introduction

In our world of complex societies, where people interact daily with other anonymous people, where products and services are provided in massive standardized series by large organizations, where the financing of different economic activities is made through impersonal networks, where citizens in their daily lives are at times consumers, users, and investors, subject to the same kind of opportunities and of risks, conflicts arising from their interactions are required to be resolved by new mechanisms which differ from traditional administrative or judicial means. **1.01**

In the nineteenth century, the working conditions created by an increasingly industrial society instigated a dramatic change in labour relations. Trade unionism and employment contracts negotiated in a collective manner were the result. The traditional doctrine of contracts as an expression of the free will of the parties had to be adjusted in response to this change. The solution to conflicts arising from these developments required new kinds of remedies and new kinds of proceedings. **1.02**

In the twenty-first century, conflicts arising from the consumption of goods and services utilized by society find their solutions *ex ante* by the intervention of public regulatory authorities and, additionally, *ex post* through the development of collective actions by the private parties concerned. This latter development has created a change in contract law which grants a new type of protection to both consumers and investors. To render such protection effective, it is necessary to review the traditional doctrine of contract as an expression of the free will of the parties (and **1.03**

of tort liability based on fault). It is also necessary to consider mechanisms for collective redress.

**1.04** This chapter will examine collective redress mechanisms in the cases of consumer protection and mass torts.<sup>1</sup> They have been introduced in many legal systems. In legal systems, their introduction has been widely discussed with new proposals in the final stages of preparation. The aims of these collective redress mechanisms are the same in all jurisdictions. As an example, Article 1 of the Israeli Class Action Law of 2006 states its function as follows:

The goal of this law is to set uniform rules in the matter of the submitting and managing of class actions, in order to improve the defence of privileges, and in doing so particularly promote these: actualizing the privilege of access to the court house, including the types of the population that find it difficult addressing the court as individuals; enforcing the law and deterring its breaking; giving proper assistance to those harmed by the violation of the law; efficient, fair and exhaustive management of suits.<sup>2</sup>

**1.05** However, the structure of collective redress mechanisms varies greatly between different jurisdictions. In addition, the terminology used to define them differs. In this regard, some remarks concerning these differences seem necessary.<sup>3</sup>

**1.06** The term 'class action' could be restricted to the United States-style procedure whereby many subjects are represented by one single claimant; the term 'collective actions' could be confined to procedures whereby certain organizations or associations act on behalf of a number of persons (not necessarily their members). The label 'test' or 'model cases' could be ascribed to procedures in which an individual case may become the precedent for a multitude of similar cases. All these procedures have one aspect in common: 'at the bottom of these lawsuits there are usually interests of a larger group or even a public interest although they might formally appear as traditional two-party cases'.<sup>4</sup>

**1.07** For the purpose of this chapter, it is proposed that we reserve the term 'class action' for the United States-style procedure because within that jurisdiction, this mechanism for redress was initially developed as a remedy for cases where significant numbers of persons were involved in circumstances which presented the same questions of law or fact. It was first within the United States that 'class actions' gained an important role and became ingrained in the legal system as one of its most significant institutions.

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<sup>1</sup> The present contribution was prepared for the 18th International Congress of Comparative Law (Washington 2010) and is based upon reports which were submitted by scholars from 26 jurisdictions.

<sup>2</sup> Quoted by Professor Michael Karayanni in his report for Israel.

<sup>3</sup> The point is raised by Professor Astrid Stadler in the introduction to her report for Germany.

<sup>4</sup> I quote again Professor Stadler's report

A comparative view of the procedures in other jurisdictions may therefore be usefully conducted against the United States-style ‘class action’ to discover and understand their similarities and differences. **1.08**

## II. The United States Model and Its Influence on Other Regimes

Any national system of law is in some way reliant upon the culture of its country of origin. The close link between civil law and the cultural milieu from which it developed is a well-known phenomenon.<sup>5</sup> Additionally within the scope of collective redress, the approaches of legislators, judges, and lawyers have been influenced not only by socio-political and economic factors, but also by cultural considerations. Accordingly, the transplant of United States-style class action procedures to other jurisdictions was very strongly opposed for such cultural reasons. **1.09**

From a broad political point of view, European countries were used to employing the notion of ‘public interest’ to define widely held principles in society and to rely on the intervention of public regulatory authorities to protect them. The idea of *ex post* protection through the initiative of interested parties seemed to offer inadequate results and to make the distinction between private and public interest dangerously untidy. In the words of an American observer of the civil law world: **1.10**

For Continental Europeans all legal institutions, whether substantive, procedural or in the interstices, begin from fundamental premises and structures and work their way patiently towards the details. Rule 23 [of the Federal Rules of Civil Procedure] seemed like a Rube Goldberg artefact—a strange looking melange of pushes and pulls and bells and bumbles. The Rule had some goals, some standards and some procedures, but little in the way of either internal coherence or integration with larger community of means in which it was placed.

This attitude has slowly changed. Criticism not only of some of the more difficult aspects of United States-style class actions, but also of its perceived positive aspects, has been developed. The predominant criticisms of the aspects are the excessive use of class action procedures and of their occasionally abusive effects. Such criticisms increased and produced legal reform in 2005. The 2005 Class Action and Fairness Litigation Act (CAFA) facilitated the transfer of interstate class actions to Federal District Courts and removed such actions from the so-called ‘magnet’ state courts.

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<sup>5</sup> Wouter L De Vos, ‘French Civil Procedure Revisited’ (1998) 9 *Stellenbosch Law Review* 2, at 217. On the point Loic Cadet, ‘Culture et droit processuel’ (2010) *Rapport aux Journées Louisianaises de l’Association Henri Capitant Droit et Culture* (Brussels) at 409.

<sup>6</sup> Richard B Cappalli, in Richard B Cappalli and Claudio Consolo, ‘Class Action for Continental Europe: A Preliminary Inquiry’ (1993) 6 *Temple International and Comparative Law Journal* 217, at 219.

- 1.11** In analysing the class action procedure in the United States, a distinction must be drawn between aspects which are only a reflection (a very enhanced one) of the typical institutions and rules of American civil procedure and aspects which pertain to the fundamental character of the class action. Pre-trial discovery, trial by jury, the way in which oral testimony is made/solicited, the conduct of cross-examination, the wide discretion of judges during case management, punitive damages, the financing of the action by law firms, and contingency fees are all aspects which until not long ago simply horrified lawyers in civil law jurisdictions. Even today, these aspects still leave lawyers remaining very sceptical of the possibility of transplanting within their legal systems a class action procedure which requires such paraphernalia.
- 1.12** On the other hand, there is a growing perception that the essence of a United States-style class action does not involve vastly different procedural and socio-economic characteristics. In the words of two European observers, “the kernel of the concept” of class action US style is in an opt-out procedure whereby consumers can be represented by default if given adequate notice of the action.<sup>7</sup>
- 1.13** In the landmark case *Hansberry v Lee*,<sup>8</sup> the Supreme Court approved representative suits as due process as long as the particular procedures used are employed fairly and adequately to protect absentee interests.<sup>9</sup> In *Phillips Petroleum v Shutts*,<sup>10</sup> the Supreme Court confirmed not only the constitutionality but also the necessity of the *opt-out* device.
- 1.14** What most impresses lawyers from outside the United States is the way the principle that everyone has an individual right to assert a legal claim,<sup>11</sup> and the corollary rule of ‘*nul ne plaide par procureur*’<sup>12</sup> is candidly disposed of in the class action procedure. On the other hand, outside the United States, little attention is paid to the fact that within the United States opt-out system, a class member must usually return a claim form to the court stating his or her claim within a defined period. In other words, even with an opt-out system, a class member must take active steps to benefit from the class judgment.<sup>13</sup>

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<sup>7</sup> Duncan Fairgrieve and Geraint Howells, ‘Collective Redress Procedures—Current European Debates’ (2009) 58 *International and Comparative Law Quarterly* 379.

<sup>8</sup> 311 US 32, 61 S.Ct 115 (1940).

<sup>9</sup> See the opinion of the court delivered by Mr Justice Stone.

<sup>10</sup> 472 US 797, 105 S.Ct 2965 (1985).

<sup>11</sup> Article 24, para 1 of the 1948 Italian Constitution: ‘Everyone can act at law for the assertion of his own rights and legitimate interests.’

<sup>12</sup> See Professor Mélinea Douchy-Oudot, *Où on est-on l'action de groupe*, paper annexed to her report for France.

<sup>13</sup> The point is expressed by Antonio Gidi in his report on the United States. Gidi adds that ‘the result of this practice is worse than an “opt-in” class action because the class member that does not return the form in effect is a class member bound by the class judgment, is precluded and cannot bring his or her own proceeding and also cannot recover because he or she missed the deadline.’

The adoption of the opt-out rule results in certain consequences in addition to the procedural rules which govern class actions. Judges must clarify with great accuracy the requirements of commonality between the parties and the adequacy of representation. The way in which notification is effected becomes essential. Case management is a priority. The waiver or potential settlement of the action needs to be scrutinized and approved by the court. Judges have the power to award a flexible range of remedies, including but not restricted to an award of damages to identified individuals. **1.15**

The 26 national reports that were submitted on this subject give an interesting picture of the circumstances outlined previously.<sup>14</sup> Some countries have introduced, or are currently proposing to introduce, new legislation regarding collective redress based on the United States model. However, these countries have either not introduced the opt-out rule or, when they have introduced it, it has been harmonized with their procedural principles. Other aspects of the United States-style class action model have not been adopted in these countries (except when were already present in their systems: eg in common law jurisdictions the rule about no shifting of costs on the losing party). Other countries have introduced a collective redress action in the form of group action by a representative body or organization. Finally, a third group of countries have only adjusted their existing procedures to the need of collective redress. **1.16**

All the national reports illustrate their respective situation and even those which are limited to an answer to the questionnaire the author sent for guidance are rich in information and thoughtful remarks. This general report, therefore, will be confined to a survey of the solutions they have presented. **1.17**

Amongst the countries who have introduced a class action procedure in a similar way to the United States, the rules of countries like Canada and Australia are the most similar. The Australian Federal Act initially structured the procedure as an opt-out procedure. However, a Federal Court decision<sup>15</sup> endorsed the validity of clauses in a funding agreement which requested the member of a class to sign the agreement in order to participate in the class action. This decision created the **1.18**

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<sup>14</sup> The following national reports were submitted: Argentina (Prof Guillermo Treacy); Australia (Prof Camille Cameron); Austria (Prof Walter Rechberger); Belgium (Prof Piet Taelman and Stefan Voet); Brazil (Prof Antonio Gidi); Canada (Prof Janet Walker); Denmark (Prof Peter Møgelvang-Hansen); England (Prof Duncan Fairgrieve); Finland (Prof Antti Jokela); France (Prof Melina Douchy Oudot); Germany (Prof Astrid Stadler); Greece (Prof Dimitrios Tsikrikas); Hungary (Prof Petrovichné Wopera Zsuzsa és Nagy Adrienn); Israel (Prof Michael Karayanni); Italy (Prof Andrea Zoppini); Mexico (Prof Eduardo Ferrer Mac-Gregor, Alberto Benitez, and Antonio Gidi); the Netherlands (Prof Marie-José van der Heijden); Poland (Prof Janusz Jankowski and Prof Slawomir Cieślak); Portugal (Prof Miguel Teixeira de Sousa); Scotland (Prof Sarah Bleichner); Spain (Prof Regina Garcimartin); Sweden (Prof Per-Henrik Lindblom); Switzerland (Prof Karen Jeanneret-Druckman); Taiwan (Prof Kuan-Ling Shen); USA (Prof Antonio Gidi); Venezuela (Prof Hildegard Rondón de Sansó).

<sup>15</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] 224 ALR 600.

equivalent of an opt-in situation, making possible what the Australian reporter Professor Camille Cameron defines as ‘closed classes’. It is notable that this solution derives from the practice of obtaining financial support for the class action not from law firms (which in Australia are prohibited to stipulate contingency fees), but from other subjects, so-called commercial funders.

- 1.19** In Canada, the rule in the legislation of most provinces is opt-out class action. In some provinces however, there are special provisions requiring non-residents to opt in. Public authorities, ombudsmen, and other organizations may also start a class proceeding in some provinces (although in practice it never happens).
- 1.20** In Israel, where—as mentioned on page 4—a Class Action Law was enacted in 2006, an opt-out system exists. A number of European countries have recently enacted class action legislation. These include Sweden in 2003, Norway in 2005,<sup>16</sup> and Denmark in 2008. Swedish law is based on a mandatory opt-in procedure. The Danish and Norwegian rules allow for the possibility of using the system with automatic group affiliation with an associated right to opt out in certain cases.
- 1.21** In Italy, a new Article 140 *bis*, listed as ‘Class Action’ (*Azione di Classe*), was introduced in the Consumer Code in 2009. The concept of a class action had already been introduced by law in 2007, but it never came into force. The new provision of 2009 not only established its entry into force on 1 January, 2010, but also modified the original structure of the action. While in the previous version the redress was sought by a collective action which could be brought by consumer associations, in the new and final text the action is brought by each single person seeking redress. The structure is opt-in and the class action can be used for the enforcement of ‘homogenous, individual rights of consumers and users’. An association may have standing if the injured party grants it powers.

The opt-in solution allows for the provisions of the civil procedure code (except for some specificity) to be applied to the Italian form of the class action mechanism. This inevitably results in little room for case management. In fact, the persons who do opt-in, technically do not become parties in the proceedings (so that—for instance—in case of death of one or more of them there is no consequence on the proceedings), but only share its results. From a formal procedural point of view, the proceeding remains a bilateral one with only one party representing all the persons who opted in.

- 1.22** Another example of class action based on the United States style, but with the opt-in solution, may be found in Taiwan, where a Consumer Protection Act of 1994 and an Investor Civil Procedure Code of 2003 have regulated two kinds of class action: a class action by statutory assignment (which grants consumers’ associations the right of action for injunctive relief in the protection of public or collective

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<sup>16</sup> We received no report from Norway, but reference to its system is made in the reports for other Scandinavian countries.

interests) and a class action in which a representative party or an association act by way of parties' assignment on behalf of persons who opted in.

In 1995 Portugal introduced a 'civil popular action', by which an individual (as in the class action) or a representative body (as in the collective action) may bring actions related to consumer protection, environment, public health, cultural heritage, or public property. It appears that the same mechanism may be employed in the protection of both the 'diffuse interest' and the homogeneous individual interests. **1.23**

More articulated is the mechanism introduced in the Netherlands. The new Civil Code has provided for a collective action which may be started by associations representing the interested individuals, but only in order to obtain injunctive relief. A Settlement of Mass Damages Act (2005) has introduced a procedure for the collective settlement of mass claims. According to this procedure, a foundation or association representing the injured persons may request the court to declare that a settlement reached with the infringing party is fair and equitable. The decision also binds the injured persons who were not represented. He who does not wish to be bound by the settlement agreement has to declare it within a term determined by the court. The mechanism works on an opt-out basis. **1.24**

In Spain, a law of 2007 has introduced a collective action for consumers' protection. This law provides that consumers' associations may also claim for persons not belonging to the association. The same association may also bring an action for the protection of diffuse interests. Recently a new kind of action against gender discrimination was introduced where, again, associations have standing. **1.25**

A somewhat similar mechanism operates in Austria, where on the basis of existing legislation,<sup>17</sup> a kind of collective litigation was developed: several claims of harmed individuals are assigned to an association. This solution has been defined as 'the Austrian model of the class action', but projects for an organic legislative intervention on the matter are pending. **1.26**

An interesting solution has been adopted by the country which was one of the first to introduce a collective redress action: Brazil. Article 81 of the Brazilian Consumer Code 1990 provides that: **1.27**

the protection of consumers interests or rights may be granted by a Court individually or collectively and that the collective protection shall be allowed in the case of:

- 1) Diffuse interests or rights, meaning transindividual, indivisible interests or rights held by indeterminate persons linked by factual circumstances;
- 2) Collective interests or rights, meaning the transindividual, indivisible interests or rights held by a group, category or class of persons linked to each other or to the opposing party by a common legal relationship; or

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<sup>17</sup> Para 227(1) of the *Zivilprozessordnung* (ZPO) which allows for the assimilation of several claims into one action under certain circumstances: *objektive Klagenhäufung*.

- 3) Homogenous individual interests or rights, meaning those stemming from a common origin.
- 1.28** The wide-ranging object of this action is explained by the circumstance that, according to Article 82 of the Code, the entities who have collective standing for bringing it are:
- 1) the Office of the Attorney General;
  - 2) the Federal, State, or Municipal Government;
  - 3) the Federal District; entities and agencies of the direct and indirect public administration, including those without legal personality, specifically designed for the protection of the interests and rights protected by the Consumer Code; and
  - 4) associations legally incorporated for at least one year, whose institutional purpose include the protection of the interests and rights protected by the Consumer Code.<sup>18</sup>
- 1.29** The circumstance that the Attorney General (*Ministerio Público*) has standing gives the action the flavour of a public action. The *Ministerio Público* in Brazil is a completely independent body, which performs its task with vigour.
- 1.30** Another country which has chosen to confer to a public body the action for protecting the collective interests of consumers and users is Finland, where an act, which came into force in 2007, establishes that the Consumer Ombudsman is the primary actor to bring the action as representative of the class. Individuals have a right to act only if the Consumer Ombudsman has decided not to do so.
- 1.31** Other countries are experimenting with different solutions and are approaching the idea that a more thorough and complete intervention will eventually be needed. In England, the Civil Procedure Rules enacted in 1999 introduced the Group Litigation Order (GLO), a flexible procedure allowing for a register to be established where a number of claims give rise to common or related issues of fact or law. Exercising powers under a sort of case management, the judge may order that persons which a claimant claims to represent be notified and allowed to *opt in*. The controversy may then be resolved in one single proceeding. It has to be noted that persons who *opt in* become parties in the proceedings, so that the GLO may be considered as a sort of organized multi-party proceeding.
- 1.32** In Germany, where legal circles appear to be fiercely opposed to the introduction of class actions or a collective redress mechanism, a test case procedure in the field of securities was enacted in 2005: the Capital Market Model Case Act (*Kapitalanlage—Musterverfahrensgesetz—KapMuG*). Under the KapMuG, where several claims are brought for damages due to false, misleading, or omitted public

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<sup>18</sup> The English translation of the Consumer Code provisions is taken from the Appendix to Antonio Gidi's, 'Class Actions in Brazil. A Model for Civil Law Countries' (2003) 51 *American Journal of Comparative Law* 406. Professor Gidi's report for Brazil makes reference to this article.

capital market information, a model or test case proceeding can be commenced in order to decide on issues of fact or law which are common to all cases pending and being related to the same dispute. Such proceeding(s) can be established upon the application of one of the parties and the opting-in of nine other plaintiffs. The Court having jurisdiction for the model case proceeding (Higher Regional Court) then has to select the case of one plaintiff as the model case. All other cases pending will be suspended *ex officio* and the decision on the model case will be binding also for them.

In France, similar discussions about group actions are fervid and many proposals have been put forward in an official way. Two kinds of actions, however, are in existence in France: **1.33**

- 1) *L'action d'intérêt collectif*, or *l'action en cessation d'agissement illicite*, which allows consumers' associations registered in an official list to bring claims against the infringement of a collective consumer interest or a collective interest of investors. This kind of action is in line with the European Community directive on consumer protection.
- 2) *L'action en représentation conjointe*, which is based on a proxy to claim for damages granted to an *association agréée être connue représentative sur le plan national*. Both actions are not much used in practice. The second one, in particular, meets a limit in that '*le mandat ne peut être sollicité par voie d'appel public télévisé ou radiophonique, ni par voie d'affichage, de tract ou de lettre personnalisée*'.<sup>19</sup>

The reports from Mexico, Venezuela, and Argentina indicate that in those countries collective redress proceedings are based on an action of constitutional character (*amparo*) which is envisaged as an action to be employed by public bodies or local communities to protect diffuse and collective interests. **1.34**

The reports of other countries (Belgium, Greece, Hungary, Poland, Scotland, and Switzerland) show that the issue of collective redress has sparked interest, debates, and proposals for the introduction of new forms of action. However, the proposals are yet to be definitively approved. The different solutions presented by the reports for each country offer food for thought on one of the fundamental issues which the globalization of economic and social life poses in our time. **1.35**

### III. Developments Within the United States Model

It is a common experience that consumers' and investors' contracts often have a transnational character. As a result of this characteristic, mass damages may be **1.36**

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<sup>19</sup> This prohibition was applied by a Court decision against a group of lawyers who had created a site *classaction.fr*, which offered assistance to other lawyers in the organization of *actions en représentation conjointe*.

caused by firms who are located and/or operate in countries different from the countries where the consumers or investors live. Countries such as the United States, which have developed class action as an effective remedy for the protection of the public, have been made aware of this problem especially in the area of international securities litigation.

- 1.37** The Court of Appeal for the Second Circuit in *Morrison v National Australia Bank Ltd*,<sup>20</sup> elaborated a double test to affirm its jurisdiction: when the fraudulent conduct of a foreign financial institution has specific and relevant consequences within the United States (effect test) or, alternatively, when such conduct is performed within the United States (conduct test).<sup>21</sup> Its approach has been restricted by the United States Supreme Court decision of 24 June, 2010<sup>22</sup> on the same case: on the basis of a general presumption against extraterritoriality of United States jurisdiction. The Supreme Court excluded the notion that United States courts have jurisdiction in foreign-cubed litigation, ie in collective actions where none of the elements (nationality of claimants, seat of the financial institutions, place of negotiations of the securities) is connected with the United States.<sup>23</sup>
- 1.38** Another development of class action within the United States and one of the most controversial is the adoption of this procedure in the field of arbitration. Courts have moved from the consideration that only parties to a particular contract (or set of contracts) could participate in arbitration proceedings, and have begun to hold that class actions may in principle be asserted in arbitral proceedings if the parties' agreement explicitly so provides and also in some cases (on the basis of the unconscionability doctrine) when it expressly excludes it.<sup>24</sup> The American Arbitration Association (AAA) has adopted for class arbitration rules based on rule 23 of the Federal Rules of Civil Procedure. The recent case *Stolt Nielsen SA v Animalfeeds Int Corp*,<sup>25</sup> however, seems to be more restrictive on the possibility of class arbitration in situation where the arbitration agreement is silent or ambiguous.<sup>26</sup>
- 1.39** Although frequently classified as a 'uniquely American' device, class action arbitration is expanding outside the United States. Class arbitration may involve

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<sup>20</sup> 547 F.3d 167 (US Ct of Apps (2nd Cir.), 1978).

<sup>21</sup> See Steven J Choi and Linda J Silberman, 'The Continuing Evolution of Securities Class Actions Symposium: Transnational Litigation and Global Securities Class Action Lawsuits' [2009] *Wisconsin Law Review* 465; Hannah L Buxbaum, 'Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict' (2007) 46 *Columbia Journal of Transnational Law* 14.

<sup>22</sup> 130 S.Ct 2869.

<sup>23</sup> For a first commentary on this decision, see George T Conway III, 'U.S. Supreme Court Rejects "Foreign Cubed" Class Actions', <http://blogs.law.harvard.edu>.

<sup>24</sup> See Gary B Born, *International Commercial Arbitration* (Kluwer 2009) vol I, 1226–32.

<sup>25</sup> 435 F.Supp. 2nd 382 (US District Court), 2006.

<sup>26</sup> For a somewhat less pessimistic view, see Stacy I Strong, 'Opening more doors than it closes' (2010) *Lloyd's Maritime and Commercial Law Quarterly* 565.

non-United States parties. Collective relief has been sought in some specialized arbitral procedures, like the ICSID (International Centre for the Settlement of Investment Dispute) Rules. A movement for the introduction of collective proceedings also in arbitration is present in many countries.<sup>27</sup>

#### IV. Conclusion

The developments of international class action make urgent an integration or, at least, a coordination of different substantive rights and procedural actions of consumers and investors at the translational level. How can such integration and/or coordination be reached? Enormous political and economic problems have, of course, to be solved. But in order to prepare the ground for their solution, something may be done or even must be done from a purely legal point of view. **1.40**

Comparative law scholars are called to the task of analysing the questions which collective redress mechanisms pose in each jurisdiction and to see what kind of solution may be offered. Studies and essays in this field are already very numerous. One study which represents a generous attempt to give an answer to the difficulty that civil lawyers meet when dealing with 'class actions' is published by Antonio Gidi. In his work, Gidi publishes a class action code which acts as a model for civil law countries.<sup>28</sup> **1.41**

At the European level, a harmonization of different solutions adopted by the State legislations has to be reached. Notwithstanding the Brussels I Regulation on mutual recognition and enforcement of judicial decisions, such a harmonization is necessary to avoid the scenario where a judicial decision in one set of class action proceedings issued in one country is not acknowledged in another country because that decision is considered to be 'manifestly contrary to public policy', as, for instance, that country has introduced 'opt-out' class actions. **1.42**

The reports which were submitted from European countries also confirm one common trend which has already been noted,<sup>29</sup> namely the desire to find a model of collective redress procedures which is distinct from that of the United States class action and which draws upon more specific European concepts. **1.43**

The preference for the opt-in regime, the role of consumer associations and of public entities (Ombudsman, etc), the check on the admissibility of the collective **1.44**

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<sup>27</sup> Stacy I Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (2010) 26 *Arbitration International* 493.

<sup>28</sup> Antonio Gidi, 'The Class Action Code: A Model for Civil Law Countries' (2005) 23 *Arizona Journal of International and Comparative Law* 37.

<sup>29</sup> Fairgrieve and Howells (n 7).

claim, and the more limited scope of collective redress procedures may be seen as aspects of the different model emerging in European countries, together with the refusal of American procedural devices such as discovery, punitive damages, jury system, and contingency fees.

- 1.45** This process of creating a more harmonized development of collective redress procedures in Europe could be sustained by the European Union's policy as it has been indicated in the *Green Paper on Consumer Collective Redress*.<sup>30</sup>

<http://www.pbookshop.com>

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<sup>30</sup> COM(2008) 794 final.