CLASS ACTIONS WORLDVIEW

A Study of Trends Around the Globe

PART IV – CHINA, JAPAN, BELGIUM, THE NETHERLANDS, AND ENGLAND AND WALES • MAY 2024

Class Actions Worldview: Part IV—China, Japan, Belgium, The Netherlands, and England and Wales

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

In Part IV, we examine class actions activities in China, Japan, Belgium, The Netherlands, and England and Wales.

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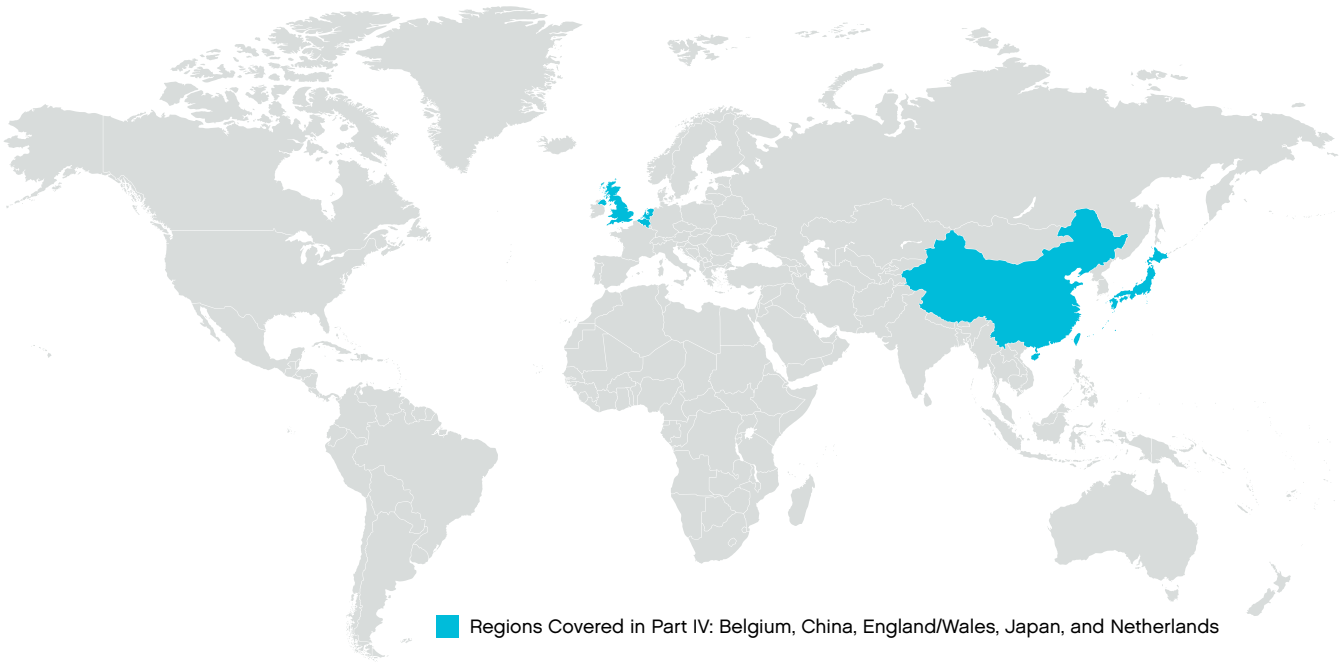

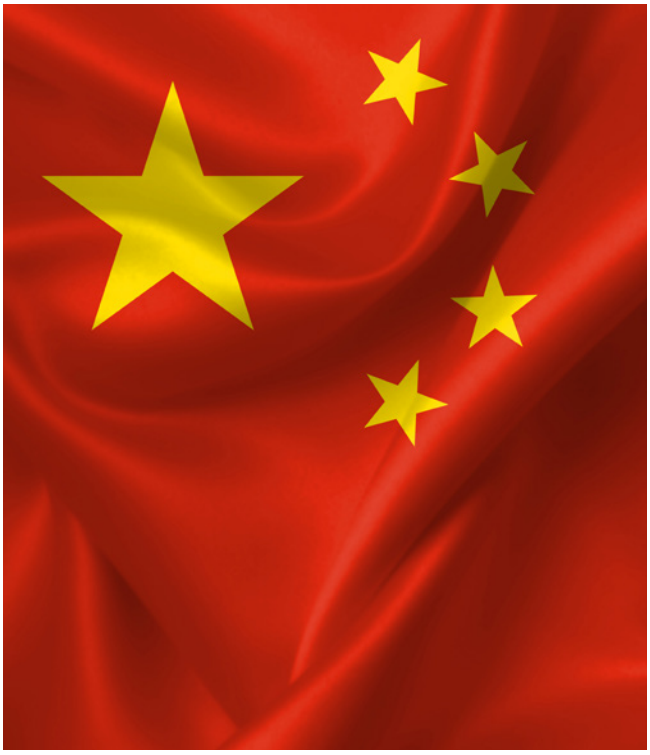

China

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A. BRIEF OVERVIEW AND HISTORY

In April 1991, China promulgated a new Civil Procedure Law (the "CPL") creating a representative action mechanism. The 1991 CPL provides that lawsuits involving numerous litigants on either the plaintiff or defense side can proceed as representative actions. The parties, with the assistance of the court as necessary, select class representatives, but all changes to or waivers of claims, admissions regarding opponents' claims, or settlements require the consent of all represented litigants. The outcome of a representative action binds all represented litigants, as well as non-participating interested parties on the same subject matter. The 1991 CPL did not provide any opt-out mechanism even for individuals failing to receive notice or lacking information to determine whether they could assert a claim.

In July 1992, the PRC Supreme People's Court (the "SPC") issued Opinions on Certain Issues of Application of the Civil Procedure Law (the "1992 SPC Opinions"). The 1992 SPC Opinions provide that representative actions require more than 10 litigants on one side of the case. The 1992 SPC Opinions also provide that there should be two to five class representatives and that the representatives can represent either all litigants on the same side, or subgroups of these litigants. The court can also appoint representatives, and the 1992 SPC Opinions permit interested parties to join the litigation upon proving their legal relationship with the opponent and their damages.

These statutory standards for representative actions have remained unchanged since 1991, although both the CPL and the SPC Opinions have been amended.

Notwithstanding this statutory framework, representative actions are not common in China. Judges, already burdened by the pressure of excessive caseloads and evaluations based on case completion rates, appear unwilling to let cases go forward on a representative basis because representative litigation is difficult to administer.[1] In practice, the SPC may require the lower courts to report the class actions they accept to their superior courts. Courts in different geographic areas will then communicate internally and make unified decisions with the guidance of their superior courts. Moreover, the requirements for litigants' individual consents to settlement, the representative election or selection process, and public announcement and registration of litigants impose administrative burdens and costs on both the courts and litigants, making representative litigation expensive and time-consuming. Many courts and litigants disfavor representative actions because significant delays often arise from parties' failure to elect representatives or from their distrust of representatives.[2] One commentator has even said that representative actions involving unascertained litigants are "ignored in judicial interpretations and set aside in practice."[3]

However, a few exceptional representative actions have moved forward in major environmental pollution, product liability, or securities litigation.

For example, in *ZHANG Changjian et. al. v. Fujian Province (Pingnan) Rongping Chemical Co., Ltd.*',[4] 1,721 individuals sued Fujian Province (Pingnan) Rongping Chemical Co., Ltd. for Pingnan's excessive release or emission of waste gas and water into the environment. Five representatives litigated the case for the 1,721 plaintiffs, seeking RMB 13.53 million. The Ningde Intermediary People's Court found Pingnan liable for polluting the environment and causing damage, and ordered it to pay RMB 249,763 to the plaintiffs as compensation for dead plants and crops, and to remove the industrial residues deposited on and behind its facilities. The Fujian Provincial High People's Court affirmed, increasing the damages to RMB 684,178.20.[5]

In 2020, the SPC implemented the Provisions on Several Issues Concerning Representative Actions Arising from Securities Disputes (the "SPC 2020 Provisions"), expressly authorizing representative actions in cases brought by purchasers of securities. Chinese courts since have issued at least one judicial judgment based on the SPC 2020 Provisions.

In *China Securities Investor Services Centre v. Kangmei Pharmaceutical Co ("Kangmei")*[6], the Guangzhou Intermediary People's Court converted an ordinary representative litigation to a special securities representative action after more than at least 60 registered right holders had applied to the court to participate in the lawsuit against Kangmei. The court ruled that Kangmei should compensate 52,037 investors for a loss of RMB 2.46 billion;[7] that the actual controllers and some executives of Kangmei should bear 100% joint and several liability for compensation; and that other executives who made false statements should bear joint and several liability for 5% to 20% of the damages. At the same time, the accounting firm and auditor who signed off on false statements in the audit also should bear 100% joint and several liability together with Kangmei.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Chinese law does not restrict representative actions to specific types of disputes. Litigants can bring representative actions for all types of disputes, including tort, contract, or statutory disputes, as long as the litigants: (i) exceed 10 people; (ii) assert claims that "relate to the same subject matter or the same type of subject matters"; and (iii) consent to representative action; and (iv) the people's court deems that the disputes of all the litigants may be tried concurrently. (CPL Arts. 55-57; SPC Interpretation on the Application of the Civil Procedure Law (2022 Revision) (the "2022 SPC Interpretation") Art. 75).

In Shanghai and Hainan, legislative proposals have emerged advocating the inclusion of third-party funding in the legal framework. In practice, some financing companies have openly engaged in third-party funding, which is not limited to representative litigation.

In theory, representative actions in China also address the rights of unidentified or unnamed litigants albeit in a somewhat different manner than U.S.-style class actions. However, the existing mechanism does not allow an interested party to opt out, nor does it make an exception for an interested party lacking notice of the representative action or whose right to raise a claim was not clear at the time of the representative action.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Any participating litigant elected, selected, or appointed to be the group representative can litigate the case on behalf of the represented litigants.[8] There is no statutory restriction on the status of a group representative, and a group representative can be an individual, an organization, or a government entity as long as it is a member of the group.[9]

D. KEY PROCEDURAL REQUIREMENTS

The key procedures for bringing a representative action are:

- In a case involving more than 10 plaintiffs suing, or more than 10 defendants sued, some or all of the numerous plaintiffs or defendants may inform the court that they want their elected representatives to litigate the case on their behalf (*see* CPL Art. 56; 2022 SPC Interpretation Art. 76). If those plaintiffs or defendants are unable to elect their representatives, they may seek the court's intervention in facilitating the election of representatives, or in appointing representatives. Court approval is required before the case can go forward on a representative basis.
- The number of representatives may range from two to five (2022 SPC Interpretation Art. 78).
- The court may, but is not required to, publish an announcement describing the case and the asserted claims for a period of no less than thirty days in order to notify all interested parties of the litigation (CPL Art. 57; 2022 SPC Interpretation Art. 79). An interested party may register with the court to participate in the litigation. That party must prove its legal relationship with the opposing parties and the damages it has suffered (2022 SPC Interpretation Art. 80). However, the consent of the existing group members or group representatives are not required for the court to approve the addition of group members to the representative litigation.
- Before the representatives change claims, waive claims, admit to claims asserted by the opponents, or settle the case (the "Dispositive Acts"), the representatives must obtain consent from the represented litigants (CPL Art. 57). Since these Dispositive Acts require unanimous consent, a sole dissenter can prevent any of these acts from being undertaken. The requirement of obtaining unanimous consent from all represented litigants creates substantial disincentives to try to settle, and it is more likely these cases will go to trial and judgment once filed and accepted. However, in securities representative cases, the representative has a special one-time authorization. This mechanism allows the representative, once authorized, to directly represent the litigants in changing, waiving, or admitting to claims, reaching settlement agreements, filing or withdrawing appeals without seeking additional consent. With such one-time authorization from multiple investors, the representative centralizes investors' rights, streamlining the litigation process and boosting efficiency. (SPC 2020 Provisions Art. 7).[10]

Other than those listed in the bullets above, a representative action is not different from a regular civil action.

E. BINDING OTHERS

Any decision made in a representative action binds all of the participating litigants and any non-participating interested party who brings action on the same or same type of subject matter (CPL Art. 57).

If an interested party tries to participate in the litigation but is denied registration, that party may choose to sue in a separate action (2022 SPC Interpretation Art. 80). If an interested party qualifies as a co-litigant but does not register to participate in the litigation, the court's decisions in the representative action will bind that party if it later files a separate lawsuit on the subject matter addressed in the representative action (CPL Art. 57 & 2022 SPC Interpretation Art. 80).

An interested party does not have the option to opt out of a representative action. If he or she files a separate action on the same subject matter, he or she will be bound by the judgment in the representative action. The statute also provides no exception for interested parties having no notice of the representative action or unsure of their right to raise claims at the time of the representative action. If they sue later, they too will be bound by the judgment in the representative action.

F. REMEDIES AVAILABLE

There are no special remedies for representative actions, and the remedies available to plaintiffs are the same as those available in standard civil actions. For example, in a representative action involving contract claims, plaintiffs can usually recover only compensatory damages. For tort claims, remedies include damages to compensate for losses and mandatory injunctions precluding further harm or requiring the removal of impediment, elimination of danger, return of property, restitution, apologies, or rehabilitation of reputation (PRC Civil Code Art. 1167). Declaratory relief is available in the form of "confirmation of rights or facts."

Punitive damages are generally unavailable except in a few statutory claims. For example, Article 55 of the Consumer Rights Protection Law (2014) ("2014 CRPL") provides that a business operator who commits fraud in the course of selling goods or providing services must pay "enhanced compensation" of three times the price of the purchased commodity or services, or RMB 500 if the enhanced damages are lower than RMB 500 (2014 CRPL Art. 55). The same statute authorizes punitive damages up to twice the victim's loss if a consumer or a third person suffers death or health damage from defective commodities or services (2014 CRPL Art. 55).

G. SETTLEMENTS AND FINANCING

Article 57 of the PRC Civil Procedure Law requires the consent of every represented litigant for settlement of representative action claims. Any one litigant can veto a settlement.

Article 194 of the 2022 SPC Interpretation provides that litigants are not required to pre-pay court filing fees upon filing of a representative action, and the losing party must pay the court filing fees at the conclusion of the litigation. In fact, Article 29 of the Measures for the Payment of Litigation Fees (2006) requires the losing party to pay all litigation costs, defined as case filing or application fees; witness, transportation, and hotel expenses; per diem stipend; and lost wages incurred by witnesses, examiners, interpreters and accounting personnel for attending court hearings.

Article 12 of the Attorney's Fee Administrative Measures (2006) forbids contingency fee arrangements for representative actions.

There is no law or regulation expressly permitting or prohibiting third-party funding in representative litigation. In Shanghai and Hainan, legislative proposals have emerged advocating the inclusion of third-party funding in the legal framework.[11] In practice, some financing companies have openly engaged in third-party funding, which is not limited to representative litigation.[12]

H. OTHER KEY CLASS ACTION ISSUES

In 2013, China amended its Consumer Rights Protection Law to allow consumer protection associations at the national or provincial level to bring actions on behalf of consumers against defective goods and service providers. In 2016, the SPC issued an interpretation[13] offering further guidance to consumer protection associations about such actions, including but not limited to clarifying the procedure, the jurisdiction, and the standing to sue.[14]

In 2014, China amended its Environmental Protection Law authorizing duly registered public interest organizations to bring actions in environmental protection cases. It is anticipated that with public interest groups spearheading suits against consumer rights violators and environmental polluters, representative actions in these two areas will increase. Finally, in 2016, China issued a regulation expressly authorizing prosecutors to bring civil actions on behalf of the public for misconduct that infringes the public's welfare, such as environmental pollution and defective goods."[15]

In 2019, China amended its Securities Law (the "SLC") to introduce the mechanism of special securities representative actions to promote investor protection ("SSRA") (SLC Art. 95). According to the revised SLC, investors with similar circumstances who file securities-related civil lawsuits against the same wrong may elect representative[s] to participate in the lawsuit on their behalf. The SPC 2020 Provisions provided further judicial interpretation of the SSRA mechanism, specifying

that securities representative actions with an investor protection institute ("IPI") serving as the litigation representative on behalf of involved investors are defined as SSRAs, while actions without IPI representatives are considered as ordinary securities representative actions (OSRAs).

Significant reform, however, is needed before representative actions become prevalent in China. First, the unanimous consensus requirement for case settlement imposes huge administrative burdens and costs in reaching consensus among the represented litigants and disincentivizes representative litigation. Second, the current representative action regime gives courts broad discretion in deciding whether to entertain or refuse representative actions. And, third, prohibiting contingency fees in representative actions makes funding a challenge. Unless reforms are made to these procedures, the class action device is likely to remain limited in China.

ENDNOTES

1 *See* LI Xiuwen & SUN Liuyi, "Problems of the Representative Litigation System and Proposed Solutions."

2 WU Yingzi, "Defects in the Design of China's Representative Action System," published in *The Jurist* (2nd Issue, 2009).

3 ZHENG Lanxi: "Reform of China's Securities Litigation Mechanism,"published in China Securities and Commodities (Issue 6, 2013).

4 Ningde Intermediary People's Court, 2003 Ningde Civil Initial No. 1. (2003) 宁民初字第1号.

5 Only RMB 400 per person, or about $60.

6 Guangzhou Intermediate People's Court, 2020 Yue Civil Initial No. 2171, (2020) 粤01民初 2171号.

7 Approximately RMB 4,727 per person, or about $680.

8 CPL Arts. 56-57; 2022 SPC Interpretation Arts. 76-78.

9 *See* 2022 SPC Interpretation Art. 77, authorizing the court to appoint a representative from among the plaintiffs if the plaintiff group cannot elect a representative on its own.

10 *See* Jingyu Ma, "Court issues judicial interpretations to address various practical challenges in special representative litigation."

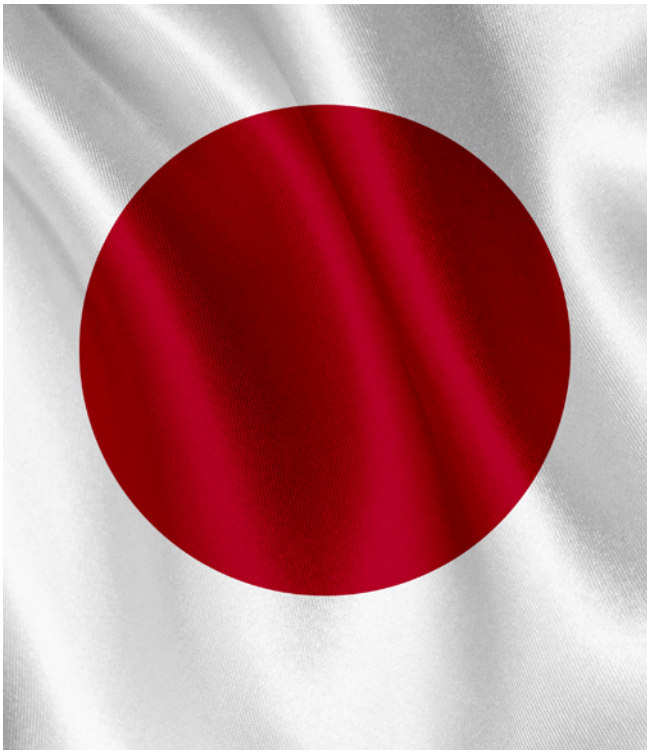
11 *See* Jiang Lili, Secretary of Beijing Arbitration Commission/Beijing International Arbitration Center.

12 深圳前海鼎颂投资有限公司, http://dslegalcapital.com/, visited on November 2, 2023; 厚助投资, houzhcapital.com, visited on November 2, 2023.

13 The Interpretation was amended in 2020, but the relevant standards remain unchanged.

14 SPC's Interpretation on Hearing Consumer Protection Civil Public Interest Litigation.

15 Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigation Cases Instituted by People's Procuratorates.



Japan

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A. BRIEF OVERVIEW AND HISTORY

The Japanese Class Action System was established by the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers ("Act"), enacted in 2013 and effective in 2016. The establishment of the Japanese Class Action System aimed to allow consumers to recover damages collectively for breaches of contractual and certain other obligations. As of October 2023, seven class actions have been filed since 2016.

As structured under the Act, the Japanese Class Action System consists of two stages. At the first stage ("Litigation Seeking Declaratory Judgment on Common Obligations"), only a Specified Qualified Consumer Organization ("SQCO") can file a complaint. SQCOs are organizations that have received certification from the prime minister. In order to receive certification, an organization must meet several requirements set forth in the Act related to, among other things, how SQCOs are organized, who can be directors, whether they have expert knowledge, and whether they have financial basis.

Accordingly, at the first stage of the class proceedings, the SQCO seeks a declaratory judgment confirming that consumers have collective rights to pursue a claim under the Act. If the SQCO wins the first step and a court issues a declaratory judgment, the SQCO must file a petition to proceed to the second stage ("Simple Determination Proceedings"). At the second stage, individual consumers who delegate powers to the SQCO can join the proceedings and claim damages for the alleged violation of the legal right confirmed by the court during the first stage. The defendants, i.e., business operators, cannot dispute the existence of such right during the second stage. The second stage is just to calculate and determine the amount of damages to be recovered for each individual.

In the first class action filed in Japan, the plaintiff SQCO partly won at the first stage in March 2020, and the second stage proceeding started in July 2020. Subsequently, it reached settlement on July 2021.

Supplementary provisions of the Act provided that, after three years of the date of the promulgation of the Act, the government should review the provisions and implementation of the Act, including the scope of claims and damages under the Act, and if necessary, take action based on the results of the review. The government started review and consideration to amend the Act under such supplemental provision in March 2021, and concluded that the Japanese Class Action System was not utilized and did not fully function as originally expected. Then, amendments were made to the Act on May 2022 ("Amendment"), which generally came into effect as of June 1, 2023, and in part on October 1, 2023. The Amendment intends to evolve the Japanese Class Action System into one that is easier to remedy consumer damages

and easier for consumers to use, as well as to establish an environment that facilitates the activities of SQCOs by implementing the features as follows:

- Expanding the scope of claims and recoverable damages;
- Allowing settlements between SQCO and a business operator with more flexible terms;
- Enhancing the ways to notify consumers of the pending class action; and
- Relaxing SQCO's obligations by implementing the certification of entity to support the activities of SQCO and taking other measures.

In the following sections, references are made to new features implemented by the Amendment.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Claims under the Japanese Class Action System arise from consumer contracts, which are any contracts between an individual and a business operator. The claims must be:

- A claim for performance of a contractual obligation;
- A claim pertaining to unjust enrichment;
- A claim for damages based on nonperformance of a contractual obligation;
- A claim for damages based on a warranty against defects; or
- A claim for damages based on a tort (limited to a claim based on the provisions of the Civil Code).

The Amendment has expanded the scope of the defendants under the Japanese Class Action System to include some individuals, such as a business operator's employee, as an additional defendant in tort cases caused by such individuals intentionally or with gross negligence.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Under the Japanese Class Action System, only SQCOs are qualified to bring lawsuits. Although they appear to act as a representative of consumers, at the first stage, the SQCOs are theoretically an independent party, not a representative of consumers. At the second stage, they act as a quasi-representative of the consumers who delegate power to the SQCO. As of August 2023, four organizations have been certified as SQCOs.

D. KEY PROCEDURAL REQUIREMENTS

Under the Japanese Class Action System, a class action can be brought, among other things, in cases where: (i) a considerable number of consumers incur damages in connection with identified claims under a consumer contract (see Section B above); and (ii) common factual and legal issues determine the defendant business operator's liability. Claims must relate to damages owed to a "considerably large number" of people, must be of "common obligations," and individual issues cannot predominate such that "appropriate and swift determination of individual claims" would be realized.

For example, in cases where a business operator is alleged to have entered into the same arguably fraudulent contract with a number of consumers and has a contractual obligation to repay monies to consumers, courts are likely to find that the case meets the above-described requirements. If, however, the plaintiff SQCO cannot prove the facts regarding these requirements, or if the court finds it would be difficult at the second stage of the proceedings to determine whether consumers' rights were violated or damages incurred, the court can dismiss, in whole or in part, the first stage action for Declaratory Judgment on Common Obligations.

E. BINDING OTHERS

If a plaintiff SQCO wins at the first stage, that SQCO, all other SQCOs, and consumers who participate in the second stage by delegating powers to the SQCO, are bound by the first stage result (opt-in). If a plaintiff SQCO loses in the first stage, the decision binds only that SQCO and other SQCOs in Japan and does not bind consumers. Consumers can still jointly or independently bring new lawsuits.

After a successful first stage decision, the plaintiff SQCO notifies all "known consumers" by mail or email and also provides general public notice through the internet and newspapers. (The notice includes general information of a class action, a court's final judgement (in case of acknowledgement by

a business operator or settlement, its terms), recoverable claims, and consumers entitled to recover, etc.) Under the Amendment, a business operator is also required to notify all "known consumers" by mail or email at the SQCO's request. Consumers then must elect to opt in and delegate authority to recover damages to the SQCO. In order to secure information on consumers possessed by a business operator from deletion or destruction, the Amendment has provided the court may issue a provisional order obligating a business operator to disclose the consumer information even during the first stage.

The Amendment provides the settlement between plaintiff SQCO and a business operator with the term not to file class action again would bind other SQCOs, which didn't participate in the class action.

F. REMEDIES AVAILABLE

As explained above, under the system, an SQCO seeks a declaratory judgment on common obligations to consumers at the first stage. At the second stage, there is no minimum claim amount. Only compensatory damages are available. Punitive damages are not permitted. Moreover, for tort claims, damages relating to secondary loss, lost earnings, or damages for personal injury/death are not recoverable. Under the Amendment, damages for pain and suffering, which was not recoverable under the Japanese Class Action System, could be recoverable in the cases of some factual and legal backgrounds.

To preserve a defendant's assets for future enforcement, SQCOs may file a petition for provisional attachment, and each consumer entitled to recover damages at the second stage may enforce the judgment. SQCOs cannot, however, seek other remedies such as injunctive relief.

G. SETTLEMENTS AND FINANCING

An SQCO may reach a settlement with business operators at the first stage. When a business operator admits an obligation to pay damages to consumers, the plaintiff SQCO, other SQCOs in Japan, and consumers who participate in the second stage by delegating powers to the SQCO, are bound by the settlement. While the original Act had strict restrictions on SQCO's authority to make settlement, the Amendment abolished such restrictions, thereby allowing a wider variety of settlement terms, including the term to pay settlement money without a business operator's acknowledgement of its liability, the term to perform something other than monetary payment, and the term to distribute the settlement money to consumers without going through the second stage.

Contingency fee arrangements are allowed, and small firms traditionally receive initial fees and contingency fees. However, the Act requires that to obtain certification as an SQCO, any remuneration or expenses must not be unreasonable from the viewpoint of protecting consumer interests. Additionally, the guidelines on SQCO certification, published by the Consumer Affairs Agency of Japan, provide that at least 50% of the amounts collected from business operators must be returned to consumers. Contingency fee arrangements are not prohibited by the Act, but must conform to these guidelines.

Third-party funding has not, to date, been addressed under the Japanese Class Action System, and more generally, there are no mechanisms for third-party litigation funding in Japan.

H. OTHER KEY CLASS ACTION ISSUES

In addition to those stated in the above sections, the Amendment has alleviated the obligations imposed on SQCO under the original Act, as described below:

- Implementation of the government's certification to the entities, which are to support SQCO's activities. SQCO can outsource part of its activities, such as notification to consumers, to the certified entities.
- Extension of the deadline for SQCO to file for the second stage from one month to four months. The deadline can be further extended to eight months when SQCO files for petition and the court approves it.
- Extension of the period for the government's certification of SQCO from three years to six years.

Belgium

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A. BRIEF OVERVIEW AND HISTORY

The Belgian law on class actions, found in Section 2 of Book XVII of the Code of Economic Law, went into effect on September 1, 2014 (the "Law"). Since its entry into force, only 11 class actions have been filed in relation to various sectors such as transports, telecommunications, energy, and data protection. Most of these cases were brought by the main Belgian consumer protection organization, Test-Achats/Test-Aankoop.

On March 18, 2024, the Belgian Government submitted to the Parliament a draft bill aiming at transposing the Directive EU 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the "Directive on Representative Actions") (the "Bill"). Indeed, as part of the "New Deal for Consumers," a new Directive on Representative Actions was published on November 25, 2020, which had to be implemented by December 25, 2022. The Bill is under review by the Parliament with possible amendments before its adoption.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The Belgian class actions can be initiated by a group of consumers or small and medium-sized enterprises ("SMEs") in relation to alleged breaches by corporations of certain specifically enumerated European and Belgian laws and regulations. The most important of those specifically-enumerated provisions include competition, product liability, trade practices and consumer protection, drug, transport of persons, health protection, data protection and privacy, electronic communications, and payment and credit services.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

In contrast to U.S. class actions, a class in Belgium cannot be represented by an individual class member (nor commercial companies, trade unions, or law firms), but must instead be represented by:

- For a class of consumers, a consumer protection association that is a member of the Consumer Council or that is recognized by the Minister of Economic Affairs. For a class of SMEs, an interprofessional association that: (i) defends the interests of SMEs; and (ii) is a member of the High Council for Self-Employed and SMEs or recognized by the Minister of Economic Affairs;
- A nonprofit organization that has existed for at least three years and is recognized by the Minister of Economic Affairs. The nonprofit organization: (i) must have a purpose that is directly linked to the collective damage suffered by the class; and (ii) cannot pursue an economic goal; or

- A nonprofit entity recognized by an EU Member State having: (i) a purpose directly linked to the alleged infringement of rights granted under EU law; and (ii) sufficient financial and HR capacity as well as the legal expertise to represent multiple claimants acting in their best interest.

These class representatives can, of course, be assisted and represented by external counsels.

The class of consumers (excluding SMEs) can also be represented by the Belgian federal mediator for consumers, but only in the negotiation phase, as opposed to the litigation phase, as explained further below.

D. KEY PROCEDURAL REQUIREMENTS

Brussels courts have exclusive jurisdiction over class actions in Belgium, and the Law sets class proceedings in four successive phases:

1. **Admissibility**. Within two months of the filing of the proceedings, the court rules upon the admissibility of the class claim. In so doing, the court assesses whether the alleged breaches raised by the class representative fall with the material scope of the Law, whether the class representative is authorized to act in that capacity and deemed adequate, and whether the class procedure will be efficient. In its discretion, the court may declare the claim inadmissible if it finds that a class action is not more efficient than standard court proceedings. In the admissibility decision, the court must also decide certain specific issues such as the description of the class, the opt-in/opt-out system and the modalities thereof, and the length of the settlement negotiation phase (minimum of three months to maximum of 12 months).
2. **Negotiation**. The parties must then explore settlement during the period set forth in the admissibility ruling. Any settlement must comply with the formal requirements set forth in the Law (14 mandatory elements, including the appointment of a trustee for the enforcement of the settlement). The settlement must also be submitted to the court for approval. The court must reject the settlement if:
   - Compensation to the consumers is manifestly unreasonable;
   - The chosen opt-in/opt-out system and the modalities thereof are manifestly unreasonable; or
   - The fees to be paid to the class representative exceed the reasonable costs allowed.

   Notably, a class settlement does not constitute an admission of liability by the defendant.
3. **Review and decision on the merits**. If no settlement is reached or if a proposed settlement is rejected, the parties exchange written pleadings pursuant to a timetable set forth by the court. Argument then occurs. After the oral argument, the court issues a decision that must comply with the formal requirements set forth in the Law (10 mandatory elements). If the claim is declared founded, the court appoints a trustee for enforcing the judgment. The decision of the court is subject to appeal.
4. **Enforcement**. The appointed trustee enforces the settlement or judgment. The trustee must submit quarterly reports to the court. At the end of his or her mission, the trustee submits a final report to the court.

E. BINDING OTHERS

Under the Law, the initial application to the court must propose an opt-in or opt-out procedure. In the decision on admissibility during the first phase of the proceedings, the court determines the appropriate system for that case and how the system will be employed. The opt-in system is however mandatory: (i) for consumers who are non-Belgian residents and SMEs whose main establishment is not located in Belgium; and (ii) if the class action aims at compensating physical or moral collective damage. The admissibility decision must be published at least in the Official State Gazette and on the website of the Ministry for Economic Affairs.

F. REMEDIES AVAILABLE

Class members are entitled to full monetary compensation of their actual damage. Punitive damages are not allowed under Belgian law. Declaratory and injunctive relief are excluded.

G. SETTLEMENTS AND FINANCING

The Law does not deal specifically with the financing of class actions. The requirement that the class be represented by an authorized nonprofit entity seeks to limit any excessive legal fees.

Full contingency fee arrangements are prohibited under Belgian law, but success fees are allowed.

Third-party funding is not prohibited, as such, but is not commonly used in practice.

H. OTHER KEY CLASS ACTION ISSUES

The amendments proposed by the Bill: With only 11 class action cases launched since 2014 and only one decision on the merits, the current Belgian representative action legal framework did not have much success. The Bill aims to amend this framework not only to transpose the new Directive on Representative Actions but also to correct the flaws and weaknesses of the Law.

The main changes of the Bill are as follows:

- **Broadening of the material scope of class action**. Class actions will also be available in relation to: (i) commercial agency contracts, commercial cooperation contracts, distribution contracts, transportation contracts; (ii) consumers debts; (iii) sales of travels and related services; (iv) late payment of commercial transactions; and (v) provisions of EU law listed in Annex I to the new Directive on Representative Actions and the Belgian provisions implementing them.
- **Broadening of the reliefs available.** Class actions may be initiated in order to obtain cease-and-desist orders aiming at protecting the interest of consumers or SMEs in case of an alleged breach of certain specifically enumerated European and Belgian laws and regulations (see point B above and the extension of the material scope of class action suggested by the Bill as described in the bullet point above).
- **Modification of the requirements applicable to class representatives**. For class of consumers, the representative must be: (i) an entity approved by the Belgian Ministry in charge of consumer protection, which requires to be an independent and not insolvent (or subject to insolvency proceedings) nonprofit organization active on consumer protection for more than 12 months prior to approval application; or (ii) an entity in charge of representing the collective interest of consumers approved in another EU Member State. If the entity is not approved, it may still act as representative in a specific case subject to the verification by the Court that the other conditions listed under (i) above are satisfied. For class of SMEs, the representative must be an entity approved: (i) by the Belgian Ministry in charge for middle classes; or (ii) by another EU Member State, which requires it to be an independent and not insolvent (or subject to insolvency proceedings) nonprofit organization defending SMEs' interest for more than twelve months prior to approval application. If the entity is not approved, it may still act as representative in a specific case subject to the verification by the court that the conditions listed above are satisfied. Also, any interprofessional organization in charge of defending SME's interest that is a member of the council of self-employed and SMEs may act as class representative. The list of approved representatives for consumers or SMEs must be published on the website of the Federal public service for Economy. The approval of representatives must be reviewed by the competent Ministry at least every five years.
- **Cross-border class actions.** The representatives for consumers approved in Belgium are allowed to initiate class actions before jurisdictions of other EU Member States.
- **Transparency on the financing of class action**. The application for class action must indicate the intervention of any third-party funder(s), and of so it must: (i) identify it/them; and (ii) specify the funded amount.
- **Shortening of the admissibility phase**. Except if otherwise agreed between the parties, the debate on the admissibility must be conducted on an expedite basis within a maximum of six months from the filing of the application.
- **Modification relating to the composition of the class**. For the negotiation phase the parties have full flexibility and may decide between opt-in and opt-out (except for: (i) consumers non residing in Belgium; and (ii) SMEs not having their main establishment in Belgium, for which opt-in applies). For the litigation phase, the opt-in system applies and the prejudiced parties have four months from the day after the publication of the decision on defendant's liability to notify their decision to join the class.
- **Suspension of the statute of limitation for individual actions**. The statute of limitation for individual damage claims is suspended from the filing of the class action application until publication of the judgment.

At this stage, there is no visibility on the timing of the adoption of the Bill, but it can be reasonably expected that it will be adopted before the upcoming legislative elections in June 2024.

Netherlands

A. Brief Overview and History
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G. Settlements and Financing
H. Other Key Class Action Issues

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A. BRIEF OVERVIEW AND HISTORY

The Netherlands has become an important venue for the (international) collective settlement of claims. An important factor in this respect is the new Class Actions Act (*Wet afwikkeling massaschade in collectieve actie*, the "WAMCA"), which entered into force on January 1, 2020. This act has broadened the scope of section 3:305a Dutch Civil Code (the "DCC") by enabling representative entities to bring damages claims on behalf of (international) parties in a class action before any district court in the Netherlands. The WAMCA introduced a central public register in which all pending collective actions are required to be recorded (Central Registry). The claim organization must submit a copy of the writ of summons to the court registry and the Central registry within two days after the service of the writ of summons. It follows from the Central Registry that an increasing number of collective proceedings have been initiated over the past two years in the Netherlands.

Prior to the WAMCA, there was no possibility to seek monetary damages in a collective action. The representative entity could merely ask the court for a declaratory judgment regarding the liability of the defendant or seek injunctive relief. A declaratory judgment could then be used as a basis for claiming damages in individual proceedings or for a collective settlement pursuant to the Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*, the "WCAM"). Although the Netherlands was already an attractive forum for facilitating collective settlement of mass claims through the WCAM, the entry into force of the WAMCA—allowing damages to be claimed by the representative entity as well—made the Netherlands the leading EU forum for collective redress.

High-profile collective actions that have been initiated before the Dutch courts include a case against Trafigura in connection with the toxic waste dump in Ivory Coast (*Probo Koala*) and a case against BP in connection with the Deepwater Horizon disaster in the Gulf of Mexico. A collective action against Fortis in connection with losses incurred by its shareholders in 2018 resulted in a massive €1.2 billion (USD$1.3 billion) settlement, making it one of the highest settlements worldwide. Another high-profile class action is the case against Royal Dutch Shell ("RDS"), in which the environmental NGO "Milieudefensie," sued RDS, and is looking for an order to drastically reduce RDS's greenhouse gas emissions in line with international climate goals. The district court of The Hague awarded the claim and ruled that RDS had a duty of care to reduce its carbon emissions in accordance with the Paris Climate Agreement's objectives. This judgment is a landmark case for climate litigation, and is currently being appealed at the The Hague Court of Appeal.

Besides collective actions and/or settlements initiated by representative entities under the WAMCA or WCAM, collective

claims can also be brought before the court by a special purpose vehicle to which claims are assigned or powers of attorney to act on behalf of the aggrieved parties have been granted ("group action"). In recent years, many antitrust follow-on claims have been brought using the assignor-model.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The collective action for damages and the collective settlement apply to all civil law subject matters, including claims relating to consumer, securities, and competition law. The new collective action regime only applies to class actions initiated on or after January 1, 2020, and that relate to events that took place on or after November 15, 2016. In these class actions, the representative entity is allowed to also claim damages on behalf of the aggrieved parties.

The old collective action regime will continue to apply to actions relating to events that took place before November 15, 2016. Where this regime is still applicable, the representative entity will have to ask the Dutch court for a declaratory judgment regarding the liability of the defendant. If the liability of the defendant is established by the court, each aggrieved party can then separately bring its own claim for compensation on that basis or the parties could try to reach a collective settlement pursuant to the WCAM. Historically, Dutch Courts assumed jurisdiction without much hesitation under the old regime. Typically, jurisdiction would be achieved by including one Dutch subsidiary who would then function as anchor defendant for other defendants.

Collective settlement proceedings enable the parties to a settlement agreement to jointly ask the Dutch court to declare the settlement binding on all aggrieved persons on an opt-out basis. These proceedings have proven useful in cases involving multiple jurisdictions, as the Dutch court has in the past declared settlement agreements binding on aggrieved parties not residing in the Netherlands, notably in *Shell* (2009) and *Converium* (2012). Both cases involved financial losses of shareholders allegedly caused by misleading statements of the companies in a certain timeframe. In *Shell*, one of the two Shell entities was established in the Netherlands and its stock was listed on the Amsterdam Stock Exchange. The majority of the aggrieved shareholders did not reside in the Netherlands during the relevant period. In *Converium*, both involved entities were Swiss and neither had its stock listed on the Amsterdam Stock Exchange. Only a very small percentage of the stockholders resided in the Netherlands during the relevant period. In both cases, the Dutch court accepted international jurisdiction to hear the case.

The new WAMCA provides that collective actions must be sufficiently closely connected to the Dutch jurisdiction (the scope rule). This is the case if: the majority of the potential claimants are domiciled in the Netherlands; the defendant is domiciled in the Netherlands and additional circumstances show a sufficiently close link to the Dutch jurisdiction; or the event from which the damage resulted took place in the Netherlands. In spite of the scope rule, case law demonstrates that Dutch courts assume jurisdiction very swiftly. Consequently, the Netherlands has become a viable gateway for the settlement of cross-border claims on the basis of both the WCAM and WAMCA.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

A claim organization representing a certain group of similar interests may initiate a collective action. Such claim organization can only be a foundation (*stichting*) or association (*vereniging*) with full legal capacity. Section 3:305a DCC sets certain standards for representative entities, which must be met in order for the representative entity to have standing. The requirements mainly concern transparency and governance of representative entities, but also the requirement that the representative entity has sufficient resources to bear the costs of bringing a class action.

This requirement applies if the proceedings are self-funded by the representative entity, but also if a third-party funder is involved. For purposes of reviewing the representative entity's funding structure, the court may request disclosure of funding agreement. While third-party funding is allowed, the representative entity should have the final word in any decisions concerning the collective action and a possible settlement. For the purpose of assessing—*ex officio*—the degree of influence a possible third-party funder may have on the proceedings or on the representative entity, the court can also request and review the financing agreement in this context.

The representative entity will only have standing if the claim to be instigated has a sufficient connection to the Netherlands, which is true if the majority of the aggrieved parties and/or the defendant reside(s) in the Netherlands or if the event(s) giving rise to the damage occurred in the Netherlands and there are additional circumstances that point towards a sufficient connection to the Netherlands. Furthermore, the representative entity does not have standing if it has not made sufficient efforts to reach a settlement with the defendant before starting the class action. There are additional requirements for the courts to accept jurisdiction, such as plausibility that the collective action will be more efficient and more effective than instigating individual proceedings.

If there is more than one representative entity bringing a collective action in relation to the same subject matter, the different actions will be joined and the court will appoint an Exclusive Representative to represent the interests of all the aggrieved parties in the action.

A collective action can also be brought by the State and governmental bodies, as well as by European consumer organizations placed on a specified list.

D. KEY PROCEDURAL REQUIREMENTS

Dutch law does not provide defined requirements that must be met to certify a class. However, for an entity to be allowed to bring a representative collective action, the entity must be sufficiently representative. This requirement will generally be met if an entity's articles of association provide that it seeks to protect the interests of the group of the aggrieved persons. In addition, the new standards laid down in section 3:305a DCC for representative entities (mainly concerning transparency and governance of representative entities) must be met. The interests of the represented aggrieved parties must also be similar.

The requirement of representativeness is similarly important in class settlement proceedings. A group of aggrieved parties can establish an association or foundation which, pursuant to its articles of association, represents their interests. This may be the same entity that initiated legal proceedings in the representative collective action.

E. BINDING OTHERS

For proceedings under the new collective action regime, the court will offer aggrieved parties residing in the Netherlands the option to opt out of the proceedings. However, unless decided otherwise by the court, aggrieved parties who are not domiciled in the Netherlands will have to expressly opt in to the collective action for a judgment to have a binding effect on them. Parties will be able to request the court to order that the opt out mechanism also applies to foreign aggrieved parties in the interest of, for example, finality. Under the old collective action regime, each individual party has to commence its own separate action to benefit from the court decision in the proceedings brought against the defendant by the representative entity.

In collective settlement proceedings, once a settlement is reached between the representative entity and the defendant, the parties to the settlement agreement must submit a formal request to the Amsterdam Court of Appeal to declare the settlement binding. The Court of Appeal then schedules a hearing where the parties, the intended beneficiaries of the settlement, and other interested parties are heard. The parties bringing the proceedings must notify all known interested parties in writing in accordance with applicable treaties, regulations, rules of civil procedure and, usually, specific instructions from the Court of Appeal. These instructions can include the publication of advertisements in newspapers.

Once the Court of Appeal declares the settlement agreement binding, the final terms and conditions must be published as specified by the Court of Appeal. The Court of Appeal decides upon a period of time of at least a year during which the intended beneficiaries can file a claim, pursuant to which they are entitled to receive compensation under the settlement. Intended beneficiaries also have the option to opt out of the settlement within a court-set period of at least three months.

The WAMCA provides more room for reaching a "voluntary" collective settlement. Under the WAMCA, the court can order both the representative entity and the defendants to submit proposals for a collective settlement of damages. Based on such proposals, the court can establish a binding collective settlement of damages.

If the parties reach a settlement during the procedure, the same conditions as settlements under the WCAM will apply.

F. REMEDIES AVAILABLE

For collective actions filed after January 1, 2020, relating to an event or events which occurred on or after November 15, 2016, all forms of relief, including damages, can be claimed.

There is no rule that prohibits injunctive relief proceedings on behalf of a group of aggrieved parties, however, the case should be suitable for such proceedings. As mentioned above under the new regime, the main aim of collective actions will be to reach a collective settlement, either voluntarily between the parties to the proceedings or by decision of the court on the basis of the WCAM.

As mentioned above, for collective actions filed before January 1, 2020, and/or which relate to an event or events occurring before November 15, 2016, the representative entity cannot ask the Dutch court for compensation of damages in a collective claim but only for a declaratory judgment regarding the liability of the defendant. In such cases the old collective action regime applies.

Dutch law generally provides that all damages are recoverable without any specific limit. However, the concept of punitive damages as applied in the United States is unknown in the Netherlands. While there may be some damages that could be considered punitive because they go beyond compensation alone, it is not possible to claim punitive damages in Dutch proceedings.

G. SETTLEMENTS AND FINANCING

Funding of the representative entity is usually provided by the aggrieved parties or a third party. It is possible for a representative entity to agree on a reasonable success fee with the parties it represents.

Pursuant to the ethical rules applicable to Dutch lawyers, fee arrangements that are contingent on the outcome of the proceedings are only permitted to a very limited extent. As a result, lawyer fees for the large part cannot be paid from the proceeds of a collective claim or settlement.

In *Converium*, the Amsterdam Court of Appeal held that in the context of determining the fairness of a class settlement, the court can take into account customary U.S. fee practices if U.S. law firms are involved and the legal services provided by them were predominantly rendered in the United States. It subsequently held that a fee of 20% of the settlement amount was not unreasonable.

There are no rules prohibiting third-party funding as long as the independence of the representative entity is not compromised in any way.

H. OTHER KEY CLASS ACTION ISSUES

The "New Deal for Consumers" introduced by the European Commission, which includes a proposal for the directive on representative actions for the protection of the collective interests of consumers ("Directive"), also provides for a system to obtain collective redress in a mass consumer harm situation. The Directive imposes the obligation on Member States to: (i) introduce a consumer collective redress action; and (ii) establish a list of representative entities that can bring cross-border consumer collective actions. Only representative entities on the list can commence collective actions for consumers in another Member State.

As a result, the Dutch new collective action regime was amended as per June 25, 2023, bringing it in line with the Directive. These amendments include, among other things, barring a representative entity from bringing a consumer class action against a competitor of its funder or against a party on which its funder depends. The rationale behind this is that a competitor could have an economic interest in the outcome of the collective action that does not correspond to the interest of the consumers for whom the collective action is brought.
In addition, to be designated by the Dutch Minister of legal protection as a Dutch representative entity to bring consumer collective actions in another Member State, the representative entity must meet certain (additional) requirements such as that: (i) the representative entity has actually performed activities for at least 12 months to protect the consumer interests concerned; (ii) the representative entity has not been declared bankrupt and that no petition for bankruptcy is pending against it nor that a suspension of payments has been granted to the entity; and (iii) the representative entity must disclose its general sources of funding.

England and Wales

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A. BRIEF OVERVIEW AND HISTORY

The English courts are handling an increasing number of high-profile group litigation actions. Claims relating to employment, product liability, financial products, antitrust, and personal injury continue to be mainstays of group litigation in the UK, but in recent years we have also seen a significant growth in both data-related and Environmental, Social & Governance ("ESG") related group actions.

These trends look to continue. With contingency fee arrangements, damages based agreements, and legal expense insurance all permitted and fairly common in English court litigation, the litigation funding market is booming. Litigation funder assets in the UK have significantly increased in the last decade, from just under £200 million in 2011/2012 to £2.2 billion in 2020/2021. Claimant-focused law firms have also spotted the opportunity, with a number of traditional U.S. plaintiff firms establishing UK outposts, and UK-based claimant law firms gaining expertise with these sorts of claims.

As is common in the United States and other markets in which class action regimes are longer established, claimant law firms are working hand in hand with litigation funders to identify potential causes of action and then advertise for and build books of potential claimants, prior to the claim itself being filed. With advertisements on the London Underground, national newspapers, and social media, they are recruiting interested or indicative claimants, to illustrate the viability of a claim to the court. They devise a litigation plan—including funding, communication and procedural steps—and drive the case forward.

This combination of claimant law firms and funders are also seeing export opportunities, looking to build on the success of existing judgments in the United States or elsewhere, and exporting their case theories and evidence directly to the UK on behalf of claimants based here. Local experts that can speak to arguments that have already been established in other jurisdictions are also being actively sought.

Three bespoke procedures are available for group actions before the courts of England and Wales: (i) collective proceedings in the Competition Appeal Tribunal ("CAT"); (ii) representative proceedings in the High Court; and (iii) group litigation orders ("GLOs") in the High Court. The English courts also have a number of procedural tools which allow similar or related claims by multiple claimants to be case managed and tried together on an *ad hoc* basis, but which are not covered in this Guide.

Collective Proceedings

In October 2015, the Consumer Rights Act 2015 significantly enhanced collective actions for infringements of competition

law. A collective action can now be brought in the CAT by a class representative:

- On an opt-in or an opt-out basis;
- On behalf of a class comprised of consumers, businesses, or any other group of claimants; and
- Formulated either as a standalone claim for breach of competition law or as a "follow on" claim (being an action to recover damages following on from a decision of a relevant competition authority).

The first class action to be certified under this new regime was filed in September 2016 against Mastercard by Walter Merricks, the former Chief Ombudsman of the Financial Ombudsman Service, seeking £14 billion on behalf of approximately 46 million UK consumers. The action follows a long-running legal battle between Mastercard and the European Commission and is based on a European Court of Justice ruling that Mastercard breached competition law by imposing unlawful interchange fees on cross-border credit and debit card payment transactions. The class action alleges that this cost was passed on by retailers to consumers in the form of higher prices for goods and services.

Mr. Merricks' application for the claim to be certified as an opt-out collective action was initially rejected by the CAT on the basis that the claims were not suitable for an award of aggregate damages.[1] On appeal, the Court of Appeal overturned the CAT's decision on the basis that the CAT had set the bar too high for the initial certification stage by effectively conducting a "mini-trial"; the class representative only has to demonstrate that the claim has a real prospect of success.[2] This decision was upheld by the Supreme Court in a judgment which clarified and simplified the threshold test for certification.[3] The Merricks CPO was eventually certified in August 2021.

As anticipated, the Merricks CPO has encouraged and inspired other claimant groups who had been waiting and watching the English court's developing approach to opt-out class actions before the CAT. Thirteen new applications for CPOs were made in 2022 alone, and the CAT has now certified class claims against major financial institutions, rail companies, global tech companies and telecommunications providers.

Representative Proceedings

Civil Procedure Rule ("CPR") 19.8 empowers a representative claimant to bring a claim in the High Court on its own behalf and on behalf of any person that has the "same interest" in the relevant claim. A representative action can be brought on an opt-in or opt-out basis, and is potentially available whatever the underlying cause of action.

As is common in the United States and other markets in which class action regimes are longer established, claimant law firms are working hand in hand with litigation funders to identify potential causes of action and then advertise for and build books of potential claimants, prior to the claim itself being filed.

The "same interest" requirement has historically been interpreted narrowly, making this an ineffective mechanism for most consumer class claims. The English courts have, however, recently opened the door to this mechanism being used for opt-out class actions in appropriate circumstances. Although in *Google LLC v Lloyd* [2021] UKSC 50 the Supreme Court ultimately found that a claim brought on behalf of 4 million iPhone

users alleging that Google had collated and misused their personal data was not suitable to proceed as a representative action pursuant to CPR 19.8, the court confirmed that:

- CPR 19.8 did in principle facilitate opt-out class claims. It was not necessary for members of the represented class to opt in to the representative action; indeed, a person could be a member of the represented class—and bound by the result—without even being aware that the claim was being brought.
- Representative actions would not typically be suitable for claims where individual claimants suffered different loss (unless it could be calculated on a basis that was common to all members of the class). However, a bifurcated process might be appropriate, in which issues of liability would be dealt with on a class-wide basis and then individualized issues such as damages would be determined in a series of mini-trials.

It remains to be seen whether this will encourage the use of representative proceedings for class claims outside the antitrust sphere. Subsequent judgments have provided mixed indications. In *Commission Recovery Ltd v Marks and Clerk LLP* [2023] EWHC 398 (Comm) the High Court approved a representative action in respect of alleged secret commissions even though the size of the class and its precise composition were uncertain at the time of the application. In contrast, in *Wirral Council v Indivior Plc and others* [2023] EWHC 3114 (Comm), the High Court rejected an attempt to try "common issues" by way of representative proceedings (with individualized issues such as standing to sue, causation, and quantum excluded from the claim), on the basis that it would give the court greater flexibility if the proceedings were brought as individual claims case managed together.

Group Litigation Orders

The English court may also make a GLO in respect of claims (whatever their underlying cause(s) of action) that give rise to common or related issues of fact or law. This formal case management regime requires claimants to opt in (usually by being entered on a group register by a particular date), and judgment on any GLO issues will typically then bind the parties to all other claims on the group register.

This mechanism is proving popular with claimants, funders, and claimant-focused law firms. In recent years, the High Court has seen an increasing number of high-profile collective actions brought under the GLO regime. These include the Volkswagen emissions litigation,[4] the first UK "shareholder class action" in the Lloyds/HBOS litigation,[5] claims against a number of multinational businesses following environmental incidents,[6] and an increasing body of claims relating to mass data breaches.[7]

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Collective Proceedings in the CAT are limited to alleged infringements of competition law. Following reforms in 2015, Collective Proceedings are no longer restricted to consumer claims and follow on actions arising out of liability decisions of the European Commission. A Collective Proceeding can now be brought on a standalone or follow on basis, on behalf of a class comprised of consumers, businesses, or any other claimants.

In the High Court, there are no subject matter limitations on Representative Proceedings or GLOs. Accordingly, various types of claims have been brought using these mechanisms, including claims alleging personal injury and negligence, pensions matters, product liability disputes, environmental issues, financial services matters and, increasingly, issues relating to ESG and to data privacy and data breach.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Collective Proceedings

A class member or a third-party representative (where the CAT authorizes it to do so) can seek a Collective Proceedings Order to bring a claim on a representative basis in the CAT. To be certified the claims must meet the tests for eligibility and authorization (see Section D below).

Representative Proceedings

Representative Proceedings can be brought where more than one person has the "same interest" in a claim. A claim can

be issued on a representative basis—there is no need for a certification or approval stage—but such claims often face applications to strike them out on the basis that they are not suitable to be brought as a Representative Proceeding, which can in effect operate as a reverse certification process.

Group Litigation Orders

A GLO requires only that more than one claimant has a cause of action raising common or related issues of fact or law. The GLO can be applied for by either the claimants seeking to bring a group action, or the defendants facing multiple claims that they wish to have formally case managed together.

D. KEY PROCEDURAL REQUIREMENTS

Collective Proceedings

The CAT will consider whether to certify a claim as a Collective Proceeding by reference to the tests for eligibility and authorization. The claims will be eligible if the Tribunal is satisfied that they are brought on behalf of an identifiable class of persons, raise common issues, and are suitable to be brought as collective proceedings (taking into account, for example, the costs and benefits of doing so, the size and nature of the class, and whether aggregate damages can be awarded). The test for authorization is whether the CAT considers it just and reasonable for the representative to act for the class (or subclass), taking into account factors such as whether the proposed representative:

- Can fairly and adequately act in the interests of the class members;
- Has any material conflict of interest with the class members;
- Has a plan as to how it will govern and consult with the class; and
- Can pay the defendant's recoverable costs if ordered to do so.

If the CAT allows class proceedings to progress, the CPO will authorize a class representative, identify the class and the claims that are certified, and specify whether the proceedings are opt-in or opt-out along with the manner for doing so. There is no minimum number of class members.

Representative Proceedings

Representative actions must pass the "same interest" test. A claimant does not require the permission of the court to bring a claim as a representative action; a claimant can appoint themselves as a representative even if the purported class members have not authorized this.

Group Litigation Orders

Parties can apply for a GLO or the court may make an order of its own initiative. A GLO application can be made at any time before or after the relevant claims have been issued. If the GLO is granted, the court will specify the issues covered by the GLO and provide directions for the establishment of a group register on which the claims managed under the GLO will be entered.

E. BINDING OTHERS

Collective Proceedings

Judgments and orders in Collective Proceedings are binding on members of the represented class. The CAT has both opt-in and opt-out procedures, and the CAT will decide, at the outset of the class proceedings, how to manage the claim and therefore who will fall into the class bound by any orders or judgments:

- Opt-in proceedings are brought and maintained on behalf of each class member who opts in by notifying the class representative that their claim should be included.
- Opt-out proceedings are maintained on behalf of each member of the defined class domiciled in the UK save for those who opt out by notifying the class representative. Class members who are not domiciled in the UK must specifically opt in to have their claim included in the proceedings. Where a class member opts out (or where a foreign class member does not opt in), the proceedings are not maintained on their behalf and such persons will not be bound by any subsequent judgment in the proceedings.

Representative Proceedings

In representative actions, judgments and orders bind "all persons represented" (who need not be a party to the actions), albeit they are enforceable only with the court's permission.

Group Litigation Orders

The GLO regime is an opt-in regime. The court ultimately controls whether claims are added to or removed from the group register, which records who has opted into the claim. Any judgment or order in a claim on the group register in respect of any GLO issues will bind the parties to all other claims on that register, unless the court orders otherwise.

F. REMEDIES AVAILABLE

Both the High Court and the CAT have the power to grant injunctive relief and/or to award damages.

Under English law, damages typically restore the injured party to their position before the tortious act. Unlike in the United States, there is no equivalent to "treble" damages, and punitive damages are typically not available.

Declaratory relief is available in the High Court, but not in the CAT.

G. SETTLEMENTS AND FINANCING

Settlements

Any settlement of opt-out Collective Proceedings must be approved by the CAT. Once approved, it is binding on all class members unless they have opted out within the specified time. The opt-out nature of the settlement will apply only to claimants domiciled in the UK, but claimants outside the jurisdiction are typically able to opt into it. In December 2023, the CAT approved the first application to settle in a Collective Proceeding since the regime began, in *Case 1339/7/7/20 Mark McLaren Class Representative Limited. v MOL (Europe Africa) Ltd and others* (the case continues against the remaining Defendants).

Parties can settle Representative Proceedings and proceedings subject to a GLO without court authorization, although the parties must inform the court of settlements in pending proceedings.

Contingency Fee Arrangements and Third-Party Funding

Contingency fee arrangements are generally permitted under English law. One type of contingency fee arrangement, the "damages-based agreement," is unenforceable in opt-out collective proceedings in the CAT, but can be used in opt-in cases.

Third-party litigation funding is also allowed, and third-party funders can earn a share of litigation proceeds, unless the funding arrangement constitutes champerty or maintenance. As set out in Section A above, the litigation funding market is booming in the UK. Third party funding is common in group claims, and is a key driver of their growing number, sophistication and complexity.

The decision of the Supreme Court in July 2023 in *R (PACCAR Inc and others) v Competition Appeal Tribunal and others*[8] cast doubt over the enforceability of a number of existing funding arrangements. The court found that litigation funding arrangements where the funder is entitled to recover a share or percentage of any damages recovered by the claimants are "damages-based agreements" and therefore: (i) are not permitted to fund opt-out Collective Proceedings; and (ii) to be enforceable in respect of any claim, must comply with the specific requirements of the Damages Based Agreement Regulations 2013. This has led to a series of satellite applications asking the court to consider whether existing and in some cases restructured funding arrangements are compliant.

ENDNOTES

1 *Walter Merricks CBE v Mastercard Incorporated and others* [2017] CAT 16

2 *Walter Merricks CBE v Mastercard Incorporated and others* [2019] EWCA Civ 674

3 *Mastercard Incorporated and others v Walter Merricks CBE* [2020] UKSC 51

4 The VW NOx Emissions Group Litigation

5 Lloyds/HBOS Group Litigation

6 The Bille and Ogale Group Litigation; The Nchanga Copper Mine Group Litigation

7 The British Airways Data Event Group Litigation; *Wm Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12

8 [2023] UKSC 280

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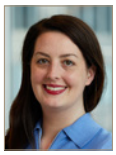

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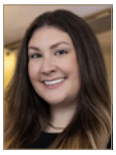

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