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INDIVIDUAL RIGHTS, COLLECTIVE ENFORCEMENT?

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INTRODUCTION: COLLECTIVE INTERESTS , ‘PRÊT À PORTER’ JUSTICE?

Individuals expect to be treated as such. We all want to be considered unique persons with unique characters (and at moments of introspection we may also admit to having character flaws), leading unique lives with unique sets of values and goals. Our sense of justice is modelled accordingly, so we may expect the institutions of the law to treat us as individuals as well.

The reality is, however, that the law can hardly ever live up to this expectation. Take the idea in law that like cases are to be treated alike. Strictly speaking, this fundamental idea may in fact lead courts away from the individual into the direction of a more or less objective reflection on the case at hand rather than on the individual person involved. By comparing and distinguishing cases the person is thought to be treated fairly. In fact, the judicial process aims at categorizing the case fairly.

Moreover, in regulating society, the legislature attempts to balance individual and collective interests. In doing so, it usually categorises individuals into groups of individuals, to attach certain rules to certain groups. Tax law and social security law are notable examples of this balancing act: the tax burden is assessed on the basis of abstract properties that can be applied relatively easily to massive numbers of persons. Social security usually sticks to a system of fixed amounts in benefits and fixed categories of beneficiaries, in order to keep the cost of administration and the likelihood of inequalities at a minimum. Such systems of distribution of wealth operate on the basis of aggregated data, fixed categories, structured templates and protocols. In essence, the law tries to categorize individuals into groups in order to deal with the need for mass justice effectively and swiftly, whilst providing an adequate level of individual justice.

Why should settling mass claims for compensation and redress in private law be any different from this typology? One reason might be that the framework for adjudicating such claims (tort law, contract law) is not primarily concerned with distributing, let alone redistributing, but rather with redressing wrongs committed against individuals. From a historical legal point of view, this might be true. However, it seems a position difficult to maintain in modern society. Try redressing ‘scattered damage’ (also referred

to as 'trifle damage') caused by breach of competition law – say, by horizontal price cartels – and resulting in slight price increases in consumer products. Such redress will not be affected by individual consumers, if they are left to individually access the institutions of justice. The costs outweigh the prospect of any benefit, and that would probably result in a sub-optimal number of claims reaching the pinnacle of the so-called conflict pyramid. Under those circumstances, individual access to justice may not be at par with effective resolution and an optimal level of compliance. And if claims are indeed substantial and economically viable, bringing them all to court at once may clog courts. The handling of similar claims in some sort of consolidated procedure may then be a viable alternative, provided that – again – collective interests and individual interests are balanced in a transparent procedure. Admittedly, any system of collective claims settlement has to balance the individual interests, the collective interest and the interest of the defendant (more often than not: industry, insurance, employers, manufacturers, government, et cetera).

This is not a new dilemma, but what is new is that in recent years both the European scholarly and legislative debate on collective access to civil justice have grown more intense. Not only have there been attempts at consolidating the masses and doing justice to individuals simultaneously (for example: in England and Wales, the Group Litigation Order 1999; in Germany, the 'Kapitalanleger-Musterverfahrensgesetz (KapMuG)' 2005; in the Netherlands, the 'Wet Collectieve Afwikkeling Massaschade' 2005; in Sweden, the 'Lag om grupprättegång' 2003), but the European Union seems to want to move forward as well. Recently, suggestions of introducing some sort of class action in consumer issues and in the domain of competition law enforcement have been voiced by the European Commission.

This issue of the *Erasmus Law Review* adds another piece to the puzzle. The papers that you find in this issue bear witness to the delicate balancing act between 'prêt à porter' justice and 'haute couture' justice, made to fit the individual. Roger van den Bergh and Louis Visscher analyse the collective approach from a law and economics perspective; they turn to the fundamental matter of goals of private enforcement in the European legal order and they draw attention to the dangers that too much or too little private enforcement can cause. Moreover, they raise the problematic issue of accountability of the legal-service providers directing collective claims and make inventory of available instruments to balance the interests of the collective and their legal head man.

Andrea Pinna addresses private international law issues concerning US class actions within the European legal order. His paper is of relevance for the issue of the 'import' of US class actions and implicitly raises an interesting subject for further analysis: the awakening 'competition' between the US class-action model and a potential European group action. The paper by Van Houtte and Yi convincingly shows that mass-settlement endeavours

in international post-conflict situations struggle with perfectly similar problems of balancing as do civil courts in managing mass claims. Moreover, their paper demonstrates that 'prêt à porter' justice elicits particular standards of due process.

To conclude, we hope that this issue on collective claims will add to the debate on the right balance in European (private) law between individual right and collective enforcement. We thank the authors for their contributions to this issue and the anonymous reviewers for their comments.

Willem van Boom

THE PREVENTIVE FUNCTION OF COLLECTIVE ACTIONS FOR DAMAGES IN CONSUMER LAW

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Abstract

From a deterrence perspective, private enforcement of consumer law can be insufficient for several reasons. Individual consumers may find it too costly to start a lawsuit ('rational apathy') or they may not even know that an infringement has occurred ('information asymmetry'). If public enforcement is not available, or if the budget of public authorities is limited and used for other purposes, the problem of under-enforcement will persist. Collective actions may be able to mitigate these problems. If many consumers can join their claims, the costs per claim decrease so that the rational apathy problem might be overcome. If consumer associations have standing, they might be able to acquire better information regarding infringements than individual consumers are able to do. However, collective actions pose problems of their own. The leading plaintiff or the organisation issuing the collective action could try to advance its own interests, rather than furthering overall consumer interests. Moreover, a large-scale lawsuit might harm the reputation of the defendant and thus create the possibility of 'frivolous suits'. The paper discusses a number of possibilities to overcome these problems. Ultimately, private and public enforcement will need to co-exist, since collective actions are not a perfect instrument to achieve optimal deterrence.

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1 Introduction

An extensive body of consumer protection laws was enacted in European countries in the 1980s and '90s.¹ Large parts of consumer law have been harmonised by European regulations and directives.² Many commentators agree that the existing rules of substantive law provide adequate protection to consumers active in the marketplace. Problems are encountered mainly in the field of ensuring compliance with consumer protection laws; a general criticism is that these laws are insufficiently enforced.³ Even though one may disagree with the first view, in particular when consumer protection rules are analysed through the lenses of economic analysis of law,⁴ lack of enforcement does indeed currently seem to be the major challenge for improving consumer protection in European countries.

There are many reasons for the insufficient enforcement of consumer rights, particularly in cases of harm inflicted upon consumers in general. Firstly, private enforcement can fail because individual claims are costly, time consuming and risky, due to their uncertain results.⁵ Moreover, the remedies awarded in the case of violation of consumer rights could be inadequate.⁶ Injunctive actions may not be sufficient to deter conduct harming consumers⁷ and damage awards can remain under-compensatory. Secondly, until recently public enforcement of consumer protection laws

¹ See S. Weatherill, *EC Consumer Law and Policy* (Cheltenham: Edward Elgar 2005).

² An overview of the 'consumer acquis' is given in the annex of Regulation 2006/2004, OJ L 364, 9.12.2004, at 11. To this list must be added Directive 2005/29/EC on unfair business-to-consumer practices (OJ L 149, 11.6.2005, at 22-39).

³ See S. Deutch, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model', 27 *Journal of Consumer Policy* 179 (2004) and the contributions in W. van Boom and M. Loos, *Collective Enforcement of Consumer Law; Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Groningen: Europa Law Publishing 2007).

⁴ For a summary of the most important criticisms, see R.J. Van den Bergh, 'Wer schützt die europäischen Verbraucher vor dem Brüsseler Verbraucherschutz? Zu den möglichen adwersen Effekten der europäischen Richtlinien zum Schutze des Verbrauchers', in C. Ott und H.-B. Schaefer (eds.) *Effiziente Verhaltenssteuerung und Kooperation im Zivilrecht* (Tübingen: Mohr Siebeck 1997) 77-102.

⁵ S. Deutch, above n. 3 at 180.

⁶ W. D. Slawson 'Mass Contracts: Lawful Fraud in California', 48 *Southern California Law Review* (1974) 1 at 6.

⁷ H-W. Micklitz and A. Stadler 'The Development of Collective Legal Actions in Europe, especially in German Civil Procedure', 17 *European Business Law Review* 1473 (2006) at 1475.

was not available in a number of European countries.⁸ Regulation 2006/2004 has forced EU member states to establish public enforcement authorities for ensuring that cross-border infringements of consumer protection laws will be adequately sanctioned. But even the combined use of individual law suits and public enforcement may still fall short of ensuring an adequate level of enforcement of consumer protection laws. Public authorities face budget constraints and government priority considerations may divert resources to other enforcement activities. Individual claims could remain unattractive because the private costs of initiating legal proceedings tend to exceed the expected private benefits. In addition, individual victims might prefer to take a free ride on the efforts of those consumers who decide to act as plaintiffs. The combined effect of rational apathy and free-riding will be a sub-optimal level of enforcement.

Several possibilities exist to enhance the enforcement of consumer protection laws. A first option is the institution of a test case procedure. On request of parties or by decision of the court, the common issues of several claims can be identified and decided in a single trial. Such procedures are available in Germany, Austria and the United Kingdom; they are not discussed in this paper.⁹ A second option is to create the possibility of collective action. A particular form of collective action, the 'American style' class action, has been criticized because it puts a large burden on courts¹⁰ and could create scope for frivolous claims. In particular, the attorney acting as the class representative may bring an unfounded claim to induce the defendant company to accept a settlement out of court. For a bona fide large firm, the latter can be more advantageous than paying the costs of a prolonged and expensive litigation. Class actions have been criticised also for other reasons, which are not inherent in this particular enforcement mechanism, but characteristic of US law. Rather than the class action in itself, some traits of the American legal system seem to cause major problems; they include contingency fees, punitive damages and jury bias. Contingency fees might be an appropriate way of financing the costs of a collective action but are often seen as contrary to the ethical rules of the

⁸ Conversely, public enforcement has been the dominant enforcement mechanism in the field of competition law. See R. J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics. A Comparative Perspective* (London: Sweet & Maxwell 2006, 2nd ed.) at 325.

⁹ See for more information: J. Stuyck et al., *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Proceedings*, Final Report Study for the European Commission (2007) http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

¹⁰ M. Handler 'The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review', 71 *Columbia Law Review* (1971) 1 at 7.

legal profession.¹¹ Punitive damages are criticised because they lead to overcompensation, even though they may be an effective method to cope with the risk of under-enforcement due to the low probability of detecting infringements. Finally, the US jury system could create a bias, to the detriment of large commercial enterprises, and lead to the award of enormous compensation sums.

Even though the above criticisms should be taken seriously, one must avoid throwing the baby out with the bathwater. The challenge is to design collective actions in such a way that the problems of under-enforcement of consumer rights are solved, while at the same time the potential disadvantages of new enforcement mechanisms are minimized. To that end one should look at alternatives to the ‘American style’ class action. These can be either collective actions initiated by individual consumers but with different (‘European’) characteristics or collective actions initiated by representative bodies, such as consumer associations. Hereinafter the latter form of collective actions is discussed under the heading ‘representative actions’.

The structure of this paper is as follows. Section 2 will provide a brief overview of two different models of collective actions: collective claims initiated by an individual person or group of persons in the name of a group of harmed consumers, and representative actions initiated by consumer associations in the collective interests of consumers. A further distinction will be made depending on whether and how individual consumers decide to adhere to a collective claim (opt-in or opt-out). Sections 3 and 4 will then tackle the main research question of this paper: How should collective actions be designed to maximise their net advantages? To answer this question, there should be clarity about the objectives to be achieved by collective actions for damages. Discussions on public or private enforcement are often obscured by the lack of a clear definition of the goals. Both efficiency (deterrence of infringements of consumer protection laws) and corrective justice (compensation of harm inflicted upon consumers) occupy a prominent place in the debate on the goals of law enforcement. From the perspective of economic efficiency, the major goal of damages claims is to deter welfare-reducing infringements of consumer protection

¹¹ It is argued that contingency fees put the independence of the lawyers in jeopardy, since they get a personal interest in the case that may diverge from the clients’ interests. In the Law and Economics literature, the reply to this traditional criticism is that principal-agent problems also exist under hourly fees but manifest themselves in a different way (see F.H. Stephen and J.H. Love ‘Regulation of the Legal Profession’, in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics III*, (Cheltenham: Edward Elgar 2000) 986 at 1002). With respect to the opinions on the impact of contingency fees on the risks of early settlements and unmeritorious cases, see below in sections 4.1.-4.3.

laws. Therefore, the central question of this paper is whether collective actions may contribute to prevent infringements of consumer law. The goal of compensation (corrective justice) is discussed only so far as it is instrumental to achieve the deterrence goal, by increasing the size of the expected costs of law infringements. In section 3 we will explain the benefits of collective actions. The main benefits seem to be the possibilities of reducing the existing information asymmetry and solving the rational apathy problem on the side of individual consumers. In section 4 we will address the main criticisms that have been forwarded against a widespread use of collective actions. These include: the costs imposed on courts, problems connected with the way in which collective actions are financed, the risk of frivolous suits and opportunistic behaviour of representative bodies. We will show that both the expected size of the potential benefits and the seriousness of the potential disadvantages vary according to the model of collective action which has been adopted. Finally, section 5 will summarise the main results of the paper and suggest a number of questions for further research.

2 Types of collective action

Collective actions may be classified in different categories. Depending on who the plaintiff is, collective actions can be divided into two types: i) proceedings initiated by an individual claimant (or group of claimants) in the name of a group of consumers; ii) proceedings initiated by a body representing consumer interests, such as consumer associations which have received legal standing.¹² A subsequent differentiation can be made on the basis of the possibilities of consumers to either opt in or opt out. Under the first model, individuals, after having been appropriately informed about the infringement, must express the wish to participate in the proceedings. Under the latter model, individuals must assert their wish not to be bound by the outcome of the litigation. In principle, opting in or opting out is possible at all stages of the legal proceedings, for example before the trial has started or after a settlement has been reached. Individual decisions to opt in or opt out are not part of so-called mandatory class actions, which can be found in the US. Another distinction can be made, depending on the sanctions that can be imposed by courts. Many European countries allow actions for injunctive

¹² Similar distinctions are made by S. Deutch, above n. 3 and K. Viitanen, 'Enforcement of Consumers' Collective Interests by Regulatory Agencies in the Nordic countries' in: W. van Boom and M. Loos (eds.) *Collective Consumer Interests and How they Are Served Best in Europe: Legal aspects and policy issues on the border between private law and public policy* (Groningen: Europa Law Publishing (forthcoming June 2007)).

relief brought by consumer associations in particular fields of law (for example, in the area of fair trade practices). Conversely, only very few European countries presently have types of collective actions for damages. This paper discusses only the latter type of collective actions.

The best-known example of a private collective action for damages is the US class action. In this model, an individual consumer or a number of consumers with a common interest can file claims to obtain redress for the entire 'class' of consumers in one single action. Rule 23 of the Federal Rules of Civil Procedure enumerates four prerequisites for class actions: i) the number of members of the group must be very large so that joinder of all members is impracticable, ii) there are questions of law or fact common to all members of the class, iii) the claims of the representative parties are typical of the claims of the class, and iv) the representative parties will fairly and adequately protect the interests of the members of the class. Next, Rule 23 delineates three major categories suitable for class treatment. These are: i) the risk of inconsistent or varying adjudications with respect to individual members of the class or adjudications with respect to individual members which would as a practical matter be dispositive of the interests of individuals not parties in the legal proceedings, ii) the fact that the defendant has acted or refused to act on grounds generally applicable to the class, and iii) the finding of the court that the questions of law or fact common to the class predominate over any questions affecting only individual members of the class and that a class action is the best method for a fair and efficient adjudication of the controversy. In American class actions, the main remedy is the award of damages which compensate the members of the class for their losses. Often, very large damage awards are granted; enormous compensations are largely due to the jury system and the possibility of granting statutory treble damages and punitive damages.

In European countries, rules of procedural law do not generally allow a single individual or a number of individuals to sue without the prior consent of each member of the affected group. Many EU member states (including the United Kingdom, France, Germany, Belgium, the Netherlands and Sweden) have granted standing to private associations or public bodies, which can bring representative actions. However, these rights are mostly limited to obtain injunctive relief and sometimes disgorgement of unlawfully obtained profits (Germany). The vast majority of EU member states presently have no collective action for damages at all. However, some countries (including the United Kingdom, Sweden, Spain, Portugal and Lithuania) have adopted legislation in the field of procedural law to increase the effectiveness of private enforcement. This has led to the creation of new enforcement mechanisms which are somewhat similar to US-style class action, even though the discussion below will make it clear that they do not have the characteristics typical of the American legal procedure. A solution

closer to the American class action has been adopted in the Netherlands. Given its specific characteristics, it will be discussed in somewhat greater detail. Moreover, in other countries (Belgium, Finland,¹³ Denmark and Italy) proposals concerning the introduction of a representative collective action for damages have been submitted.

In the United Kingdom, collective actions for damages are available. In addition, specified bodies (allowed by the Foreign Secretary) are permitted to bring representative follow-on actions for infringement of competition law before the Competition Appeal Tribunal.¹⁴ In Sweden, collective actions for claiming compensation have been possible since the enactment of the Group Proceedings Act in 2003. Group actions are possible if they fulfil the general requirement that the facts are identical and that it is sensible to decide the disputes in a single trial. Collective actions can be initiated both by private individuals and organisations protecting citizens' interests or a public authority, such as the Consumer Ombudsman. An opt-in scheme has been chosen to form the group; as a consequence, only individuals who have adhered will be affected by the judgment.¹⁵ After three years of experience, 6 out of 7 cases were initiated by private parties.¹⁶

According to the Dutch Civil Code, a foundation or association with full legal capacity can institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests. The organisation has no standing if, in the given circumstances, it has not made sufficient attempts to achieve the objective of the action through consultation with the defendant. The organisations can sue both for an injunction and for damages regarding losses of the organisation itself, but not for compensatory damages regarding losses of the members of the group. The assessment of damages therefore has to be carried out in individual procedures. However, the collective action can result in a declaratory decision regarding the unlawfulness of the defendants' behaviour, which can be used in the individual procedures. Furthermore, the individual plaintiffs can authorize the organisation to collect the compensatory damages. This resembles a collective damages action, although it still has to be carried out in the name

¹³ The proposal has met with strong opposition from business pressure groups. See K. Viitanen, above n. 12.

¹⁴ Art. 47(B) of the Competition Act 1998. See Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business* (2007). <http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf>

¹⁵ K. Viitanen, above n. 12.

¹⁶ P.H. Lindblom and K. Norback *The Swedish Group Proceedings Act* (2006) 191 at 197.

<http://www.bmelv.de/nn_754188/SharedDocs/downloads/02erbraucherschutz/Markt/Verbraucherrechtstage/26-Nordback,templateId=raw,property=publicationFile.pdf/26-Nordback.pdf>.

of all individual plaintiffs. If not all plaintiffs are traceable or if more plaintiffs are likely to turn up in the future, these solutions are inadequate.

In July 2005 the latter problem led to a reform of the Dutch Civil Code. A defendant who has entered into a contract regarding the compensation of damages with a foundation or association possessing full legal capacity can request (jointly with the foundation or association) that the contract be declared binding by the court upon persons to whom the damage has been caused.¹⁷ The contract has to include a description of the group(s) of persons in whose favour the contract has been entered into, the number of persons belonging to this group, the compensation awarded to these persons (based on the group they belong to, i.e. damage scheduling) and the conditions with which these persons must comply to be eligible for compensation. Before it can declare the contract binding, the court has to assess the reasonableness of the amounts, the way in which the compensation can be received, whether the foundation or association is truly representative of consumers' interests and the financial security posed. If the contract is declared binding, victims will receive the agreed amount and they will be bound to the contract as if they had entered into it themselves. Victims who do not want to be bound by the contract (to try to collect complete damages in an individual procedure, for example) can opt out within a period of at least three months after a public announcement of the intended declaration.

3 Benefits of collective actions

Law and Economics literature provides arguments why private enforcement is sub-optimal to achieve the deterrence goal. Collective actions for damages are a potential remedy to the deficiencies of private enforcement by individual parties. These insights will be further explained in this section of the paper. Firstly, the main economic reasons why private enforcement is sub-optimal will be highlighted. In the literature, these arguments often lead

¹⁷ According to the Dutch legislator, in many US cases of mass damages the parties involved first reach a settlement and subsequently enter into a damages class action to ask the court to declare the settlement binding. The legislator therefore opted for the system of making a settlement contract binding, instead of introducing class actions for damages. In legal literature, it is argued that it is exactly the threat of the class action that might induce tortfeasors to settle in the first place. It therefore remains to be seen if the Dutch system is able to provide a well-functioning solution for mass damages cases, now that it relies on the cooperation of the defendant. In the Dutch DES-case, the settlement indeed was declared binding, see *Gerechtshof Amsterdam*, June 1 2006, *Nederlandse Jurisprudentie* 2006,461.

to the conclusion that public enforcement is necessary. However, before drawing this conclusion, one should investigate whether the problem of under-enforcement can be cured by improving the deterrent effect of private actions. Secondly, the economic benefits of collective actions will be explained. A good understanding of these benefits is necessary to see why, how and to what extent collective actions may cure the shortcomings of private enforcement by individual parties. It will be made clear throughout the analysis below that the achievement of better deterrence depends on the type of collective action (either initiated by individual parties or a representative body) and the specific design and modalities of collective actions (for example, the choice between an opt-out or opt-in scheme).

3.1 The shortcomings of private enforcement by individual parties

To enable a better understanding of the shortcomings of private enforcement of consumer law, a brief comparison with the ongoing discussion on the desirability of increased private enforcement of competition law is useful. This debate has revealed three main reasons why private enforcement may be sub-optimal: lack of information, rational apathy and free-riding. Firstly, one cannot rely only on private parties for discovering and proving infringements of competition law. Even though information advantages generally support private enforcement (for example, in the case of liability suffered by a single individual based on tort law)¹⁸, such benefits may not exist in the field of competition law. In cases of hard-core cartels (such as price-fixing), most consumers do not even realize that they have been harmed. Secondly, in cases of infringement of competition law, interests of individual consumers diverge from the general interest. Private parties will initiate proceedings only if the private benefits of doing so are higher than the private costs. In the field of competition law, this private cost-benefit calculus has no systematic relation with the social costs and benefits. The social costs also comprise the harm suffered by consumers who do not sue¹⁹

¹⁸ S. Shavell 'The Optimal Structure of Law Enforcement', 36 *The Journal of Law and Economics* 255 (1993) at 267.

¹⁹ It is well-known from price theory that monopoly creates two problems: (1) consumers have to pay more for the product, since the monopolist may charge a super-competitive price (price effect), and (2) consumers may purchase less of the product, even though additional purchases would be utility maximizing for them (allocation effect). The price effect of monopoly is a mere distribution from the producer to the consumer. However, the allocation effect causes a 'deadweight loss', which is not captured by the monopolist. Cartels and firms enjoying a dominant position cause deadweight losses, similar to the allocative efficiency of monopoly. To achieve optimal deterrence, these losses should be compensated to force the firms involved to internalize the negative welfare effects of their behaviour.

and other losses (rent-seeking)²⁰ that cannot be attributed to individual consumers. Even though it may be beneficial to society, individual consumers will not initiate enforcement actions, since potential plaintiffs are driven only by private gain, which could be lower than the expenses of their claims. From their point of view, not bringing any claim is perfectly rational; this problem is generally known as ‘rational apathy’. Finally, a system of private enforcement creates a free-riding problem. Every consumer who is a victim of an antitrust infringement has an interest to leave the enforcement efforts to other consumers, so that profits can be obtained without having to spend own resources. The free-riding problem will reduce the number of private actions below the level of enforcement that would be socially optimal.

In the field of consumer law, one cannot rely only on private actions to achieve an optimal level of enforcement either. The reasons are similar to those which apply in the field of competition law. Firstly, individual consumers may lack information on infringements of consumer protection laws. It can be difficult for individual consumers to recognize poor quality in markets characterized by serious information asymmetries. Examples include unsound investment advice by a financial consultant and non-transparent price calculations. It is also very difficult for consumers to assess whether manufacturers have obeyed safety regulations. Due to this information asymmetry, consumers may not start a lawsuit, even if the product they bought was defective. Consumers will often remain unaware of infringements before harm has occurred. For example, it could be very costly to check whether statements in advertisements are true or false. Also standard form contracts are usually signed without a prior reading of the contract terms, since the opportunity costs of time exceed the expected benefits from discovering harsh clauses.²¹

Secondly, there is a discrepancy between the private cost-benefit calculus of enforcement and the net social benefits. The social loss consists of the overall quality deterioration in markets plagued by information asymmetries. This social loss exceeds the private loss. If consumers have inadequate information to be able to distinguish beforehand between high-quality and low-quality products, while sellers do, then a case can be made for public enforcement. After all, consumers are only willing to pay a price based on the average quality, because they cannot assess the quality of any

²⁰ These are the costs incurred to obtain and preserve a monopoly position. These costs are a pure welfare loss that must be added to the deadweight loss of monopoly.

²¹ G. De Geest, ‘The Signing-Without-Reading Problem: An Analysis of the European Directive on Unfair Contract Terms’, in H.-B. Schäfer and H.-J. Lwowski (eds.), *Konsequenzen wirtschaftsrechtlicher Normen* (Wiesbaden: Deutsche Universitäts-Verlag 2002) 214.

particular product. High-quality products will be withdrawn from the market because the seller is not willing to accept only an average price. This withdrawal reduces the average quality remaining on the market, and consumers lower the price they are willing to pay accordingly. This process of 'adverse selection' continues until only products of the lowest quality are offered for sale.²² This problem appears in markets for second-hand products and in markets for consumer goods that are not bought regularly (restaurant services in tourist destinations, audio equipment) or the quality of which is difficult to assess (standard terms & conditions in contracts, professional services). To some extent, the market itself may cure these problems through the desire to build and maintain a good reputation. Trademarks and (honest) advertising may signal quality.²³ However, consumer protection laws will be necessary to guarantee the quality of both experience goods, which are not regularly bought, and credence goods, the quality of which cannot be assessed by buyers. The social benefits of enforcement consist of increased overall quality of consumer goods. The private benefits are much smaller and only comprise the increase in quality of the products that the individual consumer buys. Therefore, consumers suffer from rational apathy and the private incentive to sue is insufficient from a social point of view.

Incentives to file individual suits will be too low if the loss consists of trifling damage; the costs of the lawsuit may then even exceed the expected compensation.²⁴ An example is product liability. Product-related losses can have a diffuse character: many individual consumers suffer a relatively small loss but the total social losses are substantial. This could lead to the situation that no individual plaintiff will file a suit because his private costs are higher than the expected private benefits.²⁵ However, given the large overall losses, it is desirable that consumers sue because this will induce the manufacturer to avoid those losses.

²² G.A. Akerlof 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', 84 *Quarterly Journal of Economics* 488 (1970).

²³ P. Nelson 'Advertising as Information', 82 *Journal of Political Economy* 729 (1974).

²⁴ See W. H. van Boom, *Efficacious Enforcement in Contract and Tort* (Den Haag: Boom Juridische uitgevers 2006) at 17-18.

²⁵ The franchise in the European Directive on Products Liability intensifies the problem, because it bars claims on the basis of the Directive in case there is only property loss that does not exceed €500. Furthermore, the fact that much of the losses are covered by social and/or private insurance might strengthen the rational apathy with the consumers, even in cases where the individual loss might be substantial. This problem will be mitigated by the recourse claims that the insurance companies might start due to subrogation clauses in the insurance contracts. However, given that recourse claims are expensive, insurance companies might refrain from them in cases of relatively low losses, so that the problem will not be fully solved.

Finally, the free-rider problem hinders adequate enforcement of consumer protection rules. Every individual victim prefers other victims to sue the injurer, so that these others will incur costs and run the risk of losing the trial. If the plaintiff(s) win(s), victims who were not involved in the trial might benefit from the outcome of the trial all the same. This is clearest in cases where the plaintiff(s) has sued for an injunction or some kind of reform (e.g. improved product safety requirements). However, the free-rider problem is also present in cases where the plaintiff(s) have sued for damages. If legal and/or factual questions have been answered in the trial, the costs for other victims to start a case of their own will be lower. If all (or too many) victims behave as a free rider, there will be no lawsuit to start with and consumer protection rules will not be enforced.

3.2 Collective action as a remedy for the shortcomings of private enforcement

Public enforcement may be advanced as a remedy to the problems discussed above. Public enforcement agencies may be better at discovering infringements, since they have investigative powers at their disposal. Moreover, they should have better incentives to bring claims since they have to protect the broader public interest rather than the dispersed small interests of individual consumers. However, some authors have argued that before resorting to public enforcement, possibilities to improve the efficacy of private enforcement should first be examined.²⁶ In the latter view, adaptations of the institutional legal framework for private enforcement might overcome the inefficiencies described above.

The case for a 'creative adaptation' of private enforcement procedures can also be made from an efficiency perspective, focusing on deterrence. If collective actions lead to a higher 'willingness to sue',²⁷ the

²⁶ W.H. van Boom, above n. 24.

²⁷ This is ultimately an empirical question. Results of Euro-barometer surveys provide some anecdotal evidence that consumers may be more willing to sue if collective actions are possible. According to the survey conducted in 2004, respectively 2006, 67 respectively 77 per cent of European Union citizens will be more willing to defend their rights before a court if they can join with other consumers who complain about the same issue. The European consumer organisation BEUC therefore asserts that collective actions are particularly suitable to obtain compensation for damages where a large number of consumers are involved, and that, if handled individually, such claims will never be brought to court by the victims.' See C. Hodges 'Competition Enforcement, Regulation and Civil Justice: What is the Case?', 43 *Common Market Law Review* 1381 (2006) at 1387.

wrongdoer will be confronted with a sanction that better reflects the real losses inflicted on consumers in general. This is particularly important when the sanction imposed in public enforcement proceedings (a mere injunction or a fine which does not equal the harm caused) is lower than the total social costs. Well-designed collective actions may lead to better internalisation of the negative externalities flowing from infringements of consumer protection laws, and thus contribute to achieving the deterrence goal. Also the fact that more victims may be willing to bring suit, if they can share risks and expenses, will provide a better picture of the total losses that are actually caused by the wrongdoer. This size of the losses will be the starting point for determining damages so that future violations are deterred by forcing the law infringer to internalise the externalities caused.

The question thus arises whether collective actions may overcome (most of) the aforementioned problems. Firstly, it should be investigated to what extent a collective action can cure the information deficiencies with respect to law infringements. Secondly, it must be examined whether and, if so, how collective actions can solve the rational apathy problem. Finally, the type of collective action which best overcomes the free-riding problem should be chosen.

3.2.1 Collective actions as a remedy for information deficiencies

There are several ways in which collective actions can solve, or at least diminish, information deficiencies. In this respect, we must distinguish between collective actions *sensu stricto* and representative actions. Under opt-in collective actions, consumers must be appropriately notified about the occurrence of any infringement that has caused them harm. Economically speaking, the value of the information provided is higher than the costs of the notification if it incites consumers to initiate a group action to recover damages. Benefits resulting from the reduction of information asymmetries may be particularly large in the case of representative actions. Generally speaking, consumer associations have a better knowledge of the applicable laws than individual consumers, so they are better able to assess whether certain behaviour of firms constitutes an infringement. The organisations can employ lawyers who are specialized in the relevant fields of law. This could even make the consumer organisation the better-informed party regarding the applicable rules. Obviously, there still will be an information asymmetry regarding possible infringements in so far as they are not easily detectable. Detection requires monitoring and supervision, which is costly. For individual consumers these costs are almost by definition insurmountable, but consumer organisations might acquire adequate funding for such investigations by charging their members a membership fee or by means of sponsoring.

Thanks to collective actions, economies of scale can be achieved. It is more expensive for individual consumers to investigate possible infringements in their own separate cases than for a group of consumers who jointly initiate a collective action. Consequently, it is not the inferior information of individual consumers that determines whether there is a real threat of liability, but the better information of the group of harmed consumers. The achievable economies of scale are larger under opt-out collective actions than under an opt-in scheme, since the number of harmed consumers reached will be larger. Economies of scale are even more important if the investigation is done by a consumer organisation which can monitor market participants more regularly. Furthermore, consumer organisations are repeat players, whereas individual consumers are one-shotters.²⁸ Representative actions by consumer organisations may restore the balance that is lost in interactions between one-shotters and repeat players.

3.2.2 Collective actions as a remedy to the rational apathy problem

Collective actions may be able to solve a number of causes of the rational apathy problem. Firstly, from the point of view of an individual claimant the cost-benefit ratio of collective actions is clearly superior to the net benefits of an individual claim. If collective actions allow compensation of the losses of an entire group of harmed consumers, the cost-benefit ratio improves further. Secondly, collective actions spread the risk of uncertainty over a large number of affected individuals, and this will increase the number of claims brought in courts. Finally, the free-riding problem can be solved if those who benefit from a successful collective action are forced to contribute to its costs. These benefits will be elaborated on below.

a Reduced costs and increased benefits²⁹

An individual will only start legal proceedings if the expected utility of the lawsuit exceeds its costs. These costs are lower in the case of collective actions than in the case of separate individual actions, because they are spread over a large group of injured people. The expected utility will be higher in the case of the violation of subjective rights than in the event of

²⁸ M. Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* 95 (1974).

²⁹ See A. van Aaken 'Massenklagen im öffentlichen Recht aus institutionenökonomischer Sicht: Eine Art der direkten Volksrechte', 86 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 44 (2003) at 55 et seq.

infringement of diffuse interests. In the latter case the court decision is a public good, since it creates non-rivalrous and non-excludable benefits.

The possibility of a collective action increases the number of lawsuits, because the expected net benefit will be higher than in the case of an individual claim. After all, the costs of the lawsuit decrease while the probability of winning the suit (and thereby the expected utility as well) increases if multiple plaintiffs have larger financial means, enabling them to have better access to evidence and get better legal advice. The problem of rational apathy is therefore reduced. Furthermore, an individual party is more likely to initiate proceedings in the case of a violation of a subjective right than in the case of diffuse harmed interests, since the net benefit of a successful claim is higher in the former scenario. In diffuse interest cases, where the expected utility is too low to start an individual claim, the possibility of collective actions could make a claim feasible. After all, the costs per person are lower with a collective action, so that the net expected benefits (the expected benefits minus the costs) might turn out positive. In some cases, however, the diffuse interests are so immaterial to the injured parties involved that even the possibility of collective actions does not lead to a lawsuit.³⁰

Besides the high litigation costs, the rational apathy may also be due to the fact that the size of the expected damages is low. Collective actions not only decrease litigation costs in the way described above but also increase the prospective damages awards. Every collective action that is initiated in cases where no individual suits would have been brought increases the total sanction faced by a potential law infringer. The latter effect appears to be stronger under an opt-out collective action than under an opt-in scheme, since the group of compensated consumers tends to be larger. Moreover, empirical evidence indicates that actual opt-out rates are extremely low.³¹ Therefore, the size of the sanction expected under opt-out will be larger than under opt-in (and the largest under a mandatory regime).

³⁰ In the United States these losses are called 'nonviable claims'. The expenses an individual would incur in asserting a right to a share of a class judgment would be greater than his expected share of the recovery. In a Dutch publication regarding such losses they are termed 'scattered losses' (*strooischade*). Examples include charging too high interest rates or other surcharges by credit card companies, incorrect rounding off of gasoline prices by gasoline station proprietors in the same distribution chain and incorrect rounding off of prices by shopkeepers as a result of the intended abolishment of eurocents. See I.N. Tzankova, *Strooischade* (Deventer: Kluwer 2005) at 20, 21.

³¹ With respect to the US, the average opt-out rate is not higher than 0.6 percent. See T. Eisenberg and G.P. Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (March 23, 2004) *NYU, Law and Economics Research Paper No. 04-004; Cornell Law School Research Paper No. 04-019*. Available at SSRN: <http://ssrn.com/abstract=528146>.

b Risk spreading

Under collective actions, plaintiffs no longer run the risk of having to bear extensive (litigation) costs if they lose the case. If they bundle their claims, so that only one lawsuit is initiated instead of many separate ones, they share the costs. Even if the costs of this collective claim are higher than the costs of a single individual claim, they will certainly be lower than the costs of all separate claims added together. Each individual plaintiff now only has a lower amount at stake. The financial effect of losing the case is spread over all individuals participating in the collective action, so that each individual only bears a small amount if the case is lost. People are better able to bear a small loss than a larger loss, so that the barriers to start a lawsuit are lowered. This will lead to more claims being filed.

In cases where a consumer association files a claim on behalf of its members, the costs of the lawsuit are spread over all members. They pay for these costs through their membership fee. If the case is lost and the association has to pay legal expenses, the members do not pay for these losses directly. Obviously, the more often the association files claims and loses, the higher the membership fee has to be in order to cover these costs. The membership fee in this respect resembles an insurance premium: by collecting enough fees (insurance premiums), the association (insurance company) acquires adequate funds to be able to file the claim (cover the insured event). Each individual member (insured) is certain to 'lose' the fee (premium) but no longer runs the risk of having to pay the full legal expenses of an individual claim (the insured event).

Finally, American-style class actions in which damages are claimed are also able to spread or shift risks, mainly because they are almost always accompanied by a system of contingency fees.³² In essence, the attorney takes the risk of losing the case, because he only receives a fee if the case is won (no cure, no pay). The fee often consists of a percentage of the awarded damages (*quota pars litis*). If the case is lost, the plaintiffs do not pay anything and hence run no risk. If the case is won, the attorney's fee is deducted from the compensation received and the remaining damages are paid in one form or another to the plaintiffs. In this situation, they do not run a risk either. Of course, the attorney will charge a risk premium for this construction. This explains why the attorneys receive a relative large fraction

³² It would be impossible to collect small contributions for costs of council from all plaintiffs in advance, so a system of contingency fees is necessary to enable the use of class actions. See H-B. Schäfer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions taken by Associations', 9 *European Journal of Law and Economics* 183 (2000) at 192.

of the damages as legal fee (often about 30%). The plaintiffs pay ex post for the legal services by receiving a lower amount of damages. This is the price they have to pay for shifting the risk. Given that each individual plaintiff receives a lower amount, this can still be regarded as a form of risk sharing.

3.2.3 Solving the free-riding problem

In collective actions initiated by individual consumers, a possible solution to the free-rider problem is to rule out the possibility of individual actions once a collective action has been initiated. Individuals will then no longer be able to first await the result of the collective action before deciding whether they want to initiate a private lawsuit.³³ The opt-out possibility that exists in many class actions and other forms of collective actions, as well as in the Dutch system of declaring the settlement contract binding, should then be abolished. The free-rider problem may also be tackled by increasing the costs of individual claims after a collective action has been undertaken. If the costs increase for plaintiffs who do not have a compelling argument for not joining the collective claim, the result of weighing costs and benefits will change. This might lead to more individuals choosing for the collective action. In essence, the free-ride (which Stigler correctly argues is actually a 'cheap ride' because the profiteer incurs the costs of the lower expected gain of the collective action)³⁴ becomes more expensive and hence less attractive.

In cases where the individual losses are high enough to make individual claims feasible, the free-rider problem seems limited because individual victims will start a lawsuit to collect damages anyway, irrespective of what others do. Given that the costs of litigation decrease per plaintiff if they bundle their claims, there will still be an incentive to collectivise, notwithstanding the free-rider problem.³⁵ In many cases of widespread losses, the individual losses of each victim are too small to make opting out an attractive strategy. By staying in the group or class, the victim contributes to the costs of the lawsuit, but also has a higher chance of receiving compensation. By opting out, the victim does not bear any costs, but given that his losses are only small, an individual suit is not worthwhile. Therefore, the possibility of free riding does not appear to be a major problem in cases with widespread losses where the victims claim

³³ See e.g. D. Rosenberg and J.P. Sullivan 'Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law', 2 *Journal of Competition Law and Economics* 159 (2006) at 177.

³⁴ G.J. Stigler, 'Free Riders and Collective Action: An Appendix to Theories of Economic Regulation', 5 *The Bell Journal of Economics and Management Science* 359 (1974) at 360.

³⁵ H-B. Schäfer, above n. 32, at 186.

compensation.³⁶ Furthermore, given that many collective actions will be settled, it remains to be seen if the collective action provides free-riders with information that they could use in their own individual claim.³⁷ However, if the plaintiffs sue for an injunction or reform, the free-riding problem should be taken seriously. It could very well frustrate the possibilities of private enforcement, making public enforcement a better option.

Collective actions initiated by consumer associations could mitigate the free-rider problem, in as far as the association is able to charge its members a fee for the costs incurred. This way, the members are forced to contribute to the funds necessary to file the collective suit and they cannot behave as free riders. However, non-members can still behave as free riders because they do not contribute to, but still benefit from the efforts of the association. Why would an individual join the association if it limits their possibilities to take a free ride? The prevailing explanation is that the consumer association offers other benefits to its members, such as a newsletter, subsidized legal assistance and discount possibilities. Stigler has challenged this explanation: Why would consumers be willing to pay a price for these private goods and services if this price is so high that it can also be used to cover the expenses of production of the public good? A rival association offering the same private goods and services but without the collective actions would be able to charge lower prices and consumers would prefer to join this second association.³⁸ However, to the extent that competing associations are absent, the above line of reasoning still holds and the associations are able to reduce the free-rider problem.

4 Disadvantages of collective actions

The story cannot end here. Even though collective actions may generate benefits in terms of economies of scale, risk-sharing, curing rational apathy of individual consumers and overcoming the free-riding problem, these advantages also come at a cost. Class actions in the United States have had a

³⁶ This is also argued by G.P. Miller, 'Class Actions', in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, volume 1 (Houndmills: Palgrave Macmillan 1998) 257 at 260.

³⁷ H-B. Schäfer, above n. 32, at 192.

³⁸ G.J. Stigler, above n. 34 at 360. This argument is nicely illustrated by the Dutch case of the ANWB versus Route Mobiel. The ANWB is a Dutch organisation that provides signposts, an alarm service for stranded tourists, a repair and towing service for motorists whose vehicle has broken down, et cetera. Route Mobiel is an organisation that entered the market for repair and towing services in 2005. In its advertisements, Route Mobiel explicitly states that it provides the services cheaper than the ANWB, because it does not offer "the whole circus of thousands of office staff, emergency telephones and a magazine that you do not read anyway."

bad press, both from consumer lawyers and legal economists. There are two main causes for resulting inefficiencies: i) the principal-agent problem, which results from information asymmetries on the side of clients and inhibits their control of the quality of the attorney's performance; and ii) the risk of opportunistic behaviour, which leads to frivolous suits. These problems have often led European policy-makers to argue against the introduction of collective actions. However, an intelligent design of collective actions coping with the problems of the American-style class action and a greater reliance on representative actions might achieve the advantages described in the previous section of this paper without causing costs that outweigh their benefits.

4.1 Principal-agent problems

It is well-known from the literature on the regulation of the legal profession that clients (principals) face great difficulties in controlling the quality of the performance of the lawyers (agents). Information asymmetries exist which make it difficult or even impossible for the client to assess the quality of the lawyer's work. In individual cases, the client has an immediate interest, so he may try to monitor his lawyer's efforts to a certain extent. In collective actions, however, the plaintiffs' interests are often too small to undertake any monitoring activities. In American class actions, the attorney thus becomes the leading actor of the case and might pursue his private interests to the detriment of the harmed consumer group as a whole. The principal-agent problems could be exacerbated by the way in which the collective action is funded. Even though contingency fees may pay the costs of the suit (and thus improve access to justice), they create new problems. Firstly, under contingency fees the attorneys' efforts may not be optimal. Secondly, contingency fees could lead to early settlements that are disadvantageous for the clients. Both objections are explained below.

From the plaintiffs' point of view, the optimal effort of the attorney is determined by comparing marginal costs with marginal benefits. As long as the costs of additional efforts are lower than the increase in the expected benefits (the probability of winning the case, multiplied by the damages that will then be received), it is desirable that the lawyer invests additional efforts. However, the optimal effort for the lawyer himself is determined by comparing the costs of additional efforts with the increase in the expected fee, which is only a percentage of the expected benefits of the plaintiffs. Hence, the expected benefits for the lawyer of putting in additional efforts are smaller than the expected benefits for the plaintiff. This will lead him to spend less effort than the client would want him to do. This risk may be mitigated by the desire to build and maintain a good reputation. However, in

class actions the reputation mechanism cannot work in an optimal way. It is the lawyer who seeks the clients, not the other way around.³⁹

An often heard objection to contingency fees is that they could lead to early settlements which are not in the interest of plaintiffs. Again the principal-agent problem lies at the basis of this inefficient outcome. It is attractive for the attorney, who receives a percentage of the damages awards as his fee, to settle the case if his private costs of pursuing the claim outweigh the expected increase in the fee to be received. For the class members it could be better if the attorney continues the litigation, because their expected damages under continued legal proceedings may be higher than the settled amount. For example,⁴⁰ if there is an 80% chance of winning the case and the damages amount to \$10 million, the expected damages for the plaintiffs are \$8 million. If the lawyer's fee amounts to 25% of the damages awarded, his expected fee will equal \$2 million. If the defendant offers to settle for \$6 million, the attorney will receive \$1.5 million, without having to continue the litigation and running the 20% risk of losing. It is attractive for the lawyer to accept this offer if his private costs of conducting litigation and bearing the risk of losing the trial exceed \$500,000 (the difference between the expected fee when litigating and the certain fee when settling). For the plaintiffs however, the expected result of litigation is 75% of \$8 million, hence \$6 million. In the case of settlement they will only receive \$4.5 million. It remains to be seen whether they would have been willing to accept this lower amount themselves in order to receive compensation sooner and to be rid of the uncertainty of the outcome of the case. It is even possible that the defendant proposes a settlement deal which is inferior for the injured parties when compared to the expected outcome of the trial, but superior for the plaintiffs' lawyer. Suppose the plaintiffs' attorney expects an outcome at trial of \$10 million (and the defendant has the same assessment), out of which he would receive 25% as fee. If the defendant offers to settle at \$8 million, out of which \$3 million goes to the plaintiffs' lawyer, the lawyer will gain \$500,000 by settling, while the plaintiffs will lose \$2.5 million.

4.2 The risk of unmeritorious suits

The American experience shows that class actions may be initiated to inflict reputational harm on companies. Class actions are likely to cause higher reputational losses than individual cases, so that class actions increase the risk of opportunistic behaviour. Firms may prefer an early settlement if this costs them less than the sum of the losses of handling the case in court. The

³⁹ H-B. Schäfer, above n. 32, at 193.

⁴⁰ See G.P. Miller, above n. 36, at 258, 259.

size of these losses creates scope for abuses if the class attorney can easily obtain payment of damages (parts of which are paid to him under the contingency fee arrangement). Frivolous suits may be brought if the amount of this payment for the company is lower than the costs of defending itself in court. This can even happen if the class attorney is certain that he will lose the case, because the costs for the defendant of going to court (legal fees and reputational harm, for example) might outweigh the settlement amount.

In addition, class actions increase the expected payment (and therefore under contingency fees the lawyer's payment as well) by far more than the increase in the lawyer's costs. Assuming that the lawyer will only take on a case if his expected payment is higher than his expected costs, he will be willing to take on a class action at a much lower probability of success than he would take on an individual case. It remains to be seen if such cases are desirable on a social level, given the low probability of success in the first place.⁴¹

The question arises whether the problems discussed above can be mitigated by imposing restrictive conditions on collective actions. Defendants who win the case could be given the right to claim their lawyers' expenses from their unsuccessful opponents. This will lower the attractiveness of unmeritorious claims, although the possibility of reputational harm might still induce defendants to settle. Other solutions require more drastic changes and a different institutional design of collective actions. These alternatives are discussed in the next section.

4.3 How to avoid principal-agent problems and frivolous suits

Different solutions have been suggested to mitigate principal-agent problems and to overcome the risk of frivolous suits in collective actions. More restrictive conditions could be imposed on collective actions. There also may be a preference for a greater reliance on representative actions brought by consumer associations, provided that the accountability problem can be solved.

4.3.1 Restrictive conditions on collective actions

To mitigate the principal-agent problems, it has been suggested a public auction be held for selecting the attorney in charge of representing victims and compensating the claimants and the lawyer through the proceeds of the auction.⁴² The defendant's attorney himself can also bid in the auction. If he

⁴¹ H-B. Schäfer, above n. 32, at 189.

⁴² J.R. Macey and G.P. Miller 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform', 58 *University of Chicago Law Review* 1 (1991); J.R. Macey and G.P. Miller

wins, in essence a settlement is reached. The underlying idea is that the auction will reveal the lawyer best qualified to litigate the case in the most efficient way. Agency problems are solved because ownership and control are united in a single party. However, if the auction is not properly run, this can lead to adverse selection problems so that cheaper but poor-quality lawyers will win the tender.⁴³ It would then follow that the quality of legal services decreases to the detriment of consumers.

Contingency fees may be prohibited and replaced by a fixed fee set by a governmental authority. Hay proposes to limit the fee in case of a settlement to the percentage the attorney would have received in a trial, thereby ensuring the class members a recovery not lower than the outcome of a continued litigation. He stresses that the problem with contingency fees is not primarily that the fee will be excessive if seen as a fraction of the settlement amount (20% or so), but that it is too large if compared to what the lawyer would have received if the case was tried (say, only 10%). This will induce the lawyer to settle for too small amounts. The greater the difference between the two percentages, the larger the problem will be. However, due to informational problems it remains doubtful if the fee can be set at such a level that the efforts of the lawyer who handles the case will be optimal.⁴⁴

Another way to combat inadequate settlement is to introduce a preliminary test of the merits of the case⁴⁵ or to enable a judicial review of settlements that class members would not have agreed upon. Koniak and Cohen propose a mandatory summary judgment as a superior solution to a pre-certification merits review.⁴⁶ The latter solution has been adopted in the US Securities Litigation Reform Act. However, the scepticism of commentators has seemingly been confirmed, since the results of the reform

'Auctioning Class Action and Derivative Suits: A Rejoinder', 87 *Northwestern University Law Review* 458 (1992).

⁴³ If information deficiencies make it difficult to assess the optimal amount of damages, the tender may be won by the lawyer who offers his services at the lowest price. Contingency fees mitigate this problem (since the lawyer's fee is linked to the achieved result) but create problems of their own (see above).

⁴⁴ B.L. Hay 'Asymmetric Rewards: Why Class Actions (May) Settle for Too Little', 48 *Hastings Law Journal* 479 (1997).

⁴⁵ R.G. Bone and D.S. Evans 'Class Certification and the Substantive Merits', 51 *Duke Law Journal* 1251 (2002); G.P. Miller, 'Review of the Merits in Class Action Certification', (May 4, 2004). *Bepress Legal Series, Working Paper* 262. <http://law.bepress.com/expresso/eps/262>.

⁴⁶ S.P. Koniak and G.M. Cohen 'Under Cloak of Settlement', 82 *Virginia Law Review* 1051 (1996).

were ambiguous, as unmeritorious and meritorious claims alike may have been discouraged.⁴⁷

Principal-agent problems in collective actions will persist if there is no adequate monitoring. In individual cases where the plaintiff has an immediate interest in the case, he will spend some resources in monitoring the lawyer, which limits the agency problems. In class actions, not even the named plaintiff will have an incentive to monitor the lawyer, given that his interest in winning the case is low. This will be truer still for the other members of the class and especially for the victims, who do not even know that they will be a member of the class at a later stage.⁴⁸ As a solution, courts could review the outcome of the collective action. However, courts may lack the information to be able to properly monitor the lawyer.⁴⁹

4.3.2 Greater reliance on representative actions

In the case of a collective action initiated by consumer associations, the risk of unwarranted side effects may be less serious. Even though this risk does not completely disappear, it could be better contained. On the one hand, consumer associations (agents) may be presumed to act in the collective interests of the consumers (principals). On the other hand, consumer associations might pursue goals of their own which conflict with objectives of consumer welfare. In particular, the risk of abuse cannot be excluded if the consumer associations are allowed to claim damages. The seriousness of this risk depends among others on the extent to which the members can control the association, the possibilities of the association to control the lawyer acting on its behalf, and the possible influence of third parties on the association.⁵⁰ If the first two relations are strong and the third weak, consumer associations will be well-suited to bring collective action, because they will serve as perfect agents for their principals. However, in most cases of widespread losses the members have little control over the association, which might be influenced by political groups or groups with a moral concern. The interests of the latter groups may not align with the interests of the members, so principal-agent problems might persist.⁵¹

⁴⁷ See several studies reviewed by J.C. Choi, 'The Evidence on Securities Class Actions', (April 7, 2004) *UC Berkeley Public Law Research Paper No. 528145*, available at SSRN: <http://ssrn.com/abstract=528145>.

⁴⁸ See C. Silver, 'Class Actions – Representative Proceedings', in: B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume V. The Economics of Crime and Litigation* (Cheltenham: Edward Elgar 2000) 194 at 215 ff.

⁴⁹ For an example, see C. Silver, above n. 48, at 215. Also see G.P. Miller, above n. 36, at 259.

⁵⁰ H.-B. Schäfer, above n. 32, at 198.

⁵¹ *Id.* at 199.

To guarantee that consumer associations are truly representative, a number of requirements regarding their credibility, reputability and commitment to acting in the collective interests of consumers must be fixed and enforced. This may be achieved by conferring standing to bring a representative action only to consumer associations approved by a governmental body or granted permission by the courts for a particular case or cases. Governmental approval may be decided upon on examination of the articles of incorporation, size of the membership and geographical scope of the activities of the consumer association. Furthermore, regulations may impose requirements regarding the possibilities of members to actually control the decisions of the association.

It is interesting to note that UK research suggests that consumer associations rarely bring suit. The reason can be that associations do not see enforcement as their core business and that they are not willing to spend resources on lawsuits, which have an uncertain outcome.⁵² Hence, collective actions brought by public bodies may be warranted after all, even if private associations, too, can start collective actions. Clearly, if a collective action is initiated by a public agency, the borderline with public enforcement will become spurious.

5 Conclusions

Improving consumer rights may remain meaningless if these rights are not adequately enforced. The design of enforcement mechanisms should ensure the achievement of two major goals: deterrence and compensation. In this paper, the focus of the analysis has been put on the former goal. Starting from the insight that individual claims may be insufficient to deter infringements of consumer protection laws, it has been investigated whether collective actions may overcome this enforcement deficit. Law and Economics literature advances three major reasons why private enforcement by individual consumers is insufficient from a deterrence perspective. Firstly, consumers may not realize that rules are violated or find out infringements only after harm has occurred. Secondly, consumers might be rationally apathetic and may not bring claims if the social benefit-cost calculus differs from the expected private benefits and costs of a law suit. Finally, individual consumers may wish to free-ride on the efforts of other consumers who might initiate legal proceedings. Under these circumstances, the threat of individual claims will not sufficiently deter potential law infringers. Therefore, it is regularly argued that public enforcement is necessary to prevent violations of consumer law.

⁵² C. Hodges above n. 27, at 1388.

This paper has investigated the question whether private collective actions can contribute to the prevention of consumer law infringements, so that one should not always resort to public enforcement. To answer this question, we must compare the benefits and costs of collective actions. On the positive side, collective actions generate information about the violation of consumer law, mitigate the rational apathy problem and may cure the free-rider problem. On the negative side, collective actions may exacerbate principal-agent problems between lawyers and clients and create scope for frivolous suits.

The size of both the benefits and costs depends on the type of collective action and its modalities. The distinction between collective actions initiated by individual consumers and representative bodies acting in the interests of consumers in general, as well as the division between opt-in and opt-out mechanisms are crucial to assess their contribution to deterrence. As far as the improvement of information flows is concerned, representative actions have a larger potential than collective actions initiated by individual consumers. For solving the rational apathy problem, opt-out collective actions are preferable to opt-in collective actions and representative actions again have the largest potential (particularly if they are organized as an opt-out or mandatory action). The free-riding problem cannot be entirely solved in collective actions, since consumers may benefit from a decision constituting a *prima facie* case in a posterior individual claim (even though they must explicitly express their wish not to be bound under an opt-out scheme). Consumer associations may mitigate the free-riding problem through charging membership fees, but may not be able to fully eliminate the risk that benefits also flow to non-members.

This paper has discussed two major disadvantages of collective actions: principal-agent problems between lawyers or representative bodies and individual consumers, and the risk of frivolous suits. Generally speaking, the ensuing costs seem to be larger with traditional collective actions than with representative actions. Experience gained with US class actions shows that attorneys may take decisions, such as early settlements, that are not in the interest of their clients and that attorneys may also initiate unmeritorious suits. These problems cannot be overcome easily. Due to informational asymmetries, it will be difficult to regulate the magnitude of the fees or to subject the outcome of the case to judicial review. In the case of representative actions, regulations may impose conditions to guarantee that consumer associations are really representative and act in the collective interests of consumers in general. The need for regulation shows that public intervention will remain necessary even if more scope is created for private collective damages actions.

Several questions for future research remain. Since collective actions are not a perfect instrument to achieve optimal deterrence, the question arises what the ideal mix of public enforcement and private enforcement of

consumer protection law should look like. If the contribution of collective actions to deterrence remains modest, their potential to achieve corrective justice will become the focal point of the analysis. If the attention shifts from deterrence to compensation, a number of different questions will emerge.

How large will the group of consumers be who have suffered harm as a consequence of infringements of consumer law and who will be compensated thanks to the availability of a collective action? How can it be assured that the damages awards are aligned with the magnitude of the actual harm suffered? How must the damages be collected and distributed? How can victimized consumers be identified? What would be the optimal use of damages awards that cannot be distributed to individual consumers? These and other questions could not be addressed within the confines of this paper. Obviously, they must be analysed thoroughly before any policy conclusions on the desirability of collective actions may be drawn.

RECOGNITION AND *RES JUDICATA* OF US CLASS ACTION JUDGMENTS IN EUROPEAN LEGAL SYSTEMS

*Andrea Pinna**

Abstract

Class actions, which allow individual plaintiffs to represent a group of others in a similar situation in a claim against a same defendant, are still a specificity of US law. Recently, transnational class actions, either against a foreign defendant or including foreign class members, have become popular. The author addresses the possibility of bringing such claims involving parties that are residents of a European country. The United States, traditionally known for the extraterritorial application of their laws and for easily retaining jurisdiction of their courts, are trying to coordinate the legal systems involved by being concerned with the possibility of recognition in a foreign country of class action judgments. Therefore, the original issue needs to be addressed of the recognition and the *res judicata* effect of these judgments in European countries that do not know similar collective judicial procedures.

1 Introduction

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In a globalised economy, the frequency of class actions brought before US courts involving a foreign element is extremely high. It is the existence of this foreign element that gives rise to private international law issues, which are particularly complex with regard to class actions procedures. The globalization of class actions is a recent phenomenon, which occurs when either the defendant or a putative class member resides outside the United States. For example, between 1998 and 2005, 145 securities class actions were brought before US courts against foreign private issuers (FPIs).⁵³ The plaintiffs are usually shareholders that have acquired shares of the company and are asking for compensation for the damage suffered because of wrong information about the financial situation of the defendant on the market. Very often, shares are held not only by United States shareholders, but also, and sometimes predominantly, by Europeans. As a consequence, courts are confronted with several private international law issues.

This article does not aim to discuss all private international law issues that arise in transnational class actions. According to US private international law, for example, the court has to determine whether it has personal and subject matter jurisdiction over the defendant. It is not the purpose of this article to discuss this issue, but what is important is to note that very often US courts retain jurisdiction under the ‘conduct test’. In other words, the fact that the foreign defendant acted on US territory, even if this behaviour caused loss to foreign investors only, enlarges the possibility that claims will be brought against defendants residing abroad. Such was the case, for example, in the recent class action brought against Vivendi Universal, a corporation organized under the laws of France and shares of which are traded both on the New York Stock Exchange (American Depository Shares, ADSs) and the French *Bourse*, Euronext Paris (ordinary shares).⁵⁴

However, regarding transnational class actions, US Courts have consistently ruled that certification of the class can be granted only if there is a good chance that a future class action judgment will be recognised abroad and, above all, both in the country of residence of the defendant and in the country of residence of the foreign absent class members. In Part II, I will

⁵³ Source, PwC, 2005 Securities Litigations Study, 57. Comparing this data with the total of 2021 securities class actions brought to court in the same period (same source, at 7), we note that FPIs are involved in 7.2% of the claims. However, only some of the FPIs are European companies. It shall also be noted that European legal systems are not concerned when the defendant is one of their residents, but also when an absent class member is, which drastically increases the situations in which a recognition of a class action judgement can be required in one or more European countries.

⁵⁴ Dismissing defendant motion for lack of subject matter jurisdiction, *In re Vivendi Universal S.A.*, 381 *West’s Federal Supplement 2d*, at 169 (4 November 2003).

detail the conditions for certification and explain for which practical reasons US law requires future treatment of US judgments be taken into account. This is a necessary step in the analysis, since it shows why and under which terms the question of the future recognition by European countries needs to be discussed. After this discussion, I will tackle the core issue of the article: the position of some European legal systems regarding US class action judgments. Legal doctrine and legal practice have shown that there are three main reasons why courts in Europe could refuse *Res Judicata* effect to a class action judgment. In Part III, I will discuss the first reason, which is often alleged to be contrary to international public policy. It concerns the specific US class action device of the ‘opt-out rule’, which allows courts to include in the procedure all plaintiffs unless they manifest their will to be excluded from the class. The second reason for non-recognition, discussed in part IV, is that European legal systems may consider US judgments awarding punitive or multiple damages to be contrary to international public policy. Finally, and this will be discussed in Part V, in some European countries an obstacle for recognition of a foreign judgment is that according to the law of the European country where the *Res Judicata* effect is sought, the US court could retain jurisdiction.

The study of these three issues and the recent evolution of European states law towards the introduction of collective procedures which are similar, though not identical, to the US class action procedures, seems to indicate a decrease of the hostility of European legal systems towards the US class action. This may signal an era in which there are fewer obstacles towards recognition of US class actions, which consequently will induce US courts to more easily certificate transnational class actions.

2 US law requirements for the certification of transnational class actions

2.1 Conditions for certification of class actions

In order for US courts to accept to decide on a transnational class action, several conditions have to be fulfilled. Traditional conditions regarding international jurisdiction have to be met as mentioned above. The most topical admissibility requirement is the certification, which is peculiar to class actions procedures, and needs to be discussed. Indeed, the issue of international jurisdiction of US courts is not the only private international law problem that has to be addressed. Once jurisdiction has been established, the class, the group of plaintiffs, has to be certified pursuant to Rule 23 of the Federal Rules on Civil Procedure, which sets the different conditions for the possibility of bringing a class action. The certification is a special stage of a class action procedure and aims at the constitution of the group of plaintiffs. For a class action to be certified, Rule 23(a) sets specific

requirements: numerosity, commonality, typicality and adequacy of representation.⁵⁵ If these conditions are fulfilled, the traditional procedure of Rule 23(b)(3), the ‘poor man’s class action’, requires additionally that:

The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The conditions contained in this provision are usually referred to as ‘predominance’ and ‘superiority’.

2.2 Transnational class actions

Federal Rule 23 raises particular concerns in case of a transnational class action. Indeed, the existence of foreign elements in the litigation could make it much more difficult to establish ‘superiority’ of the class action treatment of the dispute over other, more traditional litigation techniques. Furthermore, ‘predominance of common issues in law’ can be jeopardized by the differences in law that apply to the various putative class members. Such is for example the case in product liability class actions, where the action for compensation of the damage suffered by different members of the class may be governed by different laws when the *lex loci delicti* principle applies. In such a case, transnational class actions against the defendant are hard to certify or very difficult to manage because subclasses will need to be created. In turn, this may lead to splitting the litigation into several parts, at least on certain issues. This has happened not only in transnational class actions procedures, but also in litigation where class members were resident

⁵⁵ Rule 23(a): “Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defences of the representative parties are typical of the claims or defences of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

in different states within the US and the legal situation of the plaintiff was governed by the law of yet another state.

A leading case of the US Supreme Court has shown the difficulty to certify a so-called multi-state class action, a class where members are spread over in various countries.⁵⁶ *Shutts* is a leading case concerning the issue of personal jurisdiction of state courts as regards non-resident class members. The case is also important for the issue of difference of the law applicable to different putative class members. In this case, the class-seeking certification consisted of putative members residing in 27 states and 15 foreign countries. Arguing that it would simplify the procedure, Kansas courts applied the *lex fori* to all class members, although different laws should have been applied according to their residence. The Supreme Court rejected the idea of facilitating the application of the law of the court seized in multi-state class actions,⁵⁷ considering that this could incite plaintiffs to adopt ‘forum shopping’ strategies.⁵⁸ More recent examples of decertification on the grounds of the differences in the applicable laws include the class action brought by haemophiliacs against a pharmaceutical company after having contracted AIDS.⁵⁹ This led authors to suggest an alternative solution in favour of the application of the law of a single legal system.⁶⁰

If a single legal system can govern both the grounds and consequences of the defendant’s liability vis-à-vis all class members, this problem does not arise. In fact, this happens rather frequently at present because of the extraterritorial application of US federal law, for example in case of violation of federal securities laws (which nowadays is the most frequent ground for transnational class actions).⁶¹ In such a case, it is the

⁵⁶ *Phillips Petroleum Co. v. Shutts*, 472 *The United States Reports*. 797 (1985), 105 *The Supreme Court Reporter*. 2965 (1985). On this case, see e.g. A. R. Miller, D. Crump, Jurisdiction and Choice of Law in Multi-state Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 *Yale Law Journal* 1 (1986/1987).

⁵⁷ Some authors defend this idea, S. Lloyd Truax, ‘United States Class Actions in Private International Law Decisions’, 23 *California Western Law Review* 342 (1986/1987).

⁵⁸ *Id.* 105 *The Supreme Court reporter* 2965 (1985), at 2979, adding that in the case in point the laws of Texas, Oklahoma and Louisiana were different as to the answer to the legal issue at hand.

⁵⁹ *In re Rhône-Poulenc Rorer Incorporated*, 51 *West’s Federal Reporter, Third Series* 1293 (7th Circ. 1995).

⁶⁰ See e.g. S. Issacharoff, ‘Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act’, 106 *Columbia Law Review* 1839 (2006), who argues that the law of the defendant should be systematically applied for standardized claims.

⁶¹ In the past, securities class actions could not be certified because of the difference in law applicable, see e.g. *Zandeman v. Joseph*, 102 *Federal Rules Decisions* 924 (N.D. Ind. 1984), considering that the choice of law rule of Indiana provides for the

other condition set by Rule 23(b)(3), the ‘superiority of class action treatment’, that raises difficult issues in cases involving foreign elements. Among the different elements that a court has to take into account when deciding certification there is one that has to be addressed in particular in multi-state or transnational class actions: the desirability or the undesirability of concentration of litigation in the particular forum of the court seized. In other words, the question is whether it is desirable to concentrate a claim that concerns several legal systems in a single forum localized in the US, or whether foreign courts should retain jurisdiction to hear the case in respect of at least some of the plaintiffs.

2.3 The condition set in *Bersch v. Drexel Firestone* and its developments

The answer to this question is straightforward: a class action is desirable only in cases where the foreign courts would recognize the *Res Judicata* effects of the US court judgment. Such a solution can be found in the leading 1970s case *Bersch v. Drexel Firestone*, in which it was ruled:

[T]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts, even when the class members are mostly in the United States and still more so when they are abroad. Also, while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty.⁶²

According to this leading case, in order to refuse certification of a class including foreign absent members, a mere possibility of refusal to recognize the American judgment abroad is not sufficient. Instead, ‘near certainty’ is required. The *Bersch v. Drexel Firestone* case involved securities litigation in which the defendant was a Canadian corporation. According to the rule mentioned here, the court refused to certify a class including foreign buyers of the shares and thus limited the certification to US residents. The Court considered that it appeared from the expert opinions presented to the court by law professors that English, French, German, Italian and Swiss courts would refuse to recognize the American class action judgment, especially if

application of the law of residence of the investor, which would have jeopardized the manageability of the class action. See also, *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 *Federal Rules Decisions* 168 (D. Del. 1982).

⁶² 519, *West’s Federal Reporter, Second Series* 974 (1975), at 996.

it were in favour of the defendant.⁶³ The expert opinions asserted that the reasons for rejecting the *Res Judicata* were mainly to be found in the US rule that absent class members are automatically included in the class unless they manifestly express their intention to be excluded from the procedure. This rule is described as the ‘opt-out principle’. Following the expert legal opinions, it was therefore considered in this case that the *opt-in* requirement is fundamental to European legal systems and therefore a judgment rendered in respect of absent and even ignorant plaintiffs would be considered contrary to these countries’ concept of international public policy.

In more recent cases, the requirement set by *Bersch* has been slightly modified and stricter conditions to the certification of a foreign class are often found. For instance, in the certification judgment of the Vivendi Universal securities class action, judge Holwell considered that the ‘superiority’ requirement is fulfilled when the plaintiffs prove that there is a considerable probability that a foreign court will recognise the American judgment.⁶⁴ More precisely, foreign putative absent class members will have the possibility to be part of the procedure if “foreign court recognition [of their place of residence] is more likely than not.”⁶⁵ In other words, certification of this group of plaintiffs will be granted if the chances of recognition abroad of the outcome of the class action litigation are above 50 per cent. It is interesting to see that even though the conditions that are to be fulfilled in 2007 are stricter than in 1975, the Vivendi Universal certification decision included foreign plaintiffs from France, the Netherlands and the UK. It merely excluded putative class members from Germany and Austria. This indicates that the Vivendi court considered that recognition of a class action judgment is probable and that the opt-out rule is no longer seen as generally contrary to public policy in Europe.

Sooner or later, for the purpose of the certification of a transnational class action, the US court will have to explore the possibility of the future recognition and enforcement of its verdict abroad. Doing so will require exploring the conditions for recognition in other legal systems and therefore will also require the court to take into account foreign private international law rules. As a consequence, a US court has to apply its own system of private international law to assess jurisdiction and to determine the law applicable to the litigation, as well as give effect to foreign private international law rules.

The requirement of taking into account, and thus giving effect to, foreign private international law is rather unusual. It is widely accepted that in principle a court merely has to apply the rules of private international law

⁶³ *Id.* at 997.

⁶⁴ *In re Vivendi Universal, S.A. Securities Litigation*, 241 *Federal Rules Decisions* 213, at 233 (S.D.N.Y.), 22 March 2007.

⁶⁵ *Id.*

of the *forum*. Exceptions to this rule are conceivable, for example as regards the theory of *renvoi*, which leads to the application of the foreign choice of law rule of the legal system indicated by the choice of law rule of the *forum*.⁶⁶ Indeed, the attention given to foreign private international law in transnational class actions demonstrates the intention of the US legal system not to impose its solution worldwide and instead to coordinate conflicting sovereignties in dealing with globalised litigation.

There is also a practical element to be considered. The fact that US Courts examine the potential recognition abroad of a US class action judgment does not aim at exploring the possibilities of enforcement. In fact, such enforcement will not be necessary in every case, because the defendant may have sufficient property in the US to pay the damages that the court may award against him. Why then is the absence of recognition seen as a problem? If recognition abroad were not an obstacle for satisfying the plaintiffs, even though their residence is abroad, one would think that the condition set by *Bersch* is useless. This, however, is not the case. The absence of recognition would be problematic if the US court were to decide in favour of the defendant. It is important to recognize the *Res Judicata* of the class action verdict in order to prevent deceived foreign class members from bringing a new claim against the very same defendant before a foreign court and especially the court of the plaintiff's place of residence. If that were possible, the defendant – being prevented from opposing the *Res Judicata* in the US – would face new claims relating to the same facts and run a new risk of paying damages. In the end, different courts may come to diverging solutions. The requirement of a foreign recognition is therefore at the same time a sign of respect for foreign legal systems and of protection of the defendant in a class action procedure. This requirement indicates that the US legal system is concerned with the question whether the extraterritorial application of its laws or the large jurisdiction of its courts is acceptable for other legal systems. The requirement also signals that the procedural rights of the defendant of a class action are taken into account.

As a consequence of the condition set by *Bersch*, in many European legal systems an important doctrinal debate is now taking place regarding the possibility to recognize a US class action judgment. In the absence of a clear line of the case law, the *Res Judicata* of a US class action ruling is uncertain most of the time. Moreover, the specificities of such a procedure make it nearly impossible to apply reasoning by analogy, simply because European courts have not had the opportunity to rule on similar situations. Moreover, the doctrinal debate presents particular features because it does not take

⁶⁶ On this theory, Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (Paris: Sirey 1958).

place in legal journals or other scholarly publications.⁶⁷ The fact is that most of the leading experts in the field of private international law in Europe are currently requested and accepting to give expert legal opinions (the term often used is *affidavit*) in the framework of pending class actions. Therefore, the legal arguments in favour of and against the *Res Judicata* effect of a class action judgment in most of the European countries are to be found in these expert opinions. The opinions are accessible to the public either on *Westlaw* or on the ad hoc websites edited for the purposes of the information of the interested parties to the litigation.⁶⁸ The specificities of the doctrinal debate oblige the observer to consider the possibility of partiality of the expert opinion. Even if the expert asserts that the content of the opinion is positive law by using expressions such as “I declare under penalty or perjury under the laws of United States of America that the foregoing is true and correct”, it is remarkable to see that in the very same procedure and concerning the very same country, the experts will diverge considerably in their views. This divergence is explained by the uncertainty of the answer and also by the fact that American courts do not require a certainty of recognition, but merely a strong probability.

The purpose of this article is not to give a clear-cut answer to the question whether European courts will give *Res Judicata* effect to US class action rulings. Such an effort would be utopian. Instead, of interest here is the determination of the reasons of potential refusal of recognition. These reasons seem to be based on the idea that the features of a class action procedure offend the very foundations of domestic law of the European legal systems. There are mainly three features of a class actions judgment that are relevant in this respect. In the following parts, the issue of recognition will be discussed by dealing firstly with the opt-out rule and its compatibility with European civil procedure; secondly, with the possibility under US law to award punitive damages along with compensatory damages; and thirdly how jurisdiction of US Courts holds according to European private international law rules. At the end of this analysis it will be concluded that European legal systems are presently less allergic to class-action-like procedures than they used to be.

⁶⁷ There are a few exceptions: J. C.L. Dixon, ‘The Res Judicata Effect in England of a US Class Action Settlement’, 46 *International & Comparative Law Quarterly* 134 (1997); I. Romy, ‘Class actions américaines et droit international privé suisse’, *Annales des justices de paix* 1999, 796; M.-L. Niboyet, ‘Actions de groupe et droit international privé’, *Revue Lamy de Droit Civil* 2006, n° 32; M. Matousekova, ‘Would French Courts Enforce US Class Actions Judgments?’, *Contratto e Impresa Europa*, 2006, 651; and the German legal doctrine quoted *infra*, n. 85 .

⁶⁸ Such is also the case for the *Royal Ahold* class action, <www.royalholdsecuritieslitigation.com>.

3 The opt-out mechanism and *Res Judicata* in Europe

3.1 The conformity with the public policy of the forum

Rule 23(b)(3) class actions are not mandatory for plaintiffs. However, putative absent class members will be part of the litigation unless they expressly manifest their intention to be excluded. In other words, one can become a plaintiff without having asked to become one. Traditionally, in all European legal systems the principle is that one becomes a plaintiff only by having actually manifested one's intention to bring a claim and by not remaining silent. Therefore, it is almost certain that European legal systems will give *Res Judicata* effect to 'opt-in' class-actions judgments, but this is not self-evident regarding opt-out class actions. It has been argued by several experts that the binding effect of a class-action procedure over absent class members residing in European countries could be contrary to public policy and that the outcome of such procedures can therefore not be recognized by domestic courts.⁶⁹ Other experts have argued the contrary.⁷⁰ It is impossible

⁶⁹ Between the very large amount of expert opinions submitted before US courts in class actions proceedings in the recent years, the following argue that an opt-out mechanism is contrary to public policy in some European countries. In Austrian law, G. Kodek declaration in *Royal Dutch Shell* class action. In Belgian law, H. van Houtte, declaration in *Royal Dutch Shell* class action. In Dutch law, Th.M. De Boer declaration in *Royal Ahold* class action, H. A. Groen declaration in *Royal Dutch Shell* class action. In English law, E. Peel declaration in *Royal Ahold* class action, C. Staughton declaration in *Royal Dutch Shell* class action, L. Rabinowitz declaration in *Vivendi Universal* class action. In French law, P. Mayer declaration in *Royal Ahold* class action; B. Audit, F. Terré, D. Cohen, G. Geouffre de la Pradelle, G. Carcassonne, O. Renard-Payen declarations in *Vivendi Universal* class action; J. Lemontey declaration in *Royal Dutch Shell* class action. In German law, R. Stüner declarations in *Royal Ahold* and *Daimler Chrysler* class actions, W. Grunsky declaration in *Royal Dutch Shell* class action, G. Herman Otto Wegen declaration in *Vivendi Universal* class action. In Luxembourg law, G. Ravarani declaration in *Royal Dutch Shell* class action. In Swiss law, P. Oberhammer declaration in *Royal Ahold* Class action, G. Kaufmann-Kohler declaration in *Royal Dutch Shell* class action. All declarations are on file with author.

⁷⁰ See, e.g., in Austrian law, D. Czernich and B. Rudisch declarations in *Royal Dutch Shell* class action. In Belgian law, G. Horsmans, declaration in *Royal Dutch Shell* class action. In Dutch law, H. Smit declarations in *Royal Ahold*, *Royal Dutch Shell* and *Vivendi Universal* class actions. In English law, J. Harris declarations in *Royal Dutch Shell* and *Vivendi Universal* class actions. In French law, A. Moure declarations in *Royal Ahold*, *Royal Dutch Shell* and *Vivendi Universal* class actions. In German law, P. Mankowski declarations in *Royal Dutch Shell*, *Vivendi Universal*

in the framework of this article to detail the different reasoning and nuances expressed by the authors of these expert opinions. What particularly strikes the observer, however, is the fact that the issue presents itself in a very similar way in all of the legal systems analysed here. Even if the legal grounds are not always the same, it is clear that everywhere in Europe the main problem with US class actions is the opt-out mechanism and its asserted contrariety to the domestic foundations of civil procedure.

The concept of public policy, referred to in many European countries with the French *ordre public*, relates to the comparison of a judgment – the merit, but also the adjudicating procedure – with the fundamental legal values of the forum where the judgement aims at producing its effects in case of a request for recognition of the foreign judgment.⁷¹ What counts therefore is the outcome of the case, and not whether the legal provisions that underpin the outcome are contrary to public policy in abstract terms. It is a very concrete analysis that has to be carried out by the judge who has to decide on the recognition of a foreign judgment. When it comes to procedural public policy such as the opt-out rule of a US class action, the concrete and the abstract analysis coincide. Indeed, European courts have to determine whether the fact that absent European class members can be included in the class, simply because they have not opted out, is contrary to the fundamentals of civil procedure. Deciding on this issue is not an easy task. International public policy does not prevent a juridical situation created abroad to produce effect in the forum simply because the legal institution or the procedure applied do not exist. In other words, the mere fact that a legal rule or a procedural tool that does not exist, or even could not be enacted, in the country where a foreign judgment is asked to produce its *Res Judicata* effects, is not enough to consider the foreign judgment to be contrary to public policy. The application of foreign rules is only contrary to the international public policy of the forum if these rules contradict the main, essential and fundamental legal principles of the forum. According to a leading French case, there is violation of public policy when a judgment infringes “principles of universal justice considered as having, in French opinion, absolute universal value”.⁷²

and *Daimler Chrysler* class actions. In Swiss law, S. Baumgartner, declaration in *Royal Dutch Shell* class action. All declarations are on file with author.

⁷¹ For a comparative analysis of this concept in private international law, see P. Lagarde, ‘Public Policy’, in 3 *International Encyclopedia of Comparative Law*, Ch. 11, 1994; J. Blom, ‘Public Policy in Private International Law and Its Evolution in Time’, 50 *Netherlands International Law Review* 373 (2003).

⁷² Civ. I, 25 May 1948, *Lautour*, *Revue Critique de Droit International Privé* 1949, 89, with note H. Batiffol; *Recueil Dalloz* 1948, 357, with note P. L.-P.; *Recueil Sirey* 1949, I, 21, with note Niboyet.

There are two ways to determine whether an opt-out class action is contrary to public policy. The first and most straightforward method is to verify whether there are similar, even if more confined, procedures in the law of the forum that bind plaintiffs according to an opt-out mechanism. This is still uncommon in European legal systems, but views have certainly changed in recent years. Clear examples of this are the collective claims procedures that have been enacted in the Netherlands, France and in a more limited way in England. The second method consists of analysing whether a legal institution unknown in the forum can still be considered compatible with its fundamental concepts. Such an analysis is more difficult, but it cannot be taken for granted that recognition should be refused simply because the legal system where recognition is sought does not know a class-action-like procedure, including an opt-out mechanism, such as in Germany.

3.2 The Netherlands

According to article 3:305a of the Dutch Civil Code, non-profit associations can bring a claim in representation of the category of persons (consumers, investors, et cetera) whose interests they defend. The court can give declaratory relief concerning liability of the defendant, which can be invoked later by the individual persons who were represented in the first procedure, in individual claims for damages. The *Res Judicata* effect of this collective judgment on the principle of liability is not as strong as the *Res Judicata* effect of a US class action.

However, article 7:907 of the Dutch Civil Code clearly uses an opt-out mechanism for cases of collective ‘friendly’ settlement. This article was enacted in 2005 by the Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*). This provision allows parties to a settlement agreement to request that the Amsterdam Appellate Court declare the settlement binding upon a class of persons having suffered similar losses. Therefore, if the association representing consumers or investors agrees with the defendant on a settlement of the litigation, its effects could extend to all victims, unless they opt out and thus express the intention not to be bound. The similarity of this procedure with the underlying principles of a US class action, even though its effects are more limited, is evident and considerably limits the risks of non-recognition of a US class action judgment.⁷³ This

⁷³ M.V. Polak, ‘Iedereen en overal?: Internationaal privaatrecht rond “massaclaims”’, 41 *Nederlands Juristenblad* 2346 (2006), is of the opinion that the opt-out must have been a real option, so in case of a US certified class action the Dutch interested parties must have had a real opportunity to opt out.

induced Judge Holwell in the Vivendi Universal class action to certify a class of plaintiffs, including investors residing in the Netherlands.⁷⁴

3.3 England

The same probably holds true for English law, which allows, in a more limited fashion than in the US, collective claims that bind absent plaintiffs. Such a rule can be found in the 1988 Civil Procedure Rules, where section 19(6) clearly introduces such a solution:

Representative parties with same interest.

- (1) Where more than one person has the same interest in a claim
 - (a) the claim may be begun; or
 - (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
- (2) The court may direct that a person may not act as a representative.
- (3) Any party may apply to the court for an order under paragraph (2).
- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule
 - (a) is binding on all persons represented in the claim; but
 - (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.⁷⁵

Of course, English law introduces solutions that are different from what is in force in the US. The possibility, however, of including an absent party as a plaintiff without their express consent is sufficient to consider an opt-out mechanism to not be incompatible with the English legal system; therefore a refusal of recognition of an American class action judgment cannot be based solely on these grounds.⁷⁶ In England the issue has sometimes been addressed as an issue of personal jurisdiction concerning non-resident class members. However, section 19(6) of the Civil Procedure Rules does not

⁷⁴ *In re Vivendi Universal, S.A. Securities Litigation*, 241 *Federal Rules Decisions* 213, at 243 (S.D.N.Y.), 22 March 2007.

⁷⁵ See, N. Andrews, 'Multi-Party Proceedings in England: Representative and Group Actions', 11 *Duke Journal of Comparative and International Law* 249 (2001).

⁷⁶ This is also the conclusion of J. C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement', 46 *International and Comparative Law Quarterly* 134 (1997), at 145 ff.

require the absent member to be residing in the forum in order to be bound. Consequently, US courts do not see why it should not be the same for the recognition of a foreign judgment that includes an English resident as absent member.⁷⁷ However, the main issue is indeed to know whether an opt-out US class action judgment is contrary to English public policy. It is true that foreign judgments are not enforceable in England if they are contrary to natural justice or public policy and this also implies an assessment of procedural guarantees. Considering the similarity of the English representative and collective actions regulation to the class-action system in the US, it is likely that the *Res Judicata* effect will indeed be granted.⁷⁸

3.4 France

A similar reasoning can be followed in French law. It is true that France has a long-standing principle according to which *nul ne plaide par procureur*, that is, no one may claim in court by proxy. Additionally, it has been considered by several experts that requiring a plaintiff to actively opt out in order to be excluded from the class of plaintiffs would be contrary to principles of due process, according to which every litigant shall have personal freedom to appear and be heard in court during any proceedings affecting their rights. However, in French law there are also examples of opt-out collective claims, such as the one brought by a trade union on behalf of employees for the protection of their individual interests.⁷⁹ The conditions for bringing such an action are that the employees receive notice, that they do not refuse to be bound by it and that they have been identified or are at least identifiable. In 1989 the French Constitutional Court had the opportunity to examine and confirm the conformity of such an opt-out mechanism with the Constitution and the Declaration of Human and Citizen Rights of 1789, although it did require additional guarantees regarding the individual freedom of employees.⁸⁰ The Constitutional Court in particular accepts allowing trade unions the possibility of bringing a collective claim through an individual case including all employees who did not opt out, but

⁷⁷ *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74

⁷⁸ Legal doctrine is uncertain on the issue. If J.C.L. Dixon is of the opinion that a judgement has a 'good chance' to have *Res Judicata* effect in England (J.C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement' above n. 76 at 150), other authors are more sceptical. Such is the case for P. Barnett, *Res Judicata, Estoppel, and Foreign Judgment*, (Oxford: Oxford University Press 2001) 74; A. Briggs, P. Rees, *Civil Jurisdiction and Judgments*, (London: LLP 2005, 4th ed.) 573.

⁷⁹ Artt. L. 122-3-16, L. 123-6, L. 124-20, L. 125-3-1, L. 135-4, L. 321-15, L. 341-6-2, L. 721-19 of the French Labour Code.

⁸⁰ CC 25 July 1989, 89-257 DC, *Droit social* 1989, 627.

it does require that the employee be notified of this initiative and that such a notification explains clearly the object of the claim and the possibility for the employee to be excluded from the class “at any time”. It is clear that the requirements of the Constitutional Court for the introduction of a class action in France are more stringent than those in force in the US, especially because in French law the absent class member can exclude himself from the procedure at any time before the final judgment, and not only during a predetermined opt-out period. However, this does not seem sufficient to consider an opt-out US class action judgment contrary to French public policy. As noted above, international public policy only prevents a legal situation totally incompatible with the foundations of the law of the forum to produce effects on its territory. Indeed, it is said that public policy has a reduced effect (*effet atténué*) when it comes to the recognition of a juridical situation created abroad, as opposed to a strictly interior matter, that is in the case when a court has to decide whether a such juridical situation can be created on French territory.⁸¹ This means that the fact that the French legislator cannot enact a rule because of constitutional requirements does not necessarily imply that a foreign legislator or judge will be bound by the same requirements. On the contrary, it is more likely that the Constitutional Court’s decision of 1989 shows that there is no ‘allergy’ of the French legal system to the US opt-out mechanism and that there are only divergences on its modalities and the way the opt-out right can be exercised. There should be no reason therefore to refuse *Res Judicata* effect in France of a US class action judgment on this ground. This is in fact also the analysis made by Judge Holwell in the Vivendi Universal class action.⁸²

However, in the petition to appeal, the Vivendi company submitted a brief from the French Ministry of Justice, signed by the Director of Civil Affairs, indicating that a US class action judgment is contrary to French procedural public policy and that French Courts will refuse to enforce it.⁸³ It is difficult to anticipate the effect of such an intervention of the French government. What is certain is that it is unusual for the French executive to intervene in a dispute between private parties. Giving such an expert opinion on a critical issue of French law can be clearly seen as both a violation of the separation of powers and a protective attitude towards the companies organised under its own laws.

⁸¹ The line of case law on ‘*effet atténué*’ was started by the *Rivière* case, Cass. Civ. I, 17 April 1953, *Revue Critique de Droit International Privé* 1953, 412, with annotation H. Batiffol; *Journal du Droit International* 1953, 860, with annotation G. Plaisant.

⁸² *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74

⁸³ Letter dated 3 April, 2007 (on file with author).

3.5 Germany

The first way of addressing the public policy issue is to verify whether there are similar procedural tools in the legal system of the foreign forum. If that is the case, the *Bersch* test is positive and, most of the time, the US court then certifies a class including the relevant absent class members. By contrast, the second way of approaching the public policy problem of an opt-out mechanism is much more difficult. This approach is followed in order to satisfy the test whenever the foreign forum does not make use of similar procedural tools. Such is the case for Germany, for example, where, contrary to the Netherlands, England and France, class-action mechanisms are still unknown. This absence excludes recognition of foreign judgments that are manifestly incompatible with the principles of German law, in particular with fundamental rights.⁸⁴

The only comparison that could be made is with the Investor Protection Model Procedure Act, entered into force on 1 November 2005, which organises multiple claims by shareholders regarding the loss suffered as a consequence of wrong, incorrect or lack of information on the situation of a company (*Gesetz zur Einführung von Kapitalanleger-Musterverfahren, KapMuG*). This procedure, however, is very different from a US securities class action, in the sense that shareholders who do not voluntarily take part in the procedure will not be bound by its results.⁸⁵ In other words, this procedure is based on an opt-in, not an opt-out system. Since the opt-out mechanism is the feature of US class actions that generates the highest difficulties for their foreign recognition, the fact that it was rejected by the German legislator in securities litigations cannot indicate that German courts will grant *Res Judicata* effect to a US judgment.

However, one cannot conclude that there is a very high probability of non-recognition, because it still needs to be ascertained that the German legal procedural law foundations are incompatible with an opt-out mechanism. The mere inexistence of it under the German law of civil procedure is insufficient. In other words, the recognition of a foreign judgment delivered on the basis of a foreign legal rule or institution unknown in the forum does not necessarily amount to a violation of the forum's concept of international public policy. The opposite, however, is the conclusion drawn by US courts in both the Vivendi Universal and Daimler Chrysler securities litigations, when they certify class actions and exclude

⁸⁴ § 328 (1) (4) ZPO (*Zivilprozessordnung*).

⁸⁵ For a comparison of US class actions with the *KapMuG*, see R. M. Franklin, 'Truiken J. Heydn, KapMuG: Class Actions vor deutschen Gerichten?', 105 *Zeitschrift für Vergleichende Rechtswissenschaft* 313 (2006).

German absent class members.⁸⁶ This is also the conclusion of the vast majority of German doctrine in considering that the inclusion of absent class members without their consent violates plaintiffs' fundamental rights.⁸⁷

Although it is not certain that non-recognition "is more likely than not" and therefore that the superiority test could have very well led to a certification of the class action, one has to assess the consequences of the non-inclusion of German residents to a US class actions. Some will analyse this solution as an advantage for German multinationals, which benefit from a sort of immunity from US class actions. However, this is not the case if most of the plaintiffs are not German residents, because then the class action will receive certification anyway and the German residents will not benefit from the resulting proceeds.⁸⁸ More exactly, the consequences of a refusal of recognition of a US class action can better be seen as a reduction of the protection of German resident plaintiffs. They can, indeed, only bring a claim in their own country and, therefore, cannot benefit from the advantages offered by a US class action procedure.

As noted above, the German legislator has recently enacted an ad hoc procedural scheme for securities litigations in 2005 because individual claim threatened to congest some first instance courts. As a side issue, the question can be raised whether such a procedure could be of use for securities litigations against corporations organised under the laws of a different EU member state. Indeed, the application of the Brussels I Regulation (2001/44) does not provide a jurisdiction prong to the courts of the place of residence of the investors, since they merely would have a choice between seizing the court of the place of residence of the defendant

⁸⁶ *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74; *In re Daimler Chrysler AG Securities Litigation*, 216 *Federal Rules Decisions* 291 (D. Del. 2003).

⁸⁷ See e.g. H. Spindler, 'Die amerikanische Institution der class action als Mittel des Konsumentenschutzes', in *Festschrift für Eugen Ulmer*, Munich 1973, 369 ff; R. Mann, 'Die Anerkennungsfähigkeit von US-amerikanischen "Class-action"-Urteilen', *Neue Juristische Wochenschrift* 1994, 1187; J. Mark, 'Amerikanische Class Action und deutsches Zivilprozessrecht', *Europäische Zeitschrift für Wirtschaftsrecht* 1994, 238; Ch. Greiner, 'Die "Class Action" im amerikanischen Recht und deutscher "Ordre Public"', (Frankfurt a. M.: Max-Planck-Institut, 1998) at 185 ff. *Contra*, J.C. Spindler, 'Anerkennung und Vollstreckung ausländischer Prozessvergleiche unter besonderer Berücksichtigung der US-amerikanischen Class Actions Settlements', (Konstanz: Konstanzer Schriften zur Rechtswissenschaft, 2001), 246, who suggests that the opt-out mechanism of Rule 23 is an appropriate device to protect absent class members' fundamental rights.

⁸⁸ More recently, regarding *Daimler Chrysler*, an attempt to certify a class composed of foreign class members only has been rejected on the argument of the absence of jurisdiction of US courts, Markus Blechner et alii, individually and on behalf of all others similarly situated plaintiffs v. Daimler-Benz AG, Daimler Chrysler AG et alii, 410 *West's Federal Supplement*.2d 366 (2006).

(article 2) and the court of the country where the harmful event occurred (article 5(3)).

Regarding the latter, the provision seems to suggest that the harmful event does not occur at the place of residence of the investor, but rather in the country where the shares were traded (which often coincides with the country of the company incorporation).⁸⁹ This is not necessarily true, however, if the case involves misleading information that the company addressed to foreign investors at their place of residence in Germany. Following the interpretation of article 5(3) given by the European Court of Justice in the *Mines de Potasse d'Alsace* case, the place where the “harmful event occurred” is either the place where the tort can be located or the place where the damage was suffered by the victim.⁹⁰ According to the *Fiona Shevill* case of 1995 concerning breach of privacy committed by a press publication, the courts of all the countries where the publication was sold can retain jurisdiction limited to the damage suffered as a consequence of its distribution in that country.⁹¹ In security litigations, all this would mean that German courts would indeed have jurisdiction in an action brought against a company incorporated in a different member state, but limited to the damage suffered by the investors who are German residents.

Having said that, I should add that the collective claim procedure (*KapMuG*) only applies to security litigations and not to other wrongs that can give rise to class actions in the US. This means that the exclusion of German absent class members will require individual actions, even though some of these could be brought before German courts according to the consumer jurisdiction prong of the Brussels I Regulation.⁹² To conclude, in the Vivendi Universal case the exclusion of German investors from the US

⁸⁹ Art. 5, Brussels I Regulation: “A person domiciled in a Member State may, in another Member State, be sued: [...] (3) in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.”

⁹⁰ ECJ, 30 November 1975, C-21-76, *Bier BV v. Mines de Potasse d'Alsace SA*, [1976] *European Court Reports* 1735; *Recueil Dalloz-Sirey*. 1977, 613, with annotation Droz; *Revue Critique de Droit International Privé* 1977, 563, with annotation P. Bourel; *Journal du Droit International* 1977, 728, with annotation A. Huet; *Neue Juristische Wochenschrift* 1977, 493.

⁹¹ ECJ, 7 March 1995, C-68/93, *Fiona Shevill v. Presse Alliance SA*, [1995] *European Court Reports* I-415; [1995] 2 *Law Reports, Appeal Cases* 18; [1995] 2 *Weekly Law Reports* 499; [1995] *All England Law Reports European Cases* 289; [1995] *International Litigation Procedure* 267; [1995] *Entertainment and Media Law Reports*. 543; *Revue Critique de Droit International Privé* 1996, 487, with annotation P. Lagarde; *Journal du Droit International* 1996, 543, with annotation A. Huet; *Neue Juristische Wochenschrift* 1995, 1882.

⁹² Artt. 15-17 of the Brussels I Regulation introduce a particular consumer jurisdiction prong.

class action did not necessarily oblige these investors to bring a claim in France individually. In practice, such individual cross-border claims are very unlikely to be submitted anyway, at least on a large scale. This is because collective actions are often alternatives to the practical impossibility to access justice individually as a result of the frequent disproportion between legal costs and the compensation that can be expected from a successful judgment. However, such a solution is not satisfactory for the defendant and the plaintiffs. The defendant is obliged to appear before the courts in different jurisdictions and the plaintiffs could face diverging judicial decisions, even though the facts of the case are identical.

When all is said and done, it appears that the opt-out mechanism is the feature of US class actions that causes the most difficulties in practice and could lead to non-recognition of a judgment delivered following this procedure. Consequently, a US court, confronted with the question of certification of a transnational class action including foreign and especially European absent class members, could hesitate and either limit the certification of a class to include only class members residing in the US or simply refuse certification altogether on the ground of lack of superiority. However, the recent initiatives of several European legal systems to introduce class actions or procedural techniques of consolidation of individual judicial application into collective claims, some by including an opt-out mechanism, tend to indicate that the hostility towards class actions is disappearing progressively. This should facilitate the recognition, at least in some European legal systems, of US class action judgments, since the contrariety to public policy of the forum can hardly be upheld.

A similar reasoning can be followed as regards the possibility for US courts to award punitive or multiple damages. Moreover, this issue is easier to solve, since the *Res Judicata* effect can be granted independently to the compensatory part of the judgment, even though punitive or multiple damages awards can face a refusal of recognition. That part of the judgment may then meet the requirements set in *Bersch v. Drexel*, as will be seen in the next part of this article.

4 Punitive and multiple damages awards and *Res Judicata* in Europe

If the opt-out mechanism is indeed very rarely contrary to the international public policy (*ordre public international*) of the European legal systems analysed above, the opposite can be said for the possibility to award punitive or treble damages, which is often possible in the framework of a US class action. For example, in antitrust suits, according to section 6 of the Clayton Act, compensatory damages are automatically multiplied by three.⁹³ In fact,

⁹³ 15 U.S.C. §15: “[...] any person who shall be injured in his business of property by reason of anything forbidden in the antitrust laws may sue [...] and shall recover

the issue that has to be addressed equally concerns all types of damages that can be awarded by a US court and that do not have a compensatory function but a preventive or deterring one instead. Traditionally, European legal systems deny courts the power to award damages – neither in contractual nor in extra-contractual matters – that go beyond what is necessary to compensate the injury suffered by the victim. Punitive damages are really a peculiarity of US law and can therefore limit the recognition of US judgment awarding them in Europe.⁹⁴ As regards ordinary procedures and not class actions, there is case law in many European jurisdictions where recognition has been refused on the ground of contrariety to public policy.

4.1 Germany

Such is clearly the case for Germany, according to both the Federal Court (1992 decision) and the Constitutional Court (2003 decision).⁹⁵ Moreover, the new German law on private international law on extra-contractual obligations of 1999 contains a provision that seems to exclude the recognition of foreign judgments in which a provision has been applied that leads to a different outcome on the issue of damages than German domestic law.⁹⁶ This provision leads to a refusal of recognition when either the function or the amount of damages differs from what is accepted under German law. A similar approach can be found in Switzerland, even though the line of case law is not clearly established.⁹⁷ However, it is feasible that

threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”

⁹⁴ On the question in general, R.A. Brand, ‘Punitive Damages and the Recognition of Judgments’, 43 *Netherlands International Law Review* 143 (1996).

⁹⁵ BGH, 4 June 1992, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 118, 312, *Neue Juristische Wochenschrift* 1992, 3096, with annotation H. Koch; English translation in (1993) 32 *International Legal Materials* 1327; BVerfG 25 July 2003, 2 *BVR* 1198/03. On the latter, B. Friedrich, ‘Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages’, 4 *German Law Journal* 1233 (2003).

⁹⁶ Art. 40(3) of the introductory law to the BGB: Claims governed by foreign law cannot be relied on if: 1. They go considerably beyond what a reasonable compensation of the injured party requires, 2. They serve objectives that are manifestly different from a reasonable compensation of the injured party. (author's translation)

⁹⁷ In favour of the recognition, Trib. civ. Basel, 1 February 1989, quoted by R.A. Brand, ‘Punitive Damages and the Recognition of Judgments’, *Netherlands International Law Review* 1996, 143, at 169. However, a more recent case of the Swiss Federal tribunal retaining the criminal penalty qualification may lead the observer to think that a recognition is impossible, *Arrêts du Tribunal Fédéral Suisse: Recueil Officiel* 122 III 463, at 466 (1996). In legal doctrine, C. Lenz,

the situation will change with the enactment of provisions that allow disgorgement of profits from the tort-feasor. Such provisions have both deterring and punitive functions and therefore converge with the basic idea of punitive damages. Such is the case for article 28(a)(3) of the Swiss Civil Code, which allows courts to award the victim of a breach of privacy both compensatory damages and a sum equal to the profits gained by its author.⁹⁸

4.2 England

The same approach to punitive damages can be found in English law, notably in the recent case of *Lewis v. Eliades*⁹⁹ concerning the issue of English public policy under the Protection of Trading Interest Act 1980. The 1980 Act provides that a judgment of an overseas country cannot be registered and no court in England may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment is for multiple damages. Section 5(3) of the Act defines multiple damages as an “amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment was given”. The question was whether an award for punitive damages can be granted *Res Judicata* in England is governed by this provision, as it only concerns *multiple* damages. The recognition of a punitive damages award cannot be denied on its penal law characterisation according to section 14(3) of the Private International Law (Miscellaneous Provisions) Act 1995, in view of its probable recognition in England.¹⁰⁰

In *Lewis v. Eliades*, a part of the compensatory damages was trebled in application of US Racketeer Influenced and Corrupt Organisations laws (RICO).¹⁰¹ In the proceedings to enforce the judgment in the UK, the issue was raised whether the entire judgment was unenforceable or the non-recognition should be limited to the multiple damages award. In other words, can a US judgment awarding compensatory and punitive or multiple damages be enforced for the compensatory part or shall the enforcement be

‘Amerikanische Punitive Damages vor dem Schweizer Richter’, *Études Suisses de droit international* 147, 1992; Y.P. Piantino, ‘Switzerland’s Treatment of US Money Judgments’, 46 *American Journal of Comparative Law*, 181 (1998).

⁹⁸ For a recent application, Swiss Federal Tribunal, 7 December 2006, *Arrêts du Tribunal Fédéral Suisse: Recueil Officiel* 133 III 153, disgorgement of the profits made by a newspaper because of the breach of privacy.

⁹⁹ *Lewis v. Eliades* [2003] 1 *All England Law Reports (Commercial Cases)* 850; Elaine Kellman, ‘Enforcement of Judgments on Blocking Statutes, *Lewis v Eliades*’, 53 *International Law & Comparative Law Quarterly* 1025 (2004).

¹⁰⁰ See, P.M. North, J.J. Fawcett and G.C. Cheshire (eds.) *Cheshire and North’s Private International Law*, (London: Butterworths 1999, 13th ed.) 118.

¹⁰¹ 18 U.S.C. 1964(c).

refused entirely? In this question, the Court of Appeal ruled that the 1980 Act prevents the enforcement of the non-compensatory damages award only, granting it for the rest.¹⁰² The question remains whether the compensatory element of a multiple award can be enforced. My impression is that the answer should be affirmative, since an exception, being general public policy and having been introduced by a special statute, is to be interpreted strictly. Moreover, as regards punitive damages awards, a US court is under the obligation to distinguish between mere compensatory damages and punitive damages. In other words, US case law is clearly of the opinion that a judgment cannot award a lump sum with both a compensatory and a punitive function. This is an essential precondition to enable superior courts to assess whether the balance between compensatory and punitive damages is proportional or excessive. In the latter case this would lead the superior court to conclude that due process provisions of the US Constitution have been violated.¹⁰³

Regardless of this issue, looking at the *Lewis v Eliades* case from the perspective of the issue of *Res Judicata* effects of a US class action judgment, one can conclude that the *depeçage* (severability) of a judgment in enforceable and unenforceable parts will support certification of class actions, including absent class members from England, even though the judgment does in fact award punitive or multiple damages.¹⁰⁴ Indeed, what counts for US courts is the fact that an absent class member residing in England will be barred from bringing a claim in that part of the UK; this will certainly be the case if the prospective US judgment in the class-action case has *Res Judicata* effect, albeit only in part. It is important to note here that the principle of severability in *Res Judicata* procedures is more and more

¹⁰² Contrary, in legal doctrine, A.V. Dicey, J.H.C. Morris, L.A. Collins, A. Briggs (eds.) *The Conflicts of laws*, Vol. 1 (London: Sweet & Maxwell 2000, 13th ed.) at. 566, §§ 14-246: "Judgments caught by section 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor." This opinion was expressed before *Lewis v. Eliades*.

¹⁰³ The leading case is the Supreme Court opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 *West's Supreme Court Reporter* 1032 (1991), where it was held that in itself a punitive damages award is not unconstitutional in itself, particular awards can transgress Constitutional guarantees.

¹⁰⁴ The same goes for Germany, where according to legal doctrine the judgment would be only partly unenforceable, J. Mark, 'Amerikanische Class Action und deutsches Zivilprozessrecht', *Europäischen Zeitschrift für Wirtschaftsrecht*, 238 1994. This is also the solution held by BGH, 4 June 1992, 'Entscheidungen des Bundesgerichtshofes in Zivilsachen' 118, 312, quoted above n. 95, where the American judgment was enforced as regards compensatory judgment and refused for the punitive damages award.

strongly defended in legal doctrine. One example is the Convention on choice of court agreements of 30 June 2005, which provides that even though a country can refuse to recognise punitive damages awards if these are excessive or not generally awarded in the forum (article 11 Damages),¹⁰⁵ recognition can be refused only for the punitive damages part of the foreign judgment (article 15 Severability).¹⁰⁶

4.3 France

Of all European countries, France is probably where the recognition of a US multiple and punitive damages award will be the most easily admitted, because it is not considered contrary to public policy by legal doctrine.¹⁰⁷ There is no case law dealing with the issue of recognition of foreign judgments awarding punitive of multiple damages.¹⁰⁸ Indeed, it has recently been proposed that the possibility for the judge to award punitive damages in case of wilful tort or breach of contract be introduced in French civil law.¹⁰⁹

¹⁰⁵ Art. 11 reads as follows: “(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.”

¹⁰⁶ Art. 15 reads as follows: “Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.” The solution appears clearly from the Explanatory Report by T. Hartley and M. Dogauchi, Convention of 30 June 2005 on Choice of Court Agreements, edited by the Permanent Bureau of The Hague Conference on Private International Law, <<http://www.hcch.net/upload/expl37e.pdf>>, 62, no. 215.

¹⁰⁷ See, O. Boskovic, ‘Les dommages et intérêts en droit international privé. Ne pas manquer une occasion de progrès’, *La Semaine Juridique: Juris Classeur Périodique* 2006.I.163. The author expressed the same opinion in his dissertation, O. Boskovic, *La réparation du préjudice en droit international privé*, (Paris: LGDJ 2003) nos. 408 ff., stressing that what can hurt the public policy of the forum is not the punitive ground of damages, but its eventual excessive amount. See also, G. Légier, ‘Sources extracontractuelles des obligations. Domaine de la loi compétente’, *J.-Cl. Droit international*, Fasc. 553-2, 1993, 101.

¹⁰⁸ The only exception seems to be CA Paris, 21 September 1995, *Recueil Dalloz-Sirey* 1996, somm. 168, where recognition was granted and the defendant argument of violation of public policy by excessive and punitive damages was rejected. The motivation of the case is, however, not sufficiently developed.

¹⁰⁹ Art. 1371, proposal of reform of the law of obligations: “L’auteur d’une faute manifestement délibérée, et notamment d’une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du

Even if this proposal has not entered into force yet, it is at present impossible to consider the French legal system incompatible with non-compensatory sorts of damages in order to refuse enforcement of foreign judgments having awarded multiple or punitive damages. This is especially the case for US judgments in which punitive damages are awarded in proportion to compensatory damages and in which the award can be reduced after judicial scrutiny in case a reasonable proportion was not met (as was decided by the US Supreme court in 1996 according to the Due Process Clause of the Fourteenth Amendment).¹¹⁰

4.4 Pan European perspective

More generally, from a pan European point of view, it is currently difficult to consider that damages awards going beyond the compensation of the injured party can be contrary to public policy. It is true that the right to compensation has a supra-legislative nature, recognised both by the French Constitutional Council¹¹¹ and the European Court of Human Rights.¹¹² However, it is generally admitted that *full* compensation is not a right protected by the ECvHT and that, as a consequence, a limitation of liability

juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables."

¹¹⁰ *BMW of North America Inc. v. Gore*, 517 *United States Supreme Court Reports* 559 (1996). Later, the Supreme Court gave additional guidance for the application of the proportion and nexus test in *State Farm Mut. Auto Insur. Co. v. Campbell*, 538 *United States Supreme Court Reports* 408 (2003).

¹¹¹ See e.g. CC 9 November 1999, 99-419 DC, *La Semaine Juridique: Juris Classeur Périodique* 1999.II.20173, with annotation G. Viney: "la faculté d'agir en responsabilité met en œuvre une exigence constitutionnelle posée par l'article 4 de la Déclaration des droits de l'homme et du citoyen de 1789 dont il résulte que tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer." On this issue, N. Molfessis, 'La réécriture de la loi relative au PACS par le Conseil constitutionnel', *La Semaine Juridique: Juris Classeur Périodique*. 2000.I.210.

¹¹² ECHR 20 November 1995, *Pressos Compania Naviera v. Belgium*, [1995] 21 *European Human Rights Reports* 301; *Revue Trimestrielle de Droit Civil*. 1996, 1019, with observations J.-P. Marguenaud, for tortious liability; ECHR 9 November 1994, *Stran Greek Refineries And Stratis Andreadis v. Greece*, [1994] 19 *European Human Rights Reports* 293; *Revue Trimestrielle de Droit Civil*. 1995, 652, with observations F. Zenati, for contractual liability. Both cases decided that a liability claim is a credit protected by Protocol 1 to the ECvHR.

included in an international convention is valid.¹¹³ This solution has generally permitted European legal systems to cap the compensation of certain categories of victims, which is nowadays frequent when the compensation is shifted from a liability system to be provided by 'solidarity systems', notably through special compensation schemes. In the literature it has been concluded that the principle of full compensation is now no longer a fundamental principle of the law that is internationally protected through the exception of public policy.¹¹⁴ It is therefore difficult to understand why, at the same time, public policy should not be opposed to the statutory reduction of the compensation awarded to the victim, but should be allergic to its extension. Such a solution would be only understandable if tort law were considered as having a mere compensatory function and not a deterring or punitive function. However, following the evolution of statutory law and case law in European jurisdictions, legal doctrine is increasingly of the opinion that tort law does in fact have such functions (although not as much as in the US), at least when the liable party is at fault.¹¹⁵

The legal arguments expressed above can argue in favour of the *Res Judicata* effect of a US class action judgment that also awards punitive or multiple damages. It seems that in France such a judgment can be enforced entirely. In other European countries, the US judgment can be partially enforced, that is to say without the punitive award, which is considered a criminal sanction. However, the fact that part of the judgement will be enforceable prevents individual absent class members from bringing a new claim in these countries. This in turn is a sufficient condition for a US court to certify a transnational class, including absent class members residing in these jurisdictions. We can therefore conclude that the prospect that a US class action judgment may award punitive damages is not an obstacle to its (partial) *Res Judicata* effect.

Furthermore, there is also a practical consideration indicating that punitive damages class action awards will generate little recognition issues in European jurisdictions: Punitive damages are rarely awarded in multi-state and, *a fortiori*, transnational class actions. Apart from the issue of *Res Judicata* effect of the prospective judgment in the country of residence of

¹¹³ See, in France, Cass. Civ. I, 12 May 2004, *Bulletin des Arrêts de la Chambre Civile de la Cour de Cassation*. I, n° 136; *La Semaine Juridique: Juris Classeur Périodique*. 2005.II.10030, with annotation G. Légiér.

¹¹⁴ G. Viney, P. Jourdain, 'Les effets de la responsabilité: exécution et réparation en nature, dommages et intérêts, aménagements légaux et conventionnels de la responsabilité, assurance de responsabilité,' in J. Ghestin (ed.) *Traité de droit civil* (Paris: LGDJ 2001, 2nd ed.) no. 60 and the references quoted: "[...] n'est pas rangé aujourd'hui parmi les quelques principes essentiels du droit français qui demeurent protégés sur le plan international par l'exception d'ordre public".

¹¹⁵ See e.g. S. Carval, '*La responsabilité civile dans sa fonction de peine privée*', (Paris: LGDJ 1995), which also refers repeatedly to foreign experiences.

absent class members, there are several obstacles under US law to the certification of a punitive damages class action claim.¹¹⁶ This does not mean that multi-state class actions concerning punitive damages are never certified,¹¹⁷ but it does mean that certification is rendered much more difficult. For instance, punitive damages are usually matters of state law and that may indicate that if more than one state is involved, the requirement of commonality is not met.¹¹⁸ Moreover, an opt-out class action may jeopardise the punitive damage assessment, because individual plaintiffs can be awarded punitive damages beyond the award in the class action procedure if they opt out and decide to bring a claim individually. These complications lead to a reduction of punitive damages class action claims and indeed incite authors to propose innovative solutions to tackle the issue of compensation and deterrence in mass torts.¹¹⁹

5 Jurisdiction of US courts concerning absent class members and *Res Judicata* in Europe

Finally, the most disputed issue in some European legal systems concerns jurisdiction of the US courts concerning absent class members. One of the traditional conditions for recognition of foreign judgment is the assessment of the jurisdiction of the foreign court. Normally this issue arises only with regard to subject matter jurisdiction or personal jurisdiction over the defendant. It is widely accepted that there is no point in assessing personal jurisdiction with regard to the plaintiff, because, by suing in a foreign country, they have simply withdrawn from their jurisdictional prerogatives to sue in another country, such as the one of their domicile. It is a logical consequence of the estoppel theory: one cannot claim in a foreign court and then before the courts of one's domicile, pretending the former had no jurisdiction. The idea is clearly expressed in English law by Dicey & Morris.¹²⁰ In France, this has long been analysed as a waiver of the recently

¹¹⁶ On this issue, L. J. Hines, 'Obstacles to Determining Punitive Damages in Class Actions', 36 *Wake Forest Law Review* 889 (2001), and the case law quoted.

¹¹⁷ For a famous example of certification, see *In re "Agent Orange" Prod. Liab. Litig.*, 100 *Federal Rules Decisions* 718 (E.D.N.Y. 1983).

¹¹⁸ L. J. Hines, above n. 116.

¹¹⁹ See e.g. C. M. Sharkey, 'Punitive Damages as Societal Damages', 113 *Yale Law Journal* 347 (2003).

¹²⁰ Rule 36, at 487: "[...] a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition [...] if the judgment debtor was claimant or counterclaimed, in the foreign court."

abolished¹²¹ plaintiff's privilege of jurisdiction of article 14 of the French Civil Code. According to this provision, a French citizen (or resident)¹²² can bring proceedings against a foreign defendant before French courts, even concerning obligations imposed on the defendant in a foreign court.¹²³ The same goes for the Netherlands in the case of a foreign judgment having been rendered against a litigant who commenced the litigation abroad, because it would be contrary to good faith and fairness to permit the plaintiff to relitigate his claim after having sought the aid of a foreign court which ultimately rejected his claim.¹²⁴

However, as noted above, the US class action procedure, through the opt-out mechanism, allows inclusion in the group of plaintiffs of persons who have not explicitly manifested their intention of bringing a claim before a foreign court. Therefore, it is not certain that foreign absent class members have both accepted jurisdiction of the foreign court and at the same time prevented foreign courts from assessing the existence of personal jurisdiction in their respect at the stage of recognition abroad. The first step is therefore to determine whether a court that is asked to recognize a US class action judgment is obliged to verify that the US court had personal jurisdiction over absent class members residing in the forum. That is not generally a condition required for recognition but the peculiarity of US class actions procedures does seem to require such supplementary investigation by the court in order to decide on recognition of a judgment rendered after following this procedure. The absence of case law on this point renders the issue very complex.

In the case that a US court is required to have personal jurisdiction over foreign absent class members, an explicit acceptance by these members will be necessary, because the transposition of personal jurisdiction requirements regarding defendants to foreign absent plaintiffs will very often lead to the conclusion that there is no personal jurisdiction other than voluntary.

¹²¹ Cass. Civ. I, 22 May 2007, *Banque de développement local*, no. 04-14716, *Gaz. Pal.* 2 June 2007, 11, with note M.-L. Niboyet. The privilege was abolished because art. 14 is no longer seen as introducing a case of exclusive jurisdiction, but a merely facultative one.

¹²² Following, article 4(2) of the Brussels I Regulation (2001/44/EC). Cf. H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe: règlement no. 44/2001 : conventions de Bruxelles et de Lugano* (Paris: LGDJ 2002, 3rd ed.), no. 95.

¹²³ Cass. Civ. I, 30 June 1992, *Recueil Dalloz-Sirey* 1994, 169, with note Guez, considering that the plaintiff waived their privilege by suing abroad, even if an action in France was initially proposed.

¹²⁴ The leading case being, Hoge Raad, 14 November 1925, *Fur Coat case*, *Nederlandse Jurisprudentie* 1925, 91. On the issue, see H. Smit, 'International Res Judicata and Collateral Estoppel in The Netherlands: A Comparative Analysis', 16 *Buffalo Law Review* 165 (1966), at 197.

Therefore, the question is whether the absence of opt-out declarations of certified class members is sufficient to establish consent of the foreign absent member to jurisdiction. Although this legal issue is often confused with the matter of conformity of the opt-out mechanism with public policy, it must be distinguished intellectually because the two issues do not converge at the same level of scrutiny of the foreign judgment. However, in practice, the answer to the question of the validity of consent to US jurisdiction by absent class members can depend strongly on the analysis of the actual opt-out mechanism. Indeed, when it is considered that the right for absent class members to opt out from a class action lawsuit grants them sufficient protection and is therefore not contrary to international public policy, it is possible to conclude that the absence of opting out is also a valid consent of the absent plaintiff to the jurisdiction of US courts. Consequently, jurisdiction of the US courts cannot be challenged any longer at the stage of foreign recognition.

Of course, all this depends on whether the assessment of consent to the action will be assessed in the application of US law or of the law of the forum where the *Res Judicata* effect is sought.

If US law is applicable to determine this, the conformity of an opt-out mechanism to public policy will be sufficient to satisfy the jurisdiction prong required by most European legal systems as a condition for recognition of foreign judgments. Indeed, according to *Shutts*, personal jurisdiction requirements concerning defendants do not apply to absent class members and the failure to opt out is considered to be sufficient, because absent class members do not bear the same burdens as foreign defendants, as they do not need to appoint an attorney nor bear the costs of the litigation and are not exposed to counterclaims.¹²⁵ Therefore, a state court has personal jurisdiction over absent class members residing in other states even if they do not have any connection with the forum, provided only that they benefit from some specific guarantees, such as the notification of their inclusion in the class, a right to a fair representation and, above all, the right to opt out of the class: all guarantees that are granted by rule 23 of the Federal Rules on Civil Procedure. Even though this has been opposed by some authors,¹²⁶ it is accepted by judicial practice¹²⁷ that this condition required for multi-state class actions can also be applied to transnational class action. Therefore,

¹²⁵ *Phillips Petroleum Co. v. Shutts*, 472 *United States Supreme Court Reports* 797 (1985).

¹²⁶ D. L. Bassett, 'US Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction', 72 *Fordham Law Review* 41 (2003/2004), arguing that a court has personal jurisdiction over foreign absent class members only in case they expressly join the lawsuit by opting in.

¹²⁷ See the references quoted by D. L. Bassett, *id.*

according to US law, a US court has jurisdiction over foreign absent class members since they have an actual right to opt out.

Only in cases in which a *lex fori* assessment of personal jurisdiction over absent class members is made will the public policy and jurisdiction prongs be two different conditions, to be met cumulatively. The result will be that recognition is often refused, for lack of personal jurisdiction. For example, in English law a foreign court is considered to have personal jurisdiction only if the party is resident in the foreign jurisdiction where the action is brought or has submitted to the jurisdiction of the foreign court by making a positive claim or counterclaim, by making a voluntary appearance in a claim already proceeding or by virtue of a previous agreement with the plaintiff. If these conditions are applied to the question of jurisdiction over absent class members, it appears that an English court will refuse recognition of a US class action judgment, for lack of personal jurisdiction.¹²⁸

The answer to this question is difficult to give, since European courts have not had the opportunity to be confronted with a similar situation. My impression is that the important procedural guarantees that absent class members benefit from under rule 23 of the Federal Rules on Civil Procedure, together with the very limited burdens of the procedure, will probably incite European courts to give *Res Judicata* effect to US class action judgments or settlements. The advantages of this solution certainly outweigh the inconveniences.

6 Conclusion: The hostility of European legal systems seems to decline

The previous analysis seems to suggest that the hostility of European legal systems towards granting *Res Judicata* effect to US class action judgments is progressively declining. This is the consequence of a general acceptance of the necessity of renovating the old-continent civil procedures with tools allowing the consolidation of individual claims in collective claims. This has already been enacted, under different forms and for particular types of litigation, in several European legal systems. Moreover, at the level of the European Union several steps have been taken towards the introduction of collective claims. The vote of 27 March 2007 on a report on the European Commission's Green Paper on damages actions for breach of the EC antitrust rules showed the opening of European institutions towards the enactment of collective claims tools. Even though the intention not to adopt a US-like class action has been manifested, these steps are evident marks of

¹²⁸ This was the main point of divergence between Harris (for the class) and (for the defendant) Staughton expert opinions in the *Royal Dutch Shell* class action: the former considering that the personal jurisdiction requirement only concerns the defendant, the latter arguing for its application to foreign class members.

declining hostility towards collective settlements of consumer and security litigations.

Although this is still in the domain of prospective legal reform, this article has tried to show that the recent developments in European jurisdictions' laws go in the direction of the easier recognition of US class actions judgments. It has demonstrated that the issue of recognition does not aim at its enforcement against a losing defendant, but rather at preventing disappointed European absent class members to start new, individual lawsuits against the very same defendant before a court in a European jurisdiction. The serious prospect of potential recognition is a condition required by US courts to grant certification to a group of plaintiffs which also includes foreign absent class members. If European jurisdictions are prepared to give *Res Judicata* effect to US class action judgments, they will facilitate the certification of transnational class action.

Traditionally, legal doctrine argues in favour of refusal of recognition for several reasons. The most incompatible US class action feature seems to be the opt-out rule by which plaintiffs are incorporated in the group that have not expressly manifested their will to claim. However, it appears that several European jurisdictions also use the opt-out mechanism, at least for specific claims. Whenever that is the case, it is difficult to assert that granting *Res Judicata* effect to judgments decided in favour or against absent class members is contrary to the public policy of the forum. The same goes when the argument is phrased in terms of absence of personal jurisdiction of the US court over the foreign plaintiff.

On the other hand, the issue of US judgments awarding punitive or multiple damages is different. In most European jurisdictions, probably with the exception of France, a judgment awarding such damages will not be recognised. However, in such a case, *Res Judicata* will be refused only concerning the punitive part of the judgment, while the other parts – the ruling on the liability issue and the compensation of the damage suffered – will be recognised. It is this prospective partial recognition that counts for the US judge in order to allow certification of a transnational class action. The conclusion is that, in principle, European legal systems are no longer hostile towards the recognition of US class action judgments.

In my opinion this is also a good approach from a practical point of view, since the hostility of a European legal system to US class actions would not only grant a sort of immunity to the corporations organised under its own laws, but would also reduce the protection of its own citizens, even against foreign corporations. It has been noted above that what counts is the possibility to recognise a US class action judgment in the country of residence of absent class members in order to prevent individual actions in that country, and not the enforcement in the country where the seat of the company is situated. Indeed, enforcement abroad is often not necessary,

since the defendant in a class action will probably have sufficient assets in the US. The consequence is that a corporation organised under the laws of Germany, for example, will not prevent certification of a transnational class action against it, because the enforcement of an eventual damages award in Germany will not be considered necessary by US courts, since there will be other ways to execute the judgment and make the defendant pay. Instead, refusing to recognise a US class action judgment in Germany would be disadvantageous for German consumers, because they would not be able to benefit from the access to justice granted by US courts even against a non-German defendant. We can therefore conclude that, from a policy perspective, refusing to recognize a US class action judgment is not a good solution for European countries.¹²⁹

¹²⁹ American legal doctrine adds that such a solution could jeopardise the deterrence effect of a US class action suit. Ilana T. Buschkin, 'The Viability of Class Action Lawsuits in a Globalised Economy. Permitting Foreign Claimants to Be Members of Class Actions Lawsuits in the US Federal Courts', 90 *Cornell Law Review* 1563 (2005).

DUE PROCESS IN INTERNATIONAL MASS CLAIMS

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Abstract

Mass claims proceedings, in which whole groups of claimants are treated more or less collectively, aim at an efficient settlement in circumstances where individual proceedings would be too cumbersome, too time consuming and/or too expensive. Standards of due process applicable to individual justice cannot apply directly to mass claims proceedings. However, such proceedings have to respect due process, albeit in a slightly different form, in order to be perceived as fair, credible and legitimate. This paper examines how some recent mass claim bodies involved with the restoration of property rights after war have elaborated their own standards of due process.

Mass claims proceedings, in which whole groups of claimants are treated more or less collectively, aim at an efficient settlement in circumstances where individual proceedings would be too cumbersome, too time consuming and/or too expensive. They are different from traditional court proceedings, where each party submits briefs and oral arguments, which are examined by the tribunal in order to render its decision. Consequently, the

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standards of due process applicable to individual justice cannot apply directly to mass claims handling. However, mass claims proceedings also have to respect due process – albeit in a slightly different form – in order to be perceived as fair, credible and legitimate.

This paper examines how some recent international mass claims bodies have elaborated their own standards of due process. The scope of the analysis is limited in two ways. Firstly, only mass claims processes established in the last twenty years will be discussed. Secondly, only those restoring property rights after war will be analysed. This paper starts with a brief description of the different mass claims processes that are within the present focus (section 1). It then will discuss how mass claims proceedings, although they surely deviate from the traditional judicial proceedings, still respect the basic tenets of due process (section. 2).

1 Recent Mass Property Claims Proceedings

Recently, several mass claims proceedings have settled property claims after war in an efficient way. The following bodies will be discussed: the United Nations Compensation Commission (UNCC), the Bosnian Commission for Real Property Claims (CRPC), the Claims Resolution Tribunal for Dormant Accounts (CRT), the Housing and Property Claims Commission in Kosovo (HPCC), the German Forced Labour Compensation Programme (GFLCP) and the International Commission on Holocaust Era Insurance Claims (ICHIEC).

1.1 The United Nations Compensation Commission (UNCC)

The UNCC had to settle claims for damage, including damage to property, caused by Iraq's 1990 invasion of Kuwait. It is not only the oldest but also the largest mass claims process which will be discussed. Because of the Iraqi invasion, hundreds of thousands of *Gastarbeiter* had to return to their respective countries, leaving their assets in Iraq or Kuwait. Moreover, many buildings were destroyed and/or looted, and many businesses disrupted. The UNCC collected over 2.6 million claims from individuals, corporations, governments and international organisations. For reasons of efficiency, the claims were divided into different categories, each with specific evidentiary thresholds, different processing techniques and specific standards for compensation. Category A and B claims, which concerned individuals who had to leave Iraq or Kuwait and individuals who suffered personal injury or death respectively, both led to fixed amounts compensation. The vast majority of claims submitted to the UNCC, 1,703,396 in all, were Category C property claims for loss of personal property, loss of bank accounts, stocks

and other securities, loss of income, loss of real property and individual business losses of up to 100,000 US dollars.¹³⁰ Category D claims covered the same kinds of property claims for damages above 100,000 US dollars. Further, Category E claims came from corporations, other private legal entities and public sector enterprises and concerned construction or other contract losses, losses from the non-payment for goods or services, losses relating to the destruction or seizure of business assets, loss of profits and oil sector losses.¹³¹ Finally, Category F claims were for loss of and damage to government property. As of June 2007, the UNCC had resolved nearly all its claims.

1.2 The Commission for Real Property Claims (CRPC)

The Commission for Real Property Claims (CRPC) in Bosnia was created by Annex 7 of the Dayton Peace Agreement¹³² to restore the property rights of more than 2 million people – more than half of the country's pre-war population – who fled their homes in the war that raged in Bosnia between 1992 and 1995. In some areas, more than half of the dwellings were destroyed or at least substantially damaged. Consequently, many displaced persons were forced to stay in shelters or with relatives. Moreover, many other houses, vacated because of ethnical cleansing among others, were illegally occupied.

The CRPC collected 240,223 claims from refugees and displaced persons, relating to 319,220 real properties. When the CRPC's mandate ended in December 2003, just eight years after being founded, the Commission had confirmed property titles in 312,332 decisions. Assuming that each property had four inhabitants on average, the CRPC served more than one million people.

¹³⁰ This included a consolidated claim filed by the Central Bank of the Government of Egypt on behalf of 915,527 of its nationals with approximately 1,240,000 claims. This figure also covered 31,868 individual claims from *bedouns* for a fixed amount of US dollars 2,500 each, submitted to the Commission by the government of the State of Kuwait in accordance with the special programme established by the Governing Council at its fifty-second session in June 2004. See in general <http://www2.unog.ch/uncc/> (visited June 2007).

¹³¹ For processing purposes, the claims were further divided into four sub-categories. See N. Wühler, 'The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution', (1999) 2(2) *Journal of International Economic Law* 249, at 255-256.

¹³² The General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *International Legal Materials* 75.

1.3 Claims Resolution Tribunal for Dormant Accounts (CRT)

The Claims Resolution Tribunal for Dormant Accounts (CRT) was established in 1997 to decide who was entitled to the balance of accounts opened by non-Swiss nationals or residents but which had remained inactive since 9 May 1945, often because its holders had perished in the Holocaust.¹³³ In the first stage, the CRT decided the fate of 2,308 bank accounts.¹³⁴ For the vast majority of these accounts, however, a claim was submitted by more than one person. With an average of four different claimants for each account, the docket of the CRT quickly grew to a total of 9,918. All these claims were settled within 3.5 years and some 65 million Swiss francs were distributed to the claimants. In 2001, the CRT entered a second phase when Judge Korman, of the District Court for the Eastern District of New York, settled the consolidated class actions lawsuits related to dormant Swiss bank accounts opened before and during the Second World War.¹³⁵ Judge Korman initially decided to rely on the experience and the structure of the CRT to decide on 33,496 new claims from Nazi victims or their heirs.¹³⁶ In this second phase, the CRT had to distribute a total amount of 800 million US dollars and had rendered 2,362 awards as of June 2007.¹³⁷

¹³³ Article 1 of the Board of Trustees of the Independent Claims Resolution Foundation, Rules of Procedure for the Claims Resolution Process, adopted on 15 October 1997, available at http://www.crt-ii.org/_crt-i/frame.html (visited June 2007). Pursuant to art. 1, the CRT also decided claims to accounts dormant since 9 May 1945 and held by a Swiss intermediary for a victim of Nazi persecution. Moreover, the term account is interpreted broadly to include "all kinds of accounts, including, without limitation, current, savings and securities accounts, passbooks, safety deposit boxes, and any other form of dormant bank liability, including, without limitation, bank cheques, bonds and bank-issued medium-term notes (*Kassenobligationen*)" (art. 1).

¹³⁴ This first stage was commonly known as the CRT-I.

¹³⁵ Settlement Agreement in the U.S. District Court for the Eastern District of New York, Chief Judge E. R. Korman presiding, *In re Holocaust Victim Assets Litigation (Swiss Banks)*, 4 November 2002, CV-96-4849, available at http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf (visited June 2007).

In fact, in this second phase, commonly known as CRT-II, the proceedings were more of an administrative nature rather than akin to arbitration. See R. P. Alford, 'The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks', in S. A. Riesenfeld 'Symposium 2001: Fifty Years in the Making: World War II Reparation and Restitution Claims', (2002) 20(1) *Berkeley Journal of International Law* 250, at 264-267.

¹³⁶ See http://www.crt-ii.org/index_en.phtml (visited June 2007).

¹³⁷ Data available at http://www.crt-ii.org/_awards/index.phtml (visited June 2007).

1.4 Housing and Property Claims Commission (HPCC)

The Housing and Property Claims Commission (HPCC) in Kosovo was established in 1999 by the United Nations Interim Administration Mission in Kosovo (UNMIK). It had exclusive jurisdiction to receive and decide three categories of residential property claims: (1) claims for compensation from owners or other rights holders who had to give up their property after 23 March 1989 because of their Albanian origin; (2) claims for informal but freely agreed property transactions concluded after 23 March 1989, carried out due to the growing discrimination against Kosovars of Albanian origin; and (3) claims for return of property from refugees and displaced persons who lost possession of their properties as a result of the 1999 war in Kosovo.¹³⁸

Initially, a caseload of over 60,000 claims was expected. Ultimately, only 29,160 properties were claimed, the vast majority by refugees and displaced persons.¹³⁹ All of them but one had been resolved as of June 2007.¹⁴⁰

1.5 The German Forced Labour Compensation Programme (GFLCP)

The GFLCP was created in 2000 to allocate some 200 million German marks to the more than eight million people (POWs excluded) who were forced by the Nazis to work in factories and camps in Germany, Austria and occupied Europe.¹⁴¹ Within 5 years, approximately 35,200 property claims were received and resolved, of which around 30 per cent (approximately 10,600) were decided positively.

1.6 The International Commission on Holocaust Era Insurance Claims (ICHEIC)

The ICHEIC was founded in 2000 to address the payment of life insurance policies issued to Holocaust victims that remained undisbursed. Strictly speaking, the ICHEIC was not a mass claims settlement body, as it did not evaluate the claims. However, it did initiate and monitor the reimbursement process, examining the insurance companies' files for unpaid insurance policies of Holocaust victims and publishing a list of some 500,000 policy

¹³⁸ UNMIK Regulation No. 1999/23, Section 1.2.

¹³⁹ See A. Dodson and V. Heiskanen, 'Housing and Property Restitution in Kosovo', in S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational publishers, Ardsley, NY, 2003), 236.

¹⁴⁰ Updated statistics are available at <http://www.hpdkosovo.org/> (visited June 2007).

¹⁴¹ See <http://www.compensation-for-forced-labour.org/> (visited June 2007).

holders. Moreover, it investigated the status of insurance policies for which claims had been filed with the ICHEIC. It established procedures and rules to handle claims and to evaluate compensation.¹⁴² It received claims and transmitted them to the insurance company or affiliated organisations that had issued the policy, to be reviewed in accordance with the ICHEIC claims processing and valuation guidelines.¹⁴³ If the claim did not specify the insurance company – which happened in two-thirds of the claims – the ICHEIC investigated the matter further to find out which insurance company had in effect issued the policy. It finally verified whether all the decisions were made in accordance with ICHEIC guidelines.

As of June 2007, the ICHEIC had received 91,558 claims, for which more than 48,000 offers were made by the participating insurance companies or associations.¹⁴⁴

2 Due Process in Mass Claims Proceedings

It belongs to the quintessence of legal proceedings to respect due process. Without due process the administration of justice cannot be perceived as fair and credible. It is not clear though what is exactly covered by the very broad and vague notion of ‘due process’.

This paper takes as a starting point article 6(1) of the European Convention on Human Rights (ECvHR), which contains the basics of due process, at least for traditional court proceedings on the European scene:

In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial [...] to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

¹⁴² the ICHEIC ‘Memorandum of Understanding’, 25 August 1998, at para. 5 (available at http://www.icheic.org/pdf/ICHEIC_MOU.PDF (visited June 2007)).

¹⁴³ When claims did not name a company, the ICHEIC sent them to all relevant companies, i.e. those who did business in the country listed by the claimant as the one where the policy was likely to have been issued, who would then search “for any matches between their records and the electronic information submitted.” (*Holocaust Era Insurance Claims, Processing Guide*, First Edition – June 22, 2003’, 35, (available at http://www.icheic.org/pdf/ICHEIC_CPG.pdf (visited June 2007)).

¹⁴⁴ Updated claims and decision statistics available at <http://www.icheic.org> (visited June 2007).

These requirements have been elaborated by case law of the European Court of Human Rights (ECHR).

In this part of the paper, article 6 ECvHR is used as a guideline for academic analysis to examine to what extent the mass claims proceedings mentioned in section 1 comply with the due process requirements relevant for court proceedings, as set out in article 6. It does not address the question of whether, and if so to what extent, mass claims bodies fall within the ambit of article 6 ECvHR and the scrutiny of the ECHR.

Mass claims resolution programmes are certainly not the primary addressees of article 6 ECvHR, as are judicial courts in the traditional sense. But their administrative nature or process is not in itself a decisive feature that warrants their falling outside the scope of article 6. As the ECHR stated “[t]he character [...] of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) [is] [...] of little consequence”.¹⁴⁵ Equally irrelevant is the fact that the respondent is sometimes a public authority (e.g. UNCC) or that the claim does not have a civil or commercial nature, but often involves administrative or international law.¹⁴⁶ Indeed, proceedings concerning “civil rights and obligations” covered by article 6(1) ECvHR have come to encompass many areas which are frequently regarded by national systems as part of public or administrative law. On the other hand, when claimants and respondents agree to the jurisdiction of a private body to solve their claims, like in the CRT, the proceedings are akin to arbitration and can therefore, to a certain extent, be subjected to the ECvHR requirements of due process.¹⁴⁷

In short, the reference to article 6 ECvHR is only meant as a litmus test for mass claims proceedings, as the convention has its own criteria for determining what enters within its ambit. For instance, some mass claims

¹⁴⁵ European Court of Human Rights, *Ringeisen v. Austria*, series A, N° 13 (1979-80) 1 EHRR 455.

¹⁴⁶ See European Court of Human Rights, *Ringeisen v. Austria*, Series A, No. 13 (1979-80) 1 EHRR 455. Thus expropriation of property by public authorities are covered by the ECHR due process provision: see i.a. *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A, No. 52 (1983) 5 EHRR 35, *Boden v. Sweden*, Judgment of 27 October 1987, Series A, No. 125 (1988) 10 EHRR 36, *Zanatta v. France*, Judgment of 28 March 2000.

¹⁴⁷ See, European Commission of Human Rights, *Nordström, Janzon, Lehtinen v. the Netherlands*, 27 November 1996, No. 28101/95. According to this decision, to be valid an arbitration agreement (qualified as a waiver of Article 6 (1)) must not be signed under duress (Eur. Court HR, *Deweert v. Belgium*, 27 Feb. 1980, Series 1 no. 35, p.25-26, para. 49) and the domestic legislative framework must allow for some measure of control of the arbitration by the courts (Eur. Com. HR, *KR v. Switzerland*, 4 March 1987, No. 10881/84, Dec. 4.3.87, D.R. 51, p.83).

bodies, such as the CRT, may fall within the scope the ECvHR because of their nature and location, while it is clearly not applicable to the UNCC.

In any case, even if – as a matter of principle – the standards of article 6 ECvHR apply to mass claims proceedings, specific circumstances may lead to some flexibility. Indeed, article 15 ECvHR allows a signatory state to derogate from provisions such as article 6 in emergency situations “threatening the life of the nation [...] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. The ECHR has therefore accepted that other ECvHR provisions may be derogated from in “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed”.¹⁴⁸ Far from asserting that any necessity to process hundreds of claims inevitably threatens the life of a nation, the impossibility to decide 320,000 property claims in Bosnia within a reasonable period surely would have had a disruptive effect. So, it is in this spirit of flexibility that the due process requirements, confirmed by article 6(1) of the ECvHR, should be approached in mass claims proceedings for the restoration of property rights after war.

Due process requirements are not an aim in themselves. They are the necessary path to just and fair settlements. Mass claims proceedings are often the best form of justice possible in a given situation. As will be shown below, they respect the requirements of due process, albeit in a different way than state courts do in individual adjudication. The following aspects will be discussed below: (1) access to claims proceedings, (2) exclusivity, (3) the conduct of the proceedings, (4) the impartiality of the adjudicators, (5) the timeliness of the decisions, (6) their fairness, (7) their finality, and (8) their implementation.

2.1 Access to claims proceedings

Under article 6(1), due process clearly requires access to court. This access must not only exist in theory, but also in effect. For mass claims processes, access to claims proceedings is in many respects a different issue than it is for courts, but it is surely not a less substantial issue; quite the contrary.

Firstly, regarding the geographical situation, access to court does not exclude that a claimant may have to conduct proceedings in a far-away country. He or she will usually sue in the state where the respondent is established to ensure the enforcement of the decision. Courts closer by may

¹⁴⁸ See European Court of Human Rights, *Lawless v. Ireland*, Judgment of 1 July 1961, Series A, No. 1-3, (1979-80) 1 EHRR § 28.

indeed not be allowed to assume jurisdiction and/or their judgments may not be enforceable.

While individual court cases may be heard by different judges, mass claims processes must necessarily be centralised and handled by a sole body. But claimants can come from all over the world. For instance, the relatives of dormant account holders who claimed before the CRT came from over 70 different countries, and the Bosnian refugees who submitted claims to the CRPC were spread over the Balkans and Western Europe. Nevertheless, all claimants could very easily access the resolution process. For the CRT, they could submit their claims either at the CRT offices in Zurich or through the many Ernst & Young offices around the world, and could communicate with CRT personnel in more than 15 languages. Likewise, the CRPC had regional claims registration offices across Bosnia-Herzegovina, Serbia, Montenegro and Croatia, as well as in several countries in Western Europe where significant numbers of Bosnian refugees could be found, such as Germany, the Netherlands, Norway, Denmark and Sweden. Moreover, CRPC mobile teams collected claims in remote areas of Bosnia. Similarly, the HPCC established claims collection offices in some regions of Kosovo and Serbia. Regarding the UNCC, claimants simply submitted their claims to their own government, which then filed them in a consolidated form with the UNCC.¹⁴⁹ Finally, GFLCP claims were registered through the network of IOM field offices.¹⁵⁰

Secondly, information accessibility is important, since access to justice requires that potential claimants are well-informed about their rights and available remedies. National courts do not give such information, nor is it their role. By contrast, many mass claims bodies pro-actively inform the public at large of the legal protection they grant. They often use the Internet and websites to post the requirements to claim, the application forms and any other useful information. They also inform the public of their decisions

¹⁴⁹ Stateless persons, i.a. many Palestinians, could submit their claim through an international body such as UNDP, UNRWA and UNHCR.

¹⁵⁰ The decentralisation of claims registration was motivated by “the need to be close to the claimants in a phase of the claims processing cycle when many claimants would undoubtedly require some form of assistance or guidance. It was also hoped that lowering the barrier for claimants to seek information and help from IOM, would lead to a higher quality of claims and a more efficient and cheaper claims verification process later on.” It was made possible by the “use of Internet-based technology, which allows for the simultaneous registration of claims by the IOM filed offices in a central claims database kept at the IOM headquarters in Geneva.” (P. Van der Auweraert, ‘The Practicalities of Forced Labor Compensation. The Work of the International Organisation for Migration as One of the Partner Organisations under the German Foundation Law’, in P. Zumbansen (ed.) *NS-Forced Labor: Remembrance and Responsibility: Legal and Historical Observations* (Baden-Baden, Nomos, 2002), 309)

through their websites. Their administrator can sometimes be contacted via email by claimants who need further information about their particular case. Furthermore, the websites often contain 'Questions & Answers' or 'Frequently Asked Questions' sections, as well as general news releases and links to other relevant institutions.

In countries where information technologies are less reliable, such as Bosnia and Kosovo, traditional means of communication remain important. The CRPC and the HPCC, for instance, disseminated information through a network of local and mobile offices. Moreover, potential claimants could obtain information by telephone, for instance via a toll-free number, where they could speak to interlocutors fluent in their mother tongue. In Bosnia, the CRPC also made announcements via radio and TV networks, in local newspapers and with posters displayed in public buildings. Information can also be relayed by intermediaries such as states and other organisations. For instance, associations particularly well-connected with the targeted audience may help disseminate relevant information, as did Jewish associations in order to reach potential Holocaust claimants. Likewise, the ICHEIC made available on its website information packages to increase awareness of its work. Finally, international entities, such as the Property Law Implementation Plan in Bosnia or the UNMIK in Kosovo, were instrumental in informing the claimants of the CRPC and the HPCC respectively.

Thirdly, effective access to court requires that the weaker party is assisted by professional counsel, if necessary at public expense. For instance, if a poor litigant wishes to bring court proceedings which are meritorious but too complex to pursue without professional legal assistance, the state must provide legal aid "if this is indispensable for an effective access to court".¹⁵¹ In other words, for the courtroom to be effectively open, the litigant must sometimes be seconded by a pro bono lawyer to help him or her through the normal procedural machinery.

Mass claims facilities, however, go even further by offering proceedings entirely free of cost, in which information and expertise is not provided by a legal counsel but by the institution itself. Mass claims institutions will go at length to staff their offices, especially their secretariat, with appropriate and competent personnel. Moreover, as will be discussed below, the institution itself often helps claimants in gathering evidence and/or in presenting their claim, which is more adequate than legal aid.

Fourthly, before the national courts, access to courts does not exonerate claimants from time bars, since they are not thought to violate due

¹⁵¹ European Court of Human Rights, *Airey v. Ireland*, Judgment 9 October 1979, Series A, No. 32 (1979-80) 3 EHRR 592, § 26.

process.¹⁵² The events of the Second World War, which were the object of many mass claims processes initiated in the 1990s, were at that time legally time-barred. However, the general feeling was that fairness dictated granting some relief to Holocaust victims or their heirs for what happened some 50 years ago. Holocaust-related mass claims processes such as the CRT, the ICHEIC and the GFLCP consequently set aside the time bar, thereby increasing the claimants' access to adjudication.

Finally, in spite of formal access to justice for claimants, national courts still dismiss claims when they cannot prove their case. In time of war, however, much evidence is lost or impossible to retrieve (for example when a territory changes sovereignty). As a consequence, many mass claims proceedings lowered their evidentiary standards, as will be discussed below, which ultimately improved the victims' effective access to justice.

2.3 Exclusivity

Due process, in the traditional sense, requires full access to the judiciary. But to what extent do mass claims proceedings comply with that requirement? No general answer can be given. There are several scenarios.

Some mass claims processes have no ambition to be exclusive. In Bosnia, claimants could submit property claims before the CRPC, national courts or administrations. The CRPC was only a very attractive alternative. Likewise, the UNCC had no exclusive jurisdiction but would simply not pay compensation when the loss was covered by proceedings in national courts or other fora. As a consequence, full access to the judiciary remained intact.

However, the claimant can make a mass claims process exclusive by agreeing not to submit a claim elsewhere. For instance, prior to the processing of their claim by the CRT, claimants had to sign a formal 'Claim Resolution Agreement', waiving their right to file their case before another jurisdiction. Similarly, plaintiffs may have to effectively waive their right to pursue their claim elsewhere, in order to actually receive compensation, as in the GFLCP. Likewise, the ICHEIC required the claimant who accepted compensation to sign a form releasing the insurance company from any future liability.

Exclusivity may sometimes be agreed by the initiators of the programme and included in the founding documents, say a peace

¹⁵² For the Court of Human Rights time-bars do not go against due process in court proceedings as long as they pursue "the legitimate aim of ensuring legal certainty and finality while still allowing litigants some opportunity to come to court" (*Stubbing and others v. United Kingdom* (Apps. 22083/93 and 22095/93), Judgment of 24 September 1996, (1997) 23 EHRR 213).

agreement.¹⁵³ The exclusive jurisdiction could also follow from a binding decision of an international institution. For instance, when the UNMIK created the HPCC in Kosovo, it specified that:

As an exception to the jurisdiction of local courts, the Commission shall have exclusive jurisdiction to settle the [...] claims [...]. Nevertheless, the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not [infringe on the Commission's exclusive jurisdiction].¹⁵⁴

When European insurance companies, the US insurance regulatory authorities and the Jewish and survivors organisations created the ICHEIC, they wanted it to be an exclusive remedy.¹⁵⁵ The U.S. government tried to impose this exclusivity through executive agreements. Unfortunately, since individual victims were not a party in these agreements, they were not bound by them and could therefore seek compensation elsewhere.¹⁵⁶ The U.S. State Department had to file 'Statements of Interest' before the courts in order to have the individual claims dismissed, which was usually granted, although refused by some of them.¹⁵⁷

This paper will not venture on the question of whether an imposed exclusivity would be against due process. In fact, mass claims processes should be so appealing that claimants consistently prefer them to courts. In this regard, they do, indeed, have a few trumps. As will be discussed in detail below, they are impartial and unbiased, which cannot always be said of national courts. Their decisions are implemented while enforcement of court judgments often remains problematic; and they help claimants to substantiate their claims, which courts do not do. Moreover, mass claims settlement programmes are usually less costly than court proceedings, since they are free of charge for the claimants and do not require the assistance of a lawyer. In this respect, the secretariat of mass claims bodies typically

¹⁵³ For instance, the Algiers Agreement that created the Eritrea Ethiopia Claims Commission indicated that the Commission was "the sole forum for adjudicating claims" (article 5(8)).

¹⁵⁴ UNMIK Regulation No. 1999/23, Section 2.5. The HPCC could thus submit specific technical issues, such as inheritance and family law, to domestic courts.

¹⁵⁵ The ICHEIC 'Memorandum of Understanding', above n. 142 at para. 6.

¹⁵⁶ M. J. Bazylar, 'Nuremberg in America: Litigating the Holocaust in United States Courts', (2000-2001) 34 *University of Richmond Law Review* 203.

¹⁵⁷ Even then, some courts decided not to grant the motion for voluntary dismissal filed by the plaintiffs in order to have the case dropped and the settlement programmes set up. See for instance, US Court of Appeals (2nd Circuit), 17 May 2001, *In re Austrian and German Holocaust Litigation*.

serves as a dedicated contact to provide the claimants with relevant information, guidance and forms, as well as to help them file their claims. The secretariat also stays available to the claimants during the whole resolution process to answer any further questions, in particular about the status of their claim. Furthermore, decisions are frequently reached more quickly, which is certainly attractive for Holocaust survivors and war victims in need of a home or some compensation to make a fresh start. Finally, the presumptions and relaxed standards of evidence that mass claims processes apply are often crucial for claimants who cannot meet the strict standard required for court proceedings because the evidence was lost, destroyed or confiscated in the war.

2.4 Conduct of Proceedings

Obviously, proceedings should be fair. In civil courts, that implies procedural equality, meaning that both parties should be treated equally. A party should have a reasonable opportunity to present their case – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis the other side.¹⁵⁸ Due process entails the right to have an adversarial trial whereby both parties have “the opportunity to know and comment on the observations filed or evidence adduced by the other party”.¹⁵⁹ Consequently, claimant and defendant should be able to effectively participate in the proceedings if they wish to do so.

Where due process in traditional judicial proceedings applies equally to both sides, mass claims procedural rules usually favour claimants somewhat. For instance, the Dayton Peace Agreement was the very basis of the right for every refugee or displaced person to return to his or her pre-war property.¹⁶⁰ Before the UNCC, claimants did not have to prove Iraq’s liability for all damages resulting from its invasion of Kuwait, since that had already been established by the UN Security Council.¹⁶¹

On a procedural level, overall standards were relaxed to take into account the claimants’ weak position. For instance, the proceedings before the CRT were conducted “in an informal manner and under relaxed procedural rules that [were] convenient for the claimants and [took] into

¹⁵⁸ European Court of Human Rights, *Dombo Beheer BV v. Netherlands*, Judgment of 27 October 1993, Series A, No. 274-A; (1994) 18 EHRR 213, § 33.

¹⁵⁹ European Court of Human Rights, *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A, No. 262; (1993) 16 EHRR 505, § 63.

¹⁶⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *International Legal Materials* 75, at 138.

¹⁶¹ UN Security Council Resolution 687, S/RES/687 (1991), 3 April 1991, (1991) 30 *International Legal Materials* 847, at § 16.

account their age, language and residence”.¹⁶² Furthermore, claimants could usually not meet the strict evidence requirements existing in a courtroom. Obviously, war refugees seldom took their property titles with them when they fled and records were often destroyed or confiscated. Therefore, to give claimants effective access to justice, claims proceedings very often relaxed their evidentiary standards or relied on presumptions. For instance, the ICHEIC clearly acknowledged the difficult balance between “the passage of time and the practical difficulties of the survivors, their beneficiaries and heirs in locating relevant documents, [and] providing protection to the insurance companies against unfounded claims.”¹⁶³ As a result, the ICHEIC decided that once the contractual relationship had been proven, the burden of proof shifted to the insurance company.¹⁶⁴ Similarly, the UNCC lowered its standards of proof for Category A (including displacement) and B claims (including personal injury). The CRT also applied rather relaxed standards in its assessment of claims.¹⁶⁵ Finally, the HPCC’s rules of evidence were “flexible and aimed at doing justice rather than at unnecessary formality.”¹⁶⁶

An essential aspect of fair proceedings is that parties must have ‘their day in court’ to present their case. A day in court for each claimant would, however, render a mass claims programme too lengthy and costly, and thus inefficient. Nevertheless, even without formal hearings, in mass claims processes claimants are given the possibility to ‘tell their story’, usually at greater length than in a traditional judicial process. They may present any information in writing that they consider relevant, even if it does not reach the threshold of ‘evidence’ in a normal judicial setting. They also may correspond and communicate at length with the staff of the settlement body. In this way, plaintiffs can feel that they are participating in the procedure, even without a formal ‘day in court’.

In any event, mass claims proceedings are rarely adversarial. The CRPC, for instance, did not allow oral evidence or public hearings: neither the current occupant of the claimed property nor the local authorities were invited

¹⁶² CRT, Rules of Procedure, art. 17 (i).

¹⁶³ The ICHEIC ‘Memorandum of Understanding’, above n. 142 at § 5.

¹⁶⁴ The relaxed standards of proof and the approach to the burden of proof described above also apply to claims for policies that cannot be attributed to a particular company or that were issued by companies no longer in existence.

¹⁶⁵ CRT, Rules of Procedure, art. 15.

Article 22 defines the applicable standard of proof: “The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panels [...] shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.”

¹⁶⁶ A. Dodson and V. Heiskanen, above n. 139 at 235.

to participate in the proceedings. In the UNCC, oral hearings were held for large claims and only in exceptional cases. Similarly, proceedings before the CRT were largely based on documents only, with oral hearings when necessary.¹⁶⁷ On the other hand, the HPCC gave notice of the claims to the current occupant and other parties with a legal interest in the claimed property, who were then invited to participate in the procedures.¹⁶⁸ However, given the security risks and limited freedom of movement for minorities, the HPCC did not conduct public hearings or receive oral evidence, unless there was a specific need.¹⁶⁹ Claimant and respondent therefore very often merely submitted evidence and arguments in writing.

In fact, many mass claims resolution facilities do not wait for the parties' arguments and investigate the case directly through either the adjudicators or the secretariat. The UNCC's proceedings, for instance, were inquisitorial rather than adversarial. Indeed, the commissioners were responsible for establishing the facts and evaluating the claims by seeking the information and documentation required.¹⁷⁰ So doing, the UNCC developed particularly sophisticated techniques to collect the necessary information and relied thereby on computer support and statistics. In Bosnia-Herzegovina, the CRPC was able to recover and reconstruct most of the computerised land-register data, which was used as a verification database in the resolution of claims. It also used the 1991 census database, in which the main place of residence of all citizens was recorded, and through local courts and administrative bodies obtained additional sources of evidence on property rights. The CRPC relied on its free access to all these records to determine property titles where claimants could no longer obtain that information from the local administration, in some cases for ethnical reasons. Its staff could thus check each individual claim against all available records. In Kosovo, the HPCC also used computer databases, programmes and other electronic techniques to expedite its decision-making. In the ICHEIC insurance companies searched their records regardless of whether a claim was supported by evidence and, where appropriate, consulted external archives to find evidence of the existence of an insurance policy. Finally, the GFLCP claims were entered into a central database by a professional data entry company before a number of checks were conducted to determine whether the claimant was at least *prima facie* eligible for compensation.¹⁷¹ The

¹⁶⁷ CRT, Rules of Procedure, art. 17 (iv).

Pursuant to art. 17 (ii) and (iii), the Tribunal could conduct its own factual and legal inquiries and it could order the parties to submit any relevant evidence in their possession or under their control.

¹⁶⁸ UNMIK Regulation No. 2000/60, Section 9.

¹⁶⁹ UNMIK Regulation No. 2000/60, Section 19.1 and 19.2.

¹⁷⁰ Wühler, above n. 131 at 267.

¹⁷¹ Van der Auweraert, above n. 150 at 310.

subsequent processing and verification of claims involved various types of data matching and archival research.¹⁷²

2.5 Impartiality of adjudicators

Article 6 (1) of the ECHR requires “an independent and impartial tribunal”, which has both an objective and a subjective element.¹⁷³ The objective element depends, among other things, on who appoints the adjudicators, while the subjective element concerns the personal conviction of the respective adjudicators.

Firstly: Who appoints the adjudicators? The independence of state court judges is fostered by the fact that they are appointed by the state. That certainly helps to guarantee their independence from the parties who occasionally appear before them. In mass claims resolution facilities, adjudicators can also be appointed by a neutral body. Even if some are appointed by the parties involved in the claims or have the same nationality as the claimants, the panels they are on or the decision making process still guarantees independence. In the UNCC, for instance, the 59 commissioners came from 40 different countries (none from Iraq or Kuwait) and decided the claims in panels of three. Although some commissioners may occasionally have had to decide claims from a claimant of their own nationality, the presence of the other two commissioners, the scrutiny of the UNCC Secretariat and the approval by the Governing Council of every decision, were effective structural safeguards of the independence of the resolution process. In the CRPC, three of the nine commissioners were not from Bosnia-Herzegovina and had been appointed by the President of the European Court of Human Rights. The six others, however, were appointed by the Croat, Bosnian and Serb parts of Bosnia-Herzegovina. Moreover, decisions were made by consensus, which guaranteed independence.¹⁷⁴ In Kosovo, HPCC decisions were made by a panel consisting of two

¹⁷² Id. at 311.

¹⁷³ F. G. Jacobs, R. White, C. Ovey, *The European Convention on Human Rights*, (Oxford, Oxford University Press, 2006), 4th Ed., at 181.

¹⁷⁴ The mixed international and local composition of the CRPC has important advantages. The presence of international commissioners is a guarantee for impartial and fair claims adjudication in accordance with international standards. The involvement of local adjudicators ensures full conformity with local legal standards and systems and helps to achieve a proper integration of the final decisions into the domestic legal order. The dialogue between commissioners from varied legal backgrounds has certainly informed the decision-making process. See H. Van Houtte, ‘Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina’, (1999) 48 *International and Comparative Law Quarterly* 625, at 628.

international and one local commissioner, all of whom had been appointed by the Special Representative of the Secretary-General.¹⁷⁵ For the Property Claims Commission of the GFLCP, the German Federal Ministry of Finance and the U.S. Department of State each appointed one member, who together chose a Swiss chair.¹⁷⁶

State judges are often appointed for life, which also enhances their independence. Mass claims processes, on the other hand, are by nature intended to exist only temporarily. Appointments are therefore not made for life but only for the duration of the process and the adjudicator's independence cannot be undermined by the constraints of seeking re-appointment.¹⁷⁷

Secondly, the subjective element is related to the personal independence and impartiality of the adjudicator. The UNCC had strict rules on impartiality and its commissioners had to confirm that they would act impartially and in their personal capacity. Moreover, they were not allowed to have financial interests in any of the claims submitted to their panel, nor were they allowed to represent or advise any party or claimant concerning the claims process during their service as commissioner or in the following two years. All commissioners were under obligation to disclose any prior, current or newly arisen relationship with governments, corporations or individuals, or any other circumstances that were likely to give rise to justifiable doubts as to their impartiality or independence with respect to their tasks. Finally, prior to taking up their duties, commissioners had to solemnly declare that they would perform their duties "honourably, faithfully, independently, impartially and conscientiously".¹⁷⁸ In the CRPC as well, commissioners had to be independent and impartial. Even the commissioners appointed by the ethnic groups in Bosnia-Herzegovina were not permitted to represent or defend the interests of the people from 'their' group.¹⁷⁹ Likewise, for each case the CRT arbitrators had to disclose any circumstances which could cast a doubt on their independence and impartiality and had to withdraw if so requested by a party.

Impartiality and independence is also important for the secretariat, which assisted the adjudicators extensively in the resolution of the claims. In

¹⁷⁵ Regulation No. 1999/23, Section 2.2.

¹⁷⁶ Section 9, § 6 of the Law on the Creation of the Foundation 'Remembrance, Responsibility and Future'.

¹⁷⁷ At the UNCC, appointments were made for a specific panel which would operate for three years and then be automatically dissolved. In principle no re-appointments to other panels was envisaged.

¹⁷⁸ Art. 27 of the UNCC Governing Council, Decision No. 10: Provisional Rules for Claims Procedure, S/AC.26/1992/10, 26 June 1992, (1992) 31 *International Legal Materials* 1053.

¹⁷⁹ See Dayton Peace Agreement, Annex 7, art. IX.2.

this regard, the UNCC secretariat was internationally staffed and impartial. In the CRPC, multi-ethnic teams of local lawyers were supervised by international staff members as they performed their support tasks, which included screening computerised claims, checking them against the available records and preparing decision proposals. In the HPCC, the secretariat staff reflected the ethnic composition of Kosovo (with the Serbs as a minority) and worked under the supervision of the international staff to guarantee impartiality. In any case, the use of standards for decision and computer-assisted resolution methods did not leave much room for hidden biases.

Finally, when adjudicators and staff have to operate in areas affected by mass claims, such as the CRPC did in Bosnia-Herzegovina, the HPCC in Kosovo or the CRT in Switzerland, immunities to protect them from unduly interference may be an additional feature to guarantee their independence and impartiality. These immunities can be provided in constitutive texts¹⁸⁰ or in subsequent decisions.¹⁸¹ Immunity from jurisdiction should be minimised to allow personnel acting in their personal capacity, such as commissioners or members of the policy-setting body but also secretariat staff, to perform their tasks with independence and impartiality. Immunity from legal process for acts and decisions made in the performance of official duties was granted to the CRT, the UNCC, the CRPC and the HPCC.

2.6 Reasonable time of proceedings

Due process requires that decisions be rendered within a reasonable period of time. In situations prone to mass claims settlement, the issue is not so much whether an individual claim is settled within a reasonable time but whether the totality of the claims is solved in a timely fashion. For instance, an individual Bosnian or Egyptian could probably have obtained a decision on his lost property from a state court within a reasonable period. However, if 320,000 Bosnians or some 2 million former workers in Iraq or Kuwait, had had to go to State courts, it would have taken decades before the final decisions were reached. Although individual court proceedings may lead to a decision within a reasonable time for a happy few, from a more general vantage point they do not provide overall expedient decision-making. Thanks to the specific techniques and procedures used, the CRPC rendered its 320,000 decisions within 8 years and the UNCC settled more than 2.6 million worker claims within 15 years. Mass claims processes thus serve due process better than state court proceedings.

¹⁸⁰ Dayton Peace Agreement, Annex 7, art. IX.3 and art. 5(18) of the Algiers Agreement.

¹⁸¹ Art. 26 of the UNCC 'Provisional Rules for Claims Procedure' and art. 17(6) of the UNMIK Regulation No. 2000/60.

As a result, an attractive feature of mass claims processes is the expediency of their decision-making, since these proceedings are inherently geared to settle disputes within the shortest time possible. When they can, they even speed up their proceedings. For instance, the CRT allowed a 'fast-track' procedure with a sole arbitrator through which claims had to be decided within 30 days. Similarly, accounts with a balance of less than 100 Swiss francs were solved with an expedited procedure.¹⁸² In the UNCC, small individual claims were processed with priority¹⁸³ and Category A, B and C claims were handled through an expedited procedure with relaxed standards of proof. Before the HPCC, uncontested refugee claims were also decided in a fast-track summary procedure.¹⁸⁴ Finally, in order to expedite decisions, claims with similar factual or legal issues were often processed together (for instance in the GFLCP¹⁸⁵) and standard patterns of decision-making were established, based upon the evidence submitted (in the CRPC among others).

2.7 Fairness of decision

One of the main criticisms of mass claims processes is that they are often unable to tailor their remedy to the individual case, thus granting compensation that does not reflect the actual damage suffered. In the CRT, for instance, banks were willing to pay ten times the reported account value in full and final settlement of claims for accounts with a balance of less than 100 Swiss francs.¹⁸⁶ Such compensation did not reflect the actual interest but was an expedient way of taking into account inflation and interests without requiring extensive arguments and calculations. Ultimately, the use of fixed-amount compensation or expedited valuation methods was the price paid for quick decision-making and the fact that claimants were often unable to document their losses. Nevertheless, some resolution facilities applied full valuation techniques. For instance, although the UNCC used fixed tiers of

¹⁸² Final Report on the Work of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), p.20.

¹⁸³ UNCC Governing Council, Decision No. 1: Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1, 2 August 1991, 30 *International Legal Materials* 1712, at §§ 1 and 8. According to Wühler above n. 131 ('A New Contribution, at 261), this priority marks a sharp contrast with other claims resolution processes, where the emphasis had traditionally been on claims by governments and corporations.

¹⁸⁴ UNMIK Regulation No. 2000/60, Section 23.

¹⁸⁵ The procedures are set out in the IOM Property Claims Commission, Supplemental Principles and Rules of Procedure (5 June 2001), Section 20.1 (available at http://www.compensation-for-forced-labour.org/english_home.html (visited June 2007)).

¹⁸⁶ The small amount settlement procedure was used only in non-victim cases. See the CRT, Final Report, p.21.

compensation for Category A and B claims, it went to great length to evaluate the actual damage in the claims presented by companies and states.

2.8 Finality of decision

Due process does not require the possibility of appeal against a decision. However, the possibility of review, whereby errors can be corrected, may enhance the acceptability of a decision. At first glance, appeals are incompatible with mass claims processes, as they delay the final decision. Nevertheless, many mass claims processes allowed for review of their decisions. For instance, although CRPC decisions were final and binding and could not be reviewed by any domestic court¹⁸⁷, they could be subject to internal reconsideration whenever a party submitted new evidence or facts that had not yet been considered by the commission.¹⁸⁸ In the GFLCP, an Appeals Body decided on appeals on the basis of written information and evidence available. The ICHEIC's Appeals Tribunal or Appeals Panel consisted of independent and impartial arbitrators and could review

¹⁸⁷ Dayton Peace Agreement, Annex 7, art. XII(7). Annex 7 does not grant the CRPC any enforcement or implementation powers. Instead, it imposes the responsibility for the implementation of CRPC decisions upon the domestic organs (Dayton Peace Agreement, Annex 7, art. VIII). Unfortunately, Annex 7 does not specify a particular implementation procedure, and in the first few years after the war, local authorities were often unwilling or unable to take the necessary steps to bring decision holders into possession of their property. See M. Garlick, 'Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina', (2000) 19 *Refugee Survey Quarterly* 68, at 78.

Eventually, the High Representative imposed specific laws in each entity, setting out the concrete steps that local authorities are expected to take when a claimant requests enforcement of a CRPC decision. See the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, Republika Srpska, Federation of B-H, 27 October 1999, (available at http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/html/laws/entitylaws.htm (visited June 2007)).

Once the implementation laws entered into force, the respect for CRPC decisions started growing, even in areas where obstruction of property rights was prominent until recently. See, M. Cox & M. Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in S. Leckie (ed.), above n. 139 at 65.

¹⁸⁸ CRPC, Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Refugees and Displaced Persons, 8 October 2002, Art. 76, (available at http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/html/laws/lawbookofregulations.htm (visited June 2007)).

decisions issued by the participating insurance companies or associations. These appeal proceedings were conducted on a document-only basis, unless an oral hearing was requested by one of the parties or ordered by the arbitrator.¹⁸⁹ Approximately 2,200 appeals for insurance claims were received.¹⁹⁰

2.9 Implementation

Due process implies that the decision is implemented effectively. The enforcement of court decisions with regard to property claims after a war may very often be obstructed for practical or legal reasons. For instance, when a state is recognised guilty or liable by a judgment, it may rely on immunity of enforcement, which is recognised by the European Court of Human Right as a rightful obstacle to enforcement.¹⁹¹

Many mass claims processes, however, usually provide for the implementation of their decision. In Kosovo, the HPCC itself implemented its decisions by issuing an order for the eviction of the then current occupants of a property that was to be repossessed by a claimant. All the HPCC's decisions have thus been implemented.

Mass claims instances may also pay out themselves the compensation they awarded from a designated fund. This was the case for the UNCC,¹⁹² the CRT in its second phase¹⁹³ and the GFLCP.¹⁹⁴ For

¹⁸⁹ ICHEIC, Appeals Tribunal Rules of Procedure, art. 11.3 (available at http://www.icheic.org/pdf/ICHEIC_Appeals.pdf (visited June 2007)).

¹⁹⁰ This figure encompasses appeals on company offers and declines. For a breakdown by category, see the updated on claims and decision statistics available at <http://www.icheic.org> (visited June 2007).

¹⁹¹ See amongst many examples: *Horsnby v. Greece* (App. 18357/91), Judgment of 19 March 1997; (1997) 24 EHRR 250; *Burdov v. Russia*, (App. 5949/00), Judgment of 7 May 2002, (2004) 38 EHRR 639; *Jasuniene v. Lithuania*, (App. 41510/98), Judgment of 6 March 2003; *Shmalko v. Ukraine*, (App. 60750/00), Judgment of 20 July 2004; and *Popov v. Moldova* (App. 74153/01), Judgment of 18 January 2005.

¹⁹² UN Security Council Resolution 687, S/RES/687 (1991), 3 April 1991, (1991) 30 *International Legal Materials* 847, at para 18.

¹⁹³ Section 5 of the CRT Settlement Agreement (26 January 1999):

”Settling Defendants shall pay Installments 2 [i.e. US\$ 333 million], 3 [i.e. US\$ 333 million], and 4 [i.e. US\$ 334 million] to a separate fund (Settlement Fund) that Settling Plaintiffs shall establish following the Court’s issuance of Preliminary Approval. [...]”

¹⁹⁴ Section 9 of ‘the Law on the Creation of a Foundation “Remembrance, Responsibility and Future”’ (available at http://www.compensation-for-forced-labour.org/english_home.html (visited June 2007)):

“(4) The sum of one billion deutschmarks of the Foundation’s monies is intended for payments to persons who suffered property loss. This amount is divided into the following maximum amounts: [...]”

insurance claims, each company established its own fund to pay for its own claims, but the ICHEIC also administered a Humanitarian Fund to provide relief to claimants who held an insurance policy that could not be attributed to a particular insurance company or who held insurance issued by companies no longer in existence.

Even when mass claims bodies do not implement their decisions themselves, they may nevertheless be instrumental in their enforcement. For instance, in its first stage, the CRT did not pay out the money itself but requested the banks to do so.¹⁹⁵ Moreover, it provided the claimants with practical information, such as telephone numbers and contacts at the relevant banks, and followed up when payment was in arrears.¹⁹⁶ Finally, it sent the claimant a certified copy of the award which could then be enforced in a Swiss court.¹⁹⁷ Likewise, the CRPC had no power to implement its decisions on property rights. Implementation rested squarely with the domestic authorities, which had ample room for obstruction.¹⁹⁸ However, in 1999, the High Representative imposed a 'Law on the Implementation of CRPC Decisions', which took care of implementation problems with local authorities. Moreover, any obstructive officials were dismissed by the High Representative, thus allowing the implementation of nearly all CRPC decisions.

3 Conclusion

Although mass claims settlement programmes cannot implement due process requirements in the way state courts do, their proceedings closely follow the same lines. Indeed, both domestic courts and mass claims resolution facilities aim at providing justice to the victims by safeguarding their access

See also Section 6 of 'the Law on the Creation of a Foundation "Remembrance, Responsibility and Future": "The Board of Directors shall direct the day-to-day business of the Foundation and shall implement the decisions of the Board of Trustees. It is responsible for distributing the resources of the Foundation to the partner organisations and for the management of the "Remembrance and Future" fund. It oversees the purposeful and prudent expenditure of the Foundation's funds, in particular adherence by the partner organisations to the provisions of this Law and the guidelines established by the Board of Trustees for the use of its funds."

¹⁹⁵ CRT, Final Report, 58.

¹⁹⁶ CRT, Final Report, 58.

¹⁹⁷ H. M. Holtzmann and E. Kristjánsdóttir (eds.), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford, Oxford University Press, 2007), 137.

¹⁹⁸ Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) – End of Mandate Report (1996-2003), 23.

to impartial adjudicators, the proper, expedient and fair conduct of proceedings, and by allowing final decisions to be rendered and implemented. Nevertheless, while traditional courts focus on the individualised handling of their docket, mass claims processes have in mind the resolution of claims in a global fashion. Moreover, international mass-claims resolution bodies must take into account specific constraints. The main one is linked to evidentiary difficulties, since public documentation may have been destroyed during a conflict or individuals may have fled without property-related documents. There is also a particular sense of urgency to see the claims resolved quickly for claimants who have lost everything during the conflict or who are aged (Holocaust survivors, for instance). Finally, a conflict can affect the properties of individuals spread all over the world. Therefore, mass claims processes must accommodate the demands of both claimants and defendants as best as possible, by tailoring their procedures to the specific circumstances. Ultimately, due process is only a way of delivering justice that will be considered fair, credible and legitimate. In this regard, mass claims programmes cannot afford to sacrifice basic procedural safeguards, but must adapt them so as to provide efficient and 'rough' justice for the victims, especially after war.