

INTERNATIONAL LAW ASSOCIATION
RIO DE JANEIRO CONFERENCE (2008)

**INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF
THE PUBLIC**

Members of the Committee:

Professor Catherine Kessedjian (France): *Chair*
Professor Richard Garnett (Australia): *Co-Rapporteur*
Gaetan Verhoosel (France): *Co-Rapporteur*

Professor Lauro da Gama e Souza (Brazil)

Alternate: Ana Carolina Beneti

Professor Wouter De Vos (South Africa)

Professor Masato Dogauchi (Japan)

Alternate: Professor Yasuchi Nakanishi

Dr Ales Galic (Slovenia)

Professor Burkhard Hess (Germany)

David P Joseph (UK)

Professor Patrick Kinsch (HQ)

Professor Alberto Malatesta (Italy)

Professor Dmitry Mareshin (Russia)

Anand M Mathur (India)

Alternate: Sameer Parekh

Judge Gustaf Moller (Finland)

Professor Marie-Laure Niboyet (France)

Professor Hilmar Raeschke-Kessler (Germany)

Professor Giuliana Redin (Brazil)

Genevieve Saumier (Canada)

Professor Amos Shapira (Israel)

Daniel Simms (Unaffiliated)

Ms Vesna Tomljenovic (Croatia)

Mr Jacob van de Velden (UK)

Professor Janet Walker (Canada)

Mr David J C Wyld (UK)

TRANSNATIONAL GROUP ACTIONS
Report and Draft Resolution

Submitted to the ILA 73rd Conference, Rio de Janeiro, August 17-21, 2008

On behalf of the Committee:

Catherine Kessedjian, *Chair*

Richard Garnett, *Co-Rapporteur*

Gaetan Verhoosel, *Co-Rapporteur*

Contents

	<u>Page</u>
I REPORT	2
A. THE COMMITTEE'S WORK	2
B. INTRODUCTION	2
C. SURVEY OF EXISTING MODELS	5
1. The Class Action Model	5
2. The English Group Litigation Order	5
3. Collective Action Models in Continental Europe	6
D. COMMON APPROACHES AND THEMES	7
1. Preconditions for a Group Action: Standing and Certification	7
2. Preconditions and Certification: the Transnational Dimension	9
3. Jurisdiction	12
4. Notification	14
5. Applicable Law	17
6. Evidence	17
7. Case management	178

8. Transnational Cooperation.....	19
9. Costs/Lawyers Fees.....	21
10. Res Judicata Effect and Recognition of Foreign Judgments.....	22
II DRAFT RESOLUTION.....	26

REPORT

A. The Committee's Work

1. The Committee on International Civil Litigation and the Interests of the Public was formed in November 2004. A first meeting was convened in Paris in September 2005 at the offices of Debevoise and Plimpton.¹ This meeting was convened essentially to refine the mandate of the Committee and decide which topic was to be focused on in priority. After some debate about the concept of "Interest of the Public", the Committee decided that it meant collective interests larger than the parties involved in the litigation, such as interests of the society at large, or private enforcement of public or market regulation or other similar interests.

2. Within a long list of potential topics which the Committee initially identified as candidates for its attention, collective actions or group actions (class actions in the United States terminology) was the one that was most pressing as already posing numerous difficulties in a transnational context.

3. Members then discussed the work methodology to be adopted by the Committee. Although it was recognized that national reports may not always be the best method, in this particular instance all members needed to be apprised of the developments in all countries which did have some form of collective or group actions. In addition, a number of issues were identified such as the standing of group members, parallel proceedings and preclusive effects which were considered from the outset as very important for any transnational group action.

4. A second meeting was convened in Toronto in June 2006 kindly hosted by Stikeman Elliott. At that meeting it was decided that the Committee would prepare a set of guidelines of best practices for the transnational aspects of group actions. A number of transversal reports were to be prepared on each of the following themes: standing or who can bring the claim; requirement for certification; jurisdiction; information/notification to potential group members; applicable law; evidence; management of proceedings; cost; preclusive effect of the judgment or settlement in foreign countries.

5. These reports were presented and discussed at a third meeting held in Paris in June 2007. These discussions lead to a further refinement of the objectives pursued by the Committee. It was confirmed that the Committee did not address itself to domestic laws and that the best practices to be proposed should not upset any established legal system but help the coordination of these systems where they interact with one another, i.e. in transnational cases.

B. Introduction

6. Several countries have instituted some form of group or collective action and many others are considering it. In this Resolution we refer to all such forms of action as "Group Actions or Claims". By this we mean that claimants are enabled to bring aggregated or test claims against one or more defendants. In practical terms this enables claimants to enforce rights that could not be enforced individually either because the individual claims are not economically viable or for other reasons. Dealing with and managing claims in this way results in cost efficient redress, enhances the due administration of justice and promotes the public interest in the context of private disputes². This is not to say, however, that group actions are always a good way to deal with multiple claims. Indeed, it is notorious that, at least in the United States, class actions have put pressure on defendants to settle non-meritorious claims essentially because of the huge costs defendants would incur in

¹ The Committee expresses its thanks to Debevoise and Plimpton for hosting both the 2005 and the 2007 Paris meetings allowing for a congenial and fruitful environment for the Committee's deliberations.

² The Committee is aware that it is difficult to study group actions in general for all types of actions: mass tort, securities, product liability etc... Some of the analysis below may call for nuanced answers depending the type of actions at stake.

defending a class action. This may be unique to the United States but has been kept in mind by Committee Members when preparing the Resolution proposed. The Committee also kept in mind that there are other means for collective redress, such as administrative schemes put into place by States with or without dedicated funds, with or without insurance or other means. Current wisdom is that probably different schemes are complementary one with the other. However, this report focuses exclusively on private litigation to keep in line with its mandate³.

7. The existence of one or several foreign aspects in matters giving rise to group disputes should not warrant and generally does not lead to the refusal to make group proceedings available within the territory of a given State.

8. However, the existence of one or several foreign elements in the group dispute should provide the basis for states to adopt the best practices set out in the proposed resolution notably in respect of standing, jurisdiction, notification, management of proceedings, and the effects of the decision which may be taken in the context of such a dispute.

9. In developing these best practices, the Committee's main objective is the efficiency of transnational litigation, notably by facilitating cross border preclusive effects of the judgments rendered or settlements reached by group proceedings. Indeed, group actions are not an end as of themselves but must be a tool for the pursuit of justice in concrete cases. A group action is a means by which courts may promote justice under law more fully. The resolution proposed by the Committee must be considered and appraised in this light.

10. The following features were identified as common to all group actions:

- a. A multitude of plaintiffs located in different countries⁴;
- b. A multitude of claims arising in different countries⁵;
- c. Claims which, if taken separately would not be brought to court because they are individually not economically viable;
- d. Common substantive issues to all cases, and issues that are different for each case;
- e. The possibility that multiple courts will assert jurisdiction over the same claim, thereby requiring a method of coordinating proceedings;
- f. Scattered evidence and related questions of case management; and
- g. Lack of certainty as to the effect of the decision/settlement in the various jurisdictions concerned.

11. The Committee has chosen to use the expression "transnational group actions" rather than "class actions" because it is more inclusive, extending also to those countries that have not enacted formal class action legislation on the United States model but nevertheless recognize in certain circumstances the rights of groups of individuals or bodies to bring collective claims⁶.

³ The Committee decided not to study other processes through which mass claims have been dealt with. For a detailed study of these processes, see Howard M. Holtzmann and Edda Kristjansdottir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, 2007. The Committee also decided to limit its work on judicial processes in domestic courts and not to study group actions before arbitral tribunals.

⁴ The Committee discussed at some length whether defendant-group actions were also the focus of its work. It is not uncommon for there to be group actions with more than one named defendant, but this would not appear to give rise to issues specific to the mandate of this Committee. Defendant class actions based on the US model of class actions are available in at least one jurisdiction (Ontario) but the procedure is rarely invoked.

⁵ This is particularly true in securities class actions in the United States, where some claimants have purchased the securities in dispute on one or more foreign exchanges.

⁶ In a speech delivered in Lisbon on 10 November 2007, referring to the Equitable Life crisis, Diana Wallis, Vice President of the European Parliament, regretted that European Law still lacks proceedings allowing aggregation of claims, not in the US style class actions, she said, but having in mind the specific European culture and procedural specificities. This is also confirmed by the Opinion of the European Economic and Social Committee on the Defining the collective actions system and its role in the context of Community consumer law, 6 February 2008, p.17 point 7.1.2.

12. The main objective of this report is to identify general principles and common themes or approaches across the various models of group action currently employed in the world. At times, however, it must be admitted that uniformity does not exist, even between countries which have adopted the same generic model (e.g., the US class action procedure). Obviously the differences become even starker when comparing, for example, features of the US class action and European collective claim models. Since the four “class action countries” reviewed in this report (the US, Australia, Canada and Israel) have developed more detailed and refined procedures than elsewhere in several respects, they have inevitably demanded greater attention from the Committee⁷.

13. The second objective of the report is to consider some of the uniquely *cross-border* and *transnational* aspects of group actions. While the transnational context is relevant to all aspects of group actions covered in this report, an examination of the topics of jurisdiction, applicable law and recognition and enforcement of foreign judgments will be made with a focus on whether the principles applied to ordinary suits need modification in the context of group actions.

14. The draft resolution proposed for adoption by the full house of the International Law Association is aimed at proposing guidelines or best practices for the specific issues facing courts around the globe when dealing with group actions which have some transnational components to them.

⁷ The reader may find the report as mostly oriented towards common law systems. Although this was not an intended result, it may be true because of the mere amount of experience that has developed over the years in common law countries. The resolution is aiming at a balanced approach and the guidelines propose solutions which should not hurt any legal or judicial culture around the globe.

C. Survey of Existing Models

15. In this report three major models of group action will be referred to: (i) the US/Canada/Australia/Israel model of “class actions;” (ii) the English group litigation orders model; and (iii) the various forms of collective action in continental Europe⁸.

1. The Class Action Model⁹

16. The United States has the oldest and most well known legislation on class actions in Rule 23 of the US Federal Rules of Civil Procedure (FRCP), which in its current form dates back to 1966¹⁰. Significantly, the US model has been adopted with some modifications in almost all Canadian provinces¹¹ (including the civil law province of Quebec),¹² at the federal level in Canada, in Australia in the state of Victoria¹³ and at the federal level,¹⁴ and most recently, in Israel in 2006.¹⁵

17. Under the US class action model a claim begins in the same way as any action with the plaintiff commencing a claim against the defendant by service of process on the defendant. The distinctive feature of the class action is that the plaintiff sues on his or her behalf and on behalf of a number of other persons seeking relief in respect of claims with common questions of law or fact that predominate. Generally, the plaintiff must bring a motion to the court to certify the claim as a class action¹⁶. Once certification has occurred, all members of the class as defined are bound by the result of the litigation and are entitled to share in any court judgment unless they opt-out or exclude themselves from the class before a certain time. As will be seen below, class actions have also raised difficult questions of certification, jurisdiction and recognition where class members reside in different countries.

2. The English Group Litigation Order

18. The English Group Litigation Order (GLO) was introduced in 2000¹⁷ to overcome the restrictions associated with the old Chancery representative proceeding, in particular, the requirement that “more than one person had to have the *same interest* in a claim.”¹⁸ While the constraints of the old representative action also led to the enactment of the class action legislation in Canada and Australia, England was not prepared to go as far. Instead, it adopted the GLO which contains some of the features of the US/Canada/Australia regime but with key differences¹⁹.

19. Under the GLO, once relevant group issues are identified, a registry of group claims must be created as well as a court to manage the claims.²⁰ Significantly, the GLO provides for an “opt-in” rather than an “opt-out” procedure in which parties have to choose to litigate by having their names entered on the group register. The court in its case management powers may alter the GLO issues or order that a claim or claims proceed to

⁸ For a fully developed study, see the contributions gathered for the Oxford conference entitled « The Globalization of Class Actions », held in December 2007 and available at <http://www.globalclassactions.stanford.edu/>.

⁹ For a detailed and very well informed study, see Rachael Mulheron, *The Class Action in Common Law Legal Systems – A Comparative Perspective*, Hart Publishing, 2004.

¹⁰ Linda Silberman, “The Vicissitudes of the American Class Action – With a Comparative Eye”, 7 Tul. J; Int’l & Comp. L. 201 (1999).

¹¹ For the purposes of this report, reference will be made to the Class Proceedings Act 1992 (Ontario) and the Class Proceedings Act 1996 (British Columbia) (CPA).

¹² Code of Civil Procedure Arts 999-1030.

¹³ Supreme Court Act 1986 (Vic) Part 4A

¹⁴ Federal Court of Australia Act 1976 (Cth) Part IVA (FCA)

¹⁵ Class Action Act 2006 (Isr) (CAA)

¹⁶ In Australia, there is no specific statutory requirement for certification. However, in practice, the same requirements can and do arise for determination if the defendant seeks to challenge the class proceeding by stating that it lacks sufficient numerosity, for example, or the plaintiff otherwise fails to satisfy the standing requirements.

¹⁷ Civil Procedure Rules 1998 Part 19.III (CPR).

¹⁸ CPR 19.6.

¹⁹ The English system is under scrutiny for a potential reform. See Rachael Mulheron, “Reform of Collective Redress in England and Wales: A Perspective of Need”, A research paper for submission to the Civil Justice Council of England and Wales, May 2008.

²⁰ CPR 19.11(2)

trial as “test cases.”²¹ A test case is a procedure whereby one action is used to determine a single issue common to all group members. Any judgment given on a GLO issue in the test case binds all other parties on the group register unless the court orders otherwise. In addition, the court may give directions as to the extent to which that judgment or order is binding on the parties to any subsequent claim entered on the group register²².

3. Collective Action Models in Continental Europe

20. The great divide between common and civil law resonates in the historical absence in civil law countries of a US-style class action model apart from the limited experience in Portugal (since 1995) and Spain (Law of civil judgment 1/2000, in force as of 1 January 2001). The Committee is not aware of any civil law country to date that has fully replicated a US-style opt-out class action model²³. That does not mean, however, that civil law countries do not provide for other forms of collective action – most of them do. Nor that attitudes in the civil law world cannot evolve towards greater acceptance of the US-style class action model – in most countries this is the subject of a lively debate.

21. Given the wide variety of group action models encountered across continental Europe, this Report can only illustrate that variety by summarily describing a few models in major European jurisdictions. It should be noted preliminarily, however, that Directive 98/27 of May 19, 1998 introduced a requirement at an *EU-wide* level for EU Member States to enact legislation enabling consumer associations from any EU Member State to bring collective actions in their courts to enjoin conduct inconsistent with EU consumer protection law. However, the Directive is not concerned with damages relief and any such consumer actions are pursued in the name of the association and do not preclude litigation by individual consumers. The essential aim of the Directive is to enhance mutual recognition in all EU countries of the standing of consumer associations duly registered in one of the Member States in order to enhance private enforcement of consumer law. On 2 April 2008, the EU Commission issued a white paper on Damages actions for the breach of the EC Antitrust rules (Com (2008) 165 final) proposing, *inter alia*, to combine the representative actions with an opt-in model of collective actions in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

22. In *France*, Article L124-20 of the Labor Code permits representative actions by trade unions to protect the interest of employees. However, every employee represented must be identified or identifiable and given actual notice, and retains the right at any time prior to judgment to withdraw from the action. Article 411-11 of the Labor Code, Article 421-1 of the Consumer Code, Article 470-7 of the Commercial Code, and Article L452-1 of the Monetary and Financial Code each allows representative actions by associations to protect a collective interest of employees, consumers, business owners, and shareholders, respectively. However, no individual association members will be bound by the result of any such litigation unless they have affirmatively given a mandate to the association to represent them.

23. In *Germany*, a 2005 securities statute (the Capital Investment Model Proceedings Act also known as “*KapMuG*” or “Master Proceeding Act”)²⁴ provides that a shareholder may commence a representative action and that all claims by other shareholders will be stayed and joined to the representative action after such action has been commenced. Those other shareholders are then joined to the representative proceeding. Both the original plaintiff in the representative proceedings and all parties joined will be bound by the judgment in the representative proceeding. Apart from *KapMuG*, Germany has instituted a number of Associations Suits either via its Unfair Competition Act (UWG) or the recent Legal Services Act (RDLG 2008). Under these statutes, actions can be launched not only for injunctive relief but also for damages.

24. In *Switzerland*, associations may bring collective actions (“*Verbandsklage*”) to bring an end to an injury to members of the public. The only available remedy, however, is injunctive relief and the outcome does

²¹ CPR 19.13(a), (b).

²² CPR 19.12.

²³ It must be noted however that Norway has adopted the Act of 17 June 2005, which entered into force on 1 January 2008, whereby although the opt-in model is the basis of the collective action instituted by the act, it is possible to use an opt-out procedure in exceptional circumstances. The court must approve such opt-out procedure; the claims must be of such small value that they are not likely to give rise to individual actions and they must not pose difficult questions of fact and law. See Inge Lorange Backer, “The Norwegian Reform of Civil Procedure,” *Int. & Comp. Law Q.*, vol 48, pp.60. The same is true for Denmark with the Administration of Justice Act, Pt 23, Act N°181 of 28 February 2007, in force as of 1 January 2008.

²⁴ <http://www.gesetze-im-internet.de/kapmug>.

not bind individual claimants.²⁵ The Swiss Investment Funds Act provides that a court may appoint an investors' representative to pursue claims on behalf of an investment fund. Such an action, however, is pursued on behalf of the fund and does not preclude investors' individual claims against management.

25. In December 2007, *Italy* passed a law introducing a group action in matters of consumer protection called "*azione collettiva risarcitoria*."²⁶ According to a new Article 140-bis of Italy's Consumer Code, consumer associations legally recognized by the Italian Government and any other consumer associations that are "adequately representative" of the collective interests at stake can file such group actions. Actions brought pursuant to this new law are limited to causes of action arising out of standard form contracts and non-contractual obligations arising out of torts, unfair commercial practices or breach of antitrust laws. For a group action to be admissible, it must allege injury to a large number of consumers. Consumers who wish to be part of the group must confirm so in writing to the association at any time prior to the judgment. If the court finds that the group members are entitled to damages, it fixes the criteria pursuant to which damages have to be awarded and, when possible, the minimum amount that has to be paid to each of the group members. Such a judgment is binding on all group members who opted in but is not preclusive of individual actions by other consumers. Damages are subsequently either agreed by settlement or assessed by a special court chamber.

26. The *Netherlands* enacted legislation in 1994 allowing representative organizations to pursue collective action. The legislation was amended later in order to transpose into Dutch law the 1998 EU Directive mentioned above. However, the law does not allow associations to seek monetary relief or even a declaratory judgment on liability for damages suffered. Moreover, the collective action is brought in the organization's own name, and the judgment is not binding on the individual association members. In 2005, the Netherlands passed legislation that comes closer to the US-style class action model²⁷. Under the law on collective settlements, an association established to promote the interests of a group of persons who allegedly have been injured in a specific event may enter into a settlement agreement regarding the underlying claims. If approved by the court, the settlement will bind all interested parties that did not opt-out, provided two conditions are met. First, all putative class members must be notified by mail of the terms and consequences of the proposed settlement and of their right to argue against court approval. Second, the court must, upon hearing, determine that the association is representative and the compensation adequate.

D. Common Approaches and Themes

27. Using the models referred to above as points of reference, the Committee identifies below, where possible, common approaches and themes. After a brief presentation of existing law on each of the issues, the report explains briefly the reasons developed within the Committee for each section in the proposed resolution.

1. Preconditions for a Group Action: Standing and Certification

28. The question of *standing* is a key element in determining whether a group action may proceed or be "certified" by the court. In the four class action countries a very liberal approach is taken to standing. Two requirements must be satisfied under this approach. First, there must be a representative party or plaintiff who has the capacity to represent the group in a manner that is in the best interest of its members and to manage the proceeding to their benefit.²⁸ In common law jurisdictions, where litigation proceeds on the principle of party prosecution, this may involve a review of the proposed litigation plan. Second, there need not be identity of claims and relief between the representative party and the other group members provided that there is no conflict between the sets of claims which would render their interests incompatible. In other words, there must be commonality between the claims of the representative and that of the other group members.

29. Apart from the ability to represent the class, the representative plaintiff needs no greater interest or stake in the subject matter of the action than any other member of the class. The US model, however, goes further by requiring that the claims of the representative party be "typical" of the claims of the class.²⁹ This "typicality" criterion was not adopted in the legislation of the other three class action countries because it was

²⁵ For description and analysis, see S. Baumgartner, *Group Litigation in Switzerland*, available at http://www.law.stanford.edu/display/images/dynamic/events_media/Switzerland_National_Report.pdf

²⁶ Law No 244 of December 24, 2007.

²⁷ Ianika N. Tzankova, *Toegang tot het Recht bij Massaschade*, Dissertation for Tilburg University, March 2007.

²⁸ See eg FRCP 23(a)(4); FCA s 33T(1); CPA (Ontario) s 5(1)(e)(iii); CPA (BC) s 4(1)(e)(iii); CAA s 4

²⁹ FRCP 23(a)(3).

considered unnecessary. Interestingly the Israeli model, in addition to adopting the “representative plaintiff” approach above, also confers standing on public authorities and other organizations where an individual member of the class would have difficulty in filing a claim.³⁰

30. Outside the class action countries, a more restrictive approach to standing appears to have been taken. Under the Brazilian collective actions law, standing is exclusively granted to a limited number of entities, such as the Attorney General, the federal government, state and municipal governments, administrative authorities and private non-governmental associations.³¹ Groups of individuals falling outside these categories have no standing.

31. As described above, most continental European countries have specific statutory provisions granting standing to pursue collective litigation to associations whose constitutional objective is the protection of specific collective interests (consumer, labor, environmental protection) to pursue collective litigation. As explained, however, most of these actions typically permit injunctive relief only and they almost never have a preclusive effect on litigation by the association’s members.

32. A second precondition to certification or admissibility of a class action is that there be established an “identifiable class” of a number of persons (this is referred to as the “**numerosity**” requirement under US law). While under Canadian³² and Australian³³ law this requirement is defined by reference to a specific number, under US law it is framed differently: the class must be so numerous that joinder of all members is impracticable.³⁴

33. Thirdly, there must be common issues of law or fact between the claims (this is known as the “**commonality**” requirement under US law).³⁵ While the presence of individual issues in an action does not breach this requirement it is generally accepted in all of the class action countries that the common issues must “predominate over” or be more “substantial” than the individual questions. The US,³⁶ Australian³⁷ and Israeli³⁸ legislation expressly refer to this requirement.

34. Significantly, both the numerosity and commonality requirements are also found in the laws of countries without class action regimes. In England, before a GLO may be commenced there must also be shown to be a number of claims³⁹ which give rise to common or related issues of fact or law.⁴⁰

35. Fourthly, under the US,⁴¹ Canadian⁴² and Israeli⁴³ models but not explicitly under the Australian⁴⁴ and Israeli regimes, there is a “**superiority**” requirement: that is, the plaintiff must show that the class method is a superior method of resolving the common issues to other available procedures such as consolidation or joinder of proceedings. Superiority is also a requirement under the English GLO regime⁴⁵ and under the Norwegian Act of 2005 when the opt-out proceedings are used⁴⁶.

36. Significantly, under none of the class action models or the GLO regime is there any threshold merits test regarding the strength of the claim that has to be satisfied by the representative plaintiff to achieve

³⁰ CAA s 4

³¹ Brazilian Consumer Code, Art 82 cited in Antonio Gidi, “Class Actions in Brazil: A Model for Civil Law Countries” (2003) 51 *American Journal of Comparative Law* 311, 366.

³² CPA (Ontario) s 5(1)(b); CPA (BC) s 4(1)(b).

³³ FCA s 33C(1)(a)

³⁴ FRCP 23(a)(1).

³⁵ FRCP 23(a)(2); FCA s 33(1)(c); CPA (Ontario) s 5(1)(c); CPA (BC) s 4(1)(c).

³⁶ In respect of a class action to recover damages brought under r 23(b)(3) but not one under 23(b)(1) or (2).

³⁷ FCA s 33C(1)(c)

³⁸ CAA s 8(a).

³⁹ CPR 19.11(1).

⁴⁰ CPR 19.10 and 19.11(1)

⁴¹ In respect of a class action to recover damages brought under r 23(b)(3) but not one under 23(b)(1) or (2).

⁴² CPA (Ontario) s 5(1)(d); CPA (BC) s 4(2).

⁴³ CAA s 8(a).

⁴⁴ The only possibly equivalent provision is that an Australian court may order that a class action be “discontinued” where it is in the interests of justice to do so; s 33N(1).

⁴⁵ Practice Direction 19B [2.3]

⁴⁶ § 35-2, first alinea.

certification.⁴⁷ However, in all common law jurisdictions courts have the power to dismiss an action as an abuse of process, which is likely to provide some restraint on vexatious or unmeritorious group litigation, even though it does not seem so far to have been used much in this context in the United States.

37. Under the heading “Who can bring the claim?”, the guidelines propose:

1.1. A “public prosecutor” or any other public body which is specifically organized or authorized by the State to represent groups of claimants.

1.2. An association or other group duly accredited in the State within whose territory it was formed and authorized by that State to represent groups of claimants.

1.3. A group of individuals or legal entities who have suffered similar common losses based on the same set of factual circumstances. Foreign nationality or residence outside the State in which the claim is brought must not, as factors in and of themselves, prevent claimants from bringing or participating in a Group Action.

1.4. An individual or legal entity who proves, to the satisfaction of the tribunal, to be capable of managing the proceedings for the benefit of the represented parties, and who has no conflict of interest in respect of the represented parties.

38. In many legal systems, it is possible for public entities and accredited associations to launch group actions in the name of the actual victims of illegal activities. The EU White Paper mentioned above does propose that representative actions be brought by qualified entities. This corresponds to sections 1.1 and 1.2 of the guidelines.

39. Section 1.3 of the guidelines corresponds to the most common way to launch a group action in common law countries. This was considered by the Committee as a sound policy which could well function for transnational group actions. In addition, the Committee felt important to call the attention of potential users of the guidelines to the effect that the foreign nationality or residence of some claimants should not be a factor for decision whether to accept the group (or class). Of course, in certain circumstances, particularly if more foreign elements exist, there may be good reasons for foreign claimants not to be accepted. But the Committee thought that, if numerous foreign elements existed, probably the court seized would not have jurisdiction under the guidelines. In any case, whatever the decision on jurisdiction, the mere foreign nationality of resident of some claimants should not have influence as of itself.

40. The concept of “private attorney general”, i.e. an individual champion of public interest, even though having no personal interest in the law suit, is unknown in some legal systems. However, this concept has been tested successfully in a number of countries. The Committee saw no reason to prohibit such representation under the strict control of the court seized of the matter and as long as the two cumulative conditions expressed in section 1.4. are fulfilled by the individual or legal entity who pretends to represent a public interest.

2. Preconditions and Certification: the Transnational Dimension

41. The transnational aspect of class actions has also had an important impact on certification decisions in the class action countries and is likely to be significant in other jurisdictions as well, although there has been no jurisprudence as yet.

42. In the US, and to a lesser extent Canada, there have been a number of cases involving class members from different countries in which the forum court has had to determine whether a judgment given by that court in a class action suit would be recognized as *res judicata* in the country in which enforcement is sought. If such

⁴⁷ See, eg in the United States, *Eisen v Carlisle and Jacquelin* 417 US 156, 177-78 (1974).

recognition is not found to occur, then plaintiffs, especially absent class members⁴⁸, could commence fresh proceedings (either group or individual actions) against the defendants in such countries. Such an outcome would no longer render the US class action a “superior” method of proceeding and so weaken the argument for certification. Of course, this argument assumes that foreign class members will, in fact, commence fresh proceedings in their home countries, which is a view that may ignore cost and other barriers to litigation. This may be true also for any plaintiff who may have a claim based on some connection with another forum than the one in which the group action occurred.

43. US courts have taken different approaches to this question. Some courts have demanded very strong and clear evidence that a foreign tribunal would recognize and enforce the US judgment before allowing certification,⁴⁹ while in other decisions a more liberal approach has been taken to the question of *res judicata* with such courts requiring only that there be a “probability” that a foreign court would recognize the US award.⁵⁰

44. The consequence of this inquiry can be dramatic for the composition of the class: if the test of foreign recognition is not satisfied then the class will only be certified to include domestic members with foreign members excluded.

45. An alternative response to the problem of certification of multijurisdictional class actions is for the forum court to retain an “opt-out” model for local class members but introduce an “opt-in” scheme for foreign residents. Defenders of this “hybrid” approach say that it avoids the need to consider whether the forum judgment will be treated as *res judicata* in the foreign countries where the foreign class members reside since such persons will, by opting in, have already consented to adjudication in the forum.⁵¹ Others have criticized this view, saying that introducing an “opt-in” system of any kind will dramatically reduce class membership.⁵²

46. While some jurisdictions have adopted this hybrid opt-in/opt-out model (for example British Columbia⁵³), the US courts have held that such an approach is not permissible for class actions under Rule 23(b)(3)⁵⁴. However, whichever of the above approaches is ultimately adopted, it seems clear the phenomenon of multi-jurisdictional class membership will increase and continue to demand solutions from courts and legislators.

47. Another problem that has arisen from the transnational character of class actions at the certification stage concerns the commonality requirement discussed above known as “predominance”. Broadly speaking, a majority of common elements or connections between the claims of the class members is required under the laws of the class action countries before certification will be granted. At least in the US, the common questions of law and fact must be predominant. The question of applicable law is relevant here. Most US court have held the predominance requirement is not satisfied where multiple national laws apply to the claims of various class members,⁵⁵ such as in a transnational tort case where the injuries occurred in multiple countries. To avoid this problem, application of a single country’s law to a class-action has been proposed both by courts⁵⁶ and some academic commentators⁵⁷ with the suggested rule being the law of the defendant’s place of business. However,

⁴⁸ The concept of “absent class member” is central to the US-type class actions. Procedurally speaking, they are not parties in the full sense of the term although they are sometimes referred to as “absent plaintiffs” or “absent parties” or “passive parties”. Even though they are not parties technically speaking, they may be bound by the judgment or the settlement “represented parties”.

⁴⁹ *Bersch v Drexel Firestone* 519 F 2d 974 (2nd Cir 1974); *In re Daimler-Chrysler AG Sec Litig* 216 FRD 291 (D Del 2003); *Ansari v New York University* 179 FRD 112, 116-7 (SDNY 1998) (foreign residents not included in certified class).

⁵⁰ *In re Vivendi Universal SA Securities Litigation* 241 FRD 213, 233 (SDNY 2007). See also *In Re US Fin Sec Litig* 69 FRD 24, 48-54 (SD Cal 1975). For a Canadian example see *Carom v Bre-X Minerals Ltd* (1999) 43 OR 3d 441.

⁵¹ See eg Debra Lyn Bassett, “US Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction” (2003) 70 *Fordham Law Review* 41.

⁵² See eg Janet Walker, “Crossborder Class Actions: A View from Across the Border” [2004] *Michigan State Law Review* 755, 770.

⁵³ Class Proceedings Act RSBC 1996 (CPA) s 21(1).

⁵⁴ *Kern v Siemens Corp* 393 F 3d 120 (2d Cir 2004).

⁵⁵ See, for example, *In re Rhone-Poulenc Rorer Incorp* 51 F 3d 1293 (7th Cir 1995).

⁵⁶ See eg *Ysbrand v Daimler Chrysler Corp* 81 P 3d 618 (Okla 2003). In that case, the court applies the law of the principal place of business to contract claims but rejects that rule with respect to fraud.

⁵⁷ Samuel Issacharoff, “Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act” (2006) 106 *Columbia Law Review* 1839.

this seems to be a minority view, the majority of the doctrinal approach being not to alter the choice of law rules to accommodate group litigation⁵⁸.

48. According to its proponents, such an approach would in most cases avoid the constitutional problems of due process raised by the US Supreme Court in the *Shutts* case since the law of the defendant's jurisdiction, for example in a product liability suit, would likely have a significant contact with the action as a whole. However, outside the United States, there has been no reported instance of a court altering its traditional applicable law rules in the context of a class or group action. Until such decisions appear it should be assumed that the ordinary rules of applicable law apply to such proceedings.

49. Under the title "*Requirements for Bringing a Claim (certification)*" section 2 of the guidelines propose:

2.1. The tribunal may require the claimants to show that their action has a reasonable prospect of success. To evaluate the prospect of success on the merits, the standard of proof is less burdensome than for the establishment of the claim itself at trial, but is more onerous than a simple factual presentation.

2.2. The tribunal may also require that all claimants to the transnational group action have sufficient questions of fact or law in common, that the proceedings will be most efficiently disposed of by a group action rather than by individual claims; that the group proceeding will be manageable; that the principles of due process will be respected, including in respect of non-participating claimants, and that the judgment or settlement obtained will have a reasonable prospect of recognition or enforcement in other countries.

2.3. The fact that several laws may be applicable in a single transnational group action, where it is a factor taken into consideration at the certification level, should not necessarily mean that a group action is inappropriate.

50. The Committee rapidly came to an agreement on two major policies. The first policy is to strike a fair balance between the rights of claimants and that of defendants. The second policy is to try to avoid abuse of recourse to courts and frivolous actions. It is to keep in line with these two policies that the Committee decided that the court seized of a transnational group action could require from claimants to establish that they had a serious claim, the burden of proof required from the claimants at this early stage of the proceedings being less cumbersome than at a later stage if the proceedings evolve as to the merits. This is also due to the experience, in some jurisdiction, where the action never reaches the stage of the merits since the potential cost involved in the action worked as a compulsion for the defendant to settle the case.

51. Section 2.2. reflects usual requirements found in most systems which have instituted group actions. Indeed, even in jurisdictions where group actions have been known for a long time, there is an understanding that group actions are the exception and recourse to that kind of proceedings (instead of individual claims) must be justified by a number of factors showing a clear superiority of group proceedings over individual actions.

52. Consensus of Committee Members on Section 2.3 was obtained very rapidly. Indeed, at the early stage of the proceedings when the certification occurs, it is difficult for the court to conduct a thorough and exact conflict analysis. The complexity, and hence the cost involved, in a conflict analysis would also be out of proportion with the purpose of the certification process. However, some courts still look into the conflict of laws analysis for that purpose. Hence, the Committee does not pass a judgment on the possibility for a court to look into the conflict of laws analysis. But courts at the beginning of the XXIst century, with the developing globalization of human activities, have become more sophisticated in eventually applying foreign laws, so that the prospect of having to apply one or more foreign laws in a group action should not be a sufficient reason to refuse certification.

⁵⁸ See Larry Kramer, "Choice of Law in Complex Litigation", 71 N.Y.U. L. Rev. 547, 549 (1996) and, more recently, Linda Silberman, "The Role of Choice of Law in National Class Actions", 156 U. Pa. L. Rev. 101 (2008).

3. Jurisdiction

53. An important question in any transnational suit, whether a group or individual proceeding, is whether the forum court has jurisdiction over the action. While this inquiry includes both jurisdiction over the defendant (“personal jurisdiction”) and jurisdiction over the subject matter of the case (“subject matter jurisdiction”), in this report only personal jurisdiction will be examined.

54. For the purposes of this report, the concept of personal jurisdiction involves two elements. First whether the claimant can establish one or more jurisdictional gateways having regard to the nature of the claim and the identity of the defendant. Second, whether in all the circumstances the court should agree to entertain the suit in light of any question of *lis pendens* or pre-existing parallel litigation, or in common law countries questions of *forum non conveniens*.

55. The key question for this report is whether the ordinary rules of personal jurisdiction over the defendant require modification in the class-action context. As far as the rules governing the existence of jurisdiction are concerned, it is clear that in all four class action countries the ordinary rules of personal jurisdiction continue to apply in the case of class actions.⁵⁹ Hence, where the defendant is found to be amenable to the jurisdiction of the forum either by service on that party within the forum territory or service outside the jurisdiction under a recognized basis (for example, minimum contacts) then jurisdiction will be established regardless of the location of the plaintiff class members. This principle was most clearly illustrated in the *Shutts* case⁶⁰ where the jurisdictional basis over the defendant was the US “doing business”. The key point, therefore, is that the presence of foreign class plaintiffs, whether represented or absent, does not alter the basic jurisdictional enquiry towards the defendant.

56. What is specific to class actions is jurisdiction over absent class plaintiffs. In *Shutts*, the basis of jurisdiction over absent class members is consent. Consent is deemed to exist when there has been notice and a failure to opt-out. This is why, after careful scrutiny, the US Supreme Court held that it is consistent with constitutional due process for a court to assert jurisdiction over absent class members, where they receive notification of the proceedings and fail to opt-out.

57. What has proven to be more difficult in the class action countries is the application of the discretionary principles for the exercise of jurisdiction to class actions. In each of the four relevant countries the forum court may stay its proceedings on the ground of *forum non conveniens* (that is, another court is clearly more appropriate to try the action) or *lis alibi pendens* where another court is seized of the same or similar proceeding (whether a group or individual action). In practice, in common law countries, the two grounds are often submerged into a general enquiry about the appropriateness of the forum, although the presence of a foreign pending proceeding elsewhere can be a weighty factor in the court declining jurisdiction.

58. There have been a number of US, Canadian and Australian cases applying the above principles to class actions. In deciding whether to exercise their discretion, courts have considered a number of factors including the connections between the action, the witnesses and the forum and whether the forum judgment would be enforceable in the country in which the defendant has its domicile.⁶¹ Significantly for present purposes, the courts have also considered whether the existence of an “opt-out” class-action regime in the forum, where none exists in the alternative court, constitutes a legitimate advantage to the plaintiff in proceeding locally. The argument here is that a class action not only provides greater access to justice for all class members but also stronger procedural safeguards for such persons and so jurisdiction should not be declined.⁶²

59. Thus, in a number of US decisions, courts have been willing to renounce jurisdiction in favor of Canadian and Australian courts where comparable class action legislation exists or even more emphatically, where pendent class action proceedings in respect of the same subject matter has been filed in those countries.⁶³

⁵⁹ See eg United States: *Phillips Petroleum v Shutts* 472 US 797, 821-2 (1985); Canada: *Bisaillon v Concordia University* [2006] 1 SCR 666; Australia: *Mobil Oil Australia v State of Victoria* (2002) 211 CLR 1; Israel: Civil Appeal (Tel-Aviv) 2272/01 *Rephenhagen v Rozenfeld Dinim-Mehoz* vol 33(1) 944.

⁶⁰ *Id.*

⁶¹ See eg *Wilson v Servier Canada Inc* (2000) 50 OR (3d) 219.

⁶² *Ward v Attorney General* 2007 MBCA 123; *Hall v Australian Finance Direct Ltd* [2005] VSC 306.

⁶³ *Ashley v Dow Corning Corp* 887 F Supp 1469 (ND Ala 1995); *Paraschos v YBM Magnex International Inc* 130 F Supp 2d 642 (ED Pa 2000).

Obviously in these situations, there is less concern regarding access to justice and procedural protection of the class. Indeed, in the case of pending proceedings, there is the added need to ensure efficiency of proceedings and reduce costs by having only one court proceed to the merits.

60. Another “clear” case in the area of discretionary exercise of jurisdiction has been where the plaintiff class members are *exclusively* foreign residents. In that context courts have also been very willing to stay local proceedings and seem to have downplayed the need to show that the plaintiffs will have meaningful access to justice in the foreign court.⁶⁴

61. The difficult case, therefore, will continue to be where there is a multijurisdictional plaintiff class and the alternative forum suggested by the defendant does not have class action legislation⁶⁵.

62. It is important to note that the doctrine of *lis pendens* (but not *forum non conveniens*) is also recognized in civil law countries and under the Brussels I Regulation.⁶⁶ However, the Regulation grants less discretion to the forum court to stay its proceedings than under the common law principles above. A strict “first seized” rule is applied where both sets of proceedings commenced in Member States involve the same cause of action and are between the same parties,⁶⁷ for example parallel group actions in different countries. The court has discretion to decline jurisdiction only where the proceedings are “related,”⁶⁸ such as where one suit is an individual action and the other a group proceeding or where one suit is a US-type class action with absent class members and the other an “opt-in” European-style group claim. It remains to be seen how willing European courts will be to stay their proceedings when confronted by “competing” class action proceedings, for example in the US or Canada.

63. Section 3 of the proposed resolution entitled “Jurisdiction” reads as follows:

3.1. A transnational group action may be brought in the defendant’s forum. If the defendant is a corporation, the defendant’s forum is located at any of the following three places: 1) where the corporation has its statutory seat or is incorporated, or in the state under whose law it was formed; 2) where it has its central administration; 3) where its business, or other professional activity is principally carried on.

3.2. Several defendants may be joined to the transnational group action before the court seized in the defendant’s forum if due process requirements, as defined by the lex fori, are fulfilled for each of the additional defendants.

3.3. A transnational group action may also be brought in the courts of another country closely connected to the parties and the transactions, provided that trial of the action in that country is reasonably capable of serving the interests of the group and has not been selected to frustrate those interests.

64. The choice of the defendant’s forum has caused no difficulty in the Committee’s deliberations. The balance between the interests of the claimants and that of the defendant is reversed in a group action case, in comparison with individual actions, so that members of the Committee thought the defendant’s forum was to be the “natural” forum for a group action. The definition of what is to be understood by “defendant’s forum”, when the defendant is a corporation, is borrowed from the ILA New Delhi Resolution 2002 on Principles on Jurisdiction over Corporations⁶⁹. After careful consideration, the Committee saw no reason to amend the New Delhi definition specifically for group actions.

65. The main question, however, after having accepted the defendant’s forum, was to decide whether to allow a court to use doctrines such as *forum non conveniens* or similar doctrines. The Committee was indeed

⁶⁴ See eg *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* 809 F 2d 196 (2nd Cir 1987) and *Recherches Internationales Quebec v Cambior Inc* JE-98-1905 (Supreme Court of Quebec) cited in Trevor CW Farrow, “Globalization, International Human Rights and Civil Procedure” (2003) 41 *Alberta Law Review* 671, 705.

⁶⁵ E.g. *Lubbe v. Cape plc* [2000] 2 Lloyd’s Rep 383 (HL).

⁶⁶ Arts 27-28.

⁶⁷ Art 27

⁶⁸ Art 28

⁶⁹ See The International Law Association, Report of the Seventieth Conference, New Delhi, 2002, Principle 2.1., p.39 and the accompanying Report p.413-432.

faced with several requests, coming from defendant's counsels to the effect that the Defendant's forum is not always appropriate. After due consideration of the arguments pros and cons, the majority of the Committee decided that it was better to avoid protracted litigation at this stage. Indeed, Committee members who are involved in transnational litigation know that a plea for *forum non conveniens* takes a lot of time and effort and it would be an undue burden on litigants and the court in cases already complicated by the nature of the proceedings. In addition, as mentioned in paragraph 64 above, the defendant's forum is probably the best forum when it comes to proceedings whose aim is not only compensation of the damages suffered but also the public interest at large. In any case, the guidelines contain an additional ground for jurisdiction (see section 3.3. above and paragraph 67 below) which adds flexibility to the selection of a proper jurisdiction. The Committee is also mindful that, notwithstanding the above, some countries may continue to use *forum non conveniens*. In that case, the Committee unanimously agrees that such doctrine should not be applied unilaterally and that transnational judicial cooperation (see below section 8) should be used in that context⁷⁰.

66. The Committee had more hesitations for section 3.2. Indeed, it is aware that joinder of proceedings against several defendants, in a single forum, be it the "domicile" (or the equivalent for corporations) of one of them, is not a jurisdictional mechanism existing in all legal systems. On balance, the Committee felt that the advantages of concentration of proceedings were greater than the inconveniences. By providing that due process requirements towards each of the defendants be fulfilled under the *lex fori*, section 3.2 gives room for a flexible approach depending on the court seized of the matter. This requirement is also there because, in the countries where the automatic joinder does not exist, it is often a matter of public policy.

67. Considering the pleas for flexibility expressed by a number of participants to the meetings where the draft guidelines were discussed, and having considered carefully the advantages and inconveniences of an additional jurisdictional ground, the Committee decided to include section 3.3. It is to be noted that the provision is drafted in neutral terms, i.e. it is neither in the hands of the claimants only (as is the case for additional fora in the European system) nor in the hands of the defendant, although it is to be expected that claimants may be the ones who will try to use it primarily. The provision contains an element of flexibility akin to some of the questions inherent to a *forum non conveniens* analysis. It will be for the court seized of the matter to make the analysis and decide whether the forum provided for in section 3.3 is indeed the most appropriate one.

4. Notification

68. Once the class has been certified or the court has considered the action admissible and the court has accepted jurisdiction, the next question is how the class members must be notified of the action. It is, indeed, not the notification to the defendant which causes problem in transnational group actions. Notification to the defendant follows the usual private international law rules, including the Hague Service Convention where it applies, as shown in the German experience⁷¹.

69. In the context of an "opt-out" model, such as Rule 23(b)(3) in the US, it has already been noted that the US Supreme Court considered notice of the proceeding to class members to be a fundamental element of due process given that they will be bound by the result in any class proceeding even where they did not consent to participate. It is probably best expressed by the US Supreme Court in *Phillips Petroleum Co. v. Shutts*:⁷² "*If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best*

⁷⁰ Courts will also have regard to the ILA London/Leuven Principles on Declining and Refraining Jurisdiction in civil and Commercial Matters adopted at the 69th Conference of the ILA, London, 2000 (see Report of 69th Conference, page 13 and the accompanying report, pp.137-171).

⁷¹ Several German courts have been asked to decide whether service to defendants located in Germany for the purpose of US class actions did fall under the Hague Service Convention. Although at least one lower court has indeed doubted that it would be the case (OLG Koblenz, IPRax 2006, 25), it is generally understood that the Hague Service does allow service of class action to a defendant. See Koch/Horlach/Thiel, "US Sammelklage gegen deutsches Unternehmen?" in *Recht der Internationalen Wirtschaft* 2006, 356. The Constitutional Court's decision Betelsmann/Napster frequently cited to the contrary, cannot serve as an argument against the use of the Hague Service Convention in such a context. Indeed, the decision was only preliminary and final decision was postponed on the merits of the question posed. However, the final decision was never issued since the complaint was withdrawn.

⁷² 472 US 797 (1985) at pages 811-812.

practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, Mullane, 339 U.S., at 314-315; cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." It is to conform with this pronouncement that the ALI project on Aggregate Litigation proposes that the court shall provide claimants the opportunity to avoid the preclusive effect of any determination made on an aggregate basis (§2.08 a) (1)) and provide claimants appropriate notice of the opportunity to appear in the aggregate proceeding (§2.08 a) (2)). In addition, §3.11 provides that in any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt-out after the dissemination of notice of the proposed settlement⁷³.

70. In the context of an opt-in procedure, this concern is less paramount given that no one can be bound by a judgment without their consent. However, even under this model notification still performs the important function of apprising persons of information which will affect their rights and so giving them the *capacity* to participate and so it is not surprising that all group action regimes make some reference to notification.

71. In the US, Australia and Israel due process concerns weigh most heavily and, at least in respect of claims for damages, notification to absent class members is mandatory.⁷⁴ In Canada, broad discretion is given to the courts to approve forms of notice that are appropriate in the circumstances of the individual case. In some provinces, the courts are given discretion to dispense entirely with the provision of an opt-out notice to members.⁷⁵ However, it would appear that, in practice, the considerations governing notice are similar to that in the other three class action jurisdictions.

72. Another requirement under the laws of all the class action countries is that the court must approve of the manner and form in which the notice is to be given. Here, there is some scope for recognition of the burden on the plaintiff representative in making notification, for example arising from the disparate composition and location of class members and linguistic differences.

73. The four class action countries take slightly different approaches to the issue of how notification must be given, although under all regimes the court is given discretion. In Australia the emphasis is on reducing the cost and logistical burden to the representative and so individual notice to members is only required in exceptional circumstances.⁷⁶ The reverse is the case in the United States where individual notice is the presumptive norm while in the legislation of Canada and Israel the question is left entirely to the courts' discretion where the costs of providing notice may be allocated to either party as the Court deems appropriate. The reference in the Australian legislation to notification by "press advertisement, radio or television broadcast or by any other means"⁷⁷ is consistent with the approach in all of the class action countries of allowing a variety of methods of notice to be used.

74. The requirements for the content of the opt-out notice are not uniform across the class action countries. While in Canada⁷⁸ and the United States⁷⁹ there are specific statutory or rule requirements for the contents of a notice, the Australian and Israeli legislators do not address the issue. The Ontario legislation requires that the following information be included in the notice: a description of the proceeding; the parties and the relief sought; the manner and time limitation of the opt-out; the financial consequences of the action to class members; any agreements between representative plaintiffs and their lawyers regarding fees; any counterclaim brought by the defendant; a statement that the judgment will bind any class member who does not opt-out; a description of the right of any customer to participate in the proceedings.

⁷³ The ALI proposal is still under discussion and is controversial. Hence it may not remain as described in the text in the finalised adopted document.

⁷⁴ United States: FRCP 23(c)(2)(B); Australia: FCA s 33X(1)-(2); Israel: CAA s 25.

⁷⁵ CPA (Ontario): s 17(1)-(3); CPA (BC): s 19(1)-(3).

⁷⁶ FCA s 33Y(5).

⁷⁷ FCA s 33Y(4)

⁷⁸ CPA (Ontario): s 17(6); CPA (BC): s 19(6).

⁷⁹ FRCP 23(c)(2)(B)

75. Furthermore, under the Ontario legislation, but not the US, Australian or Israeli regimes, there is a requirement of post-judgment notice to class members after the common issues have been determined.⁸⁰ The notice informs such persons of the right and procedure to bring an individual claim and the consequences of failing to do so, in particular, that they will lose such rights. The issuing of such notices has the effect of “closing the class” and so preventing further litigation against the defendant.

76. As described above, the vast majority of continental European countries do not provide for any collective action model akin to an opt-out class action model. Whenever those countries do provide for a form of collective action, individual group members will most often either not be bound by the decision regardless of whether they received notice (such as with actions by consumer NGOs in several EU countries) or must take certain affirmative procedural steps in order to be bound by the group judgment (such as with claims consolidated under the German *KapMuG*). The question of proper notice will therefore often not arise.

77. The Dutch collective settlement law, however, does provide for an opt-out system. The law requires that putative class members be notified individually by ordinary mail at two different times in the process: first, when the terms of the proposed settlement have been agreed and are submitted to the court for approval (at which point they have an opportunity to object to the proposed settlement), and, again, after the settlement has received judicial approval. The pre-approval notice must state the location and the date and time of the court hearing, and a brief description of the settlement agreement and the legal consequences of court approval of the settlement agreement. The post-approval notice must include a copy of the court’s order approving the settlement agreement; a brief description of the agreement, in particular the manner in which compensation can be obtained; if the agreement so provides, the period within which claims must be made; and the legal consequences of the order declaring the agreement binding. The notice must further state how it is possible to opt-out from the legal consequences of the court’s order and the time limits for doing so. Both notices must further state that the petition/settlement agreement can be inspected at the court registrar’s office. The court may order that the information also be published through different media.

78. The guidelines provide as follows:

Information - Notification

4.1. Information is particularly crucial to Absent Claimants, i.e. claimants who are not parties technically speaking, but who may be bound by the judgment or the settlement because they are deemed to have been represented in the proceedings.

4.2. Absent claimants must be given adequate notice of the claim and an opportunity to exclude themselves from the proceeding. Notification should occur at three stages of the proceedings: 1) at the start; 2) when a settlement is reached; 3) when the court proceeds with the verification of the settlement.

4.3. The adequacy of the notification and the method used to achieve it should be subject to review and approval by the court hearing the matter.

4.4. The type of dispute, the particular composition of the group, the likely location of the group members are elements to be taken into consideration to decide on the adequacy of the notice. In appropriate cases, electronic means of communication should be preferred.

79. Because the concept of “Absent Claimants” (or in US terminology “absent class members”) is unknown in many countries, it was felt important to define it in the guidelines themselves instead of having to revert to the report to understand it. This is the purpose of section 4.1. Having said that, the Committee decided not to use the expression “jurisdiction over absent claimant”, although it is aware that it is used increasingly in class action terminology, because it is a misleading expression in a private international law context. The Committee does not propose an alternative concept but one may be found at a later stage as transnational experience does develop.

80. Section 4.2 embodies the notification requirement so that absent claimants may be bound by the future settlement or decision. The debate, within the Committee, focused essentially on how and when the

⁸⁰ CPA (Ontario) s 18; CPA (BC) s 20.

information should reach the absent claimants. Some in the Committee were of the opinion that, because, some countries still request an individual notification, the ILA guidelines should reflect that requirement. However, the majority of the Committee was of the opinion that it was impractical to request, for each and every transnational group action, a specific form of notification, and, particularly an individual notification. This is why no specific form is requested in section 4.2 but is left for sections 4.3 and 4.4. Nonetheless, the Committee decided that information should be sent at three stages of the proceedings so that, if the group action at stake takes the form of an opt-out proceeding, absent claimants would have several opportunities to do so. Nonetheless, the Committee is aware that this is still a very much debated subject and that some courts would be reluctant to organize three stages of notification.

81. Sections 4.3 and 4.4 leave the method of notification in the hands of the court seized. It is really very difficult to provide one or more specific form(s) of notification, in general and the abstract. Instead, the Committee thinks that the court should adapt the method of notification in each case. Overall the balance between 4.2 on one side and 4.3/4.4 on the other is really in the hands of the court. Knowing that three stages of notification will enhance potential recognition and enforcement of the future settlement or decision, the court may decide different methods of notification for each of the three stages, depending on the nature of the case.

5. Applicable Law

82. As was already mentioned above, the question of applicable law arises at the certification level but normally plays no role at the settlement level. It may be suggested, however, that, in view of the verification of the fairness of the settlement, the court may take into consideration the different substantive laws which may be applicable to pecuniary and non-pecuniary compensation of the damages suffered by the different claimants.

83. In view of the above, under the heading “The applicable law on the merits”, the Committee reached the conclusion that:

5.1. The fact that the action is a transnational group action does not affect the application of the rules on the conflict of laws. The tribunal may thus apply (distributively) several systems of law both in respect of the defendant’s liability as well as in respect of the quantum of evaluated losses suffered by the claimants.

84. The proposed section 5.1 of the guidelines reflects the most neutral approach to choice of law. The Committee saw no reason to upset the normal functioning of conflict of laws analysis. On the contrary, the Committee Members were convinced that to apply the *lex fori* would give an undue advantage to defendants, and could induce abuses, particularly in light of the jurisdictional rule chosen in the present guidelines. In addition, the choice made in section 3 to open an alternative forum to the defendant’s forum, would render the applicable law very uncertain until the forum has been selected if the conflict of laws rule was to be the *lex fori*.

6. Evidence

85. The question of evidence is not entirely different in Group Action than it is in any complex transnational litigation. The Hague Convention on Taking of Evidence Abroad will be very useful in a group action context as it is in a complex transnational litigation.

86. However the Committee wishes to emphasize that the cross border judicial communication/cooperation as defined later in the report and in the resolution will be particularly useful for taking evidence in a Group Action context.

87. The Committee’s proposal in section 6 is therefore fairly modest and self explanatory:

6.1. Where the elements of proof are located outside the tribunal’s territory, judges situated within these various other territories should cooperate with the tribunal hearing the matter.

6.2. Where witnesses must be heard, whether they appear as witnesses of fact or of law, the modern means of videoconferencing must be considered each time that no aspect of the case requires that the testimony be given by another means.

7. Case Management

88. In all four class action countries, there are wide powers given to courts to manage the conduct of group proceedings to ensure that the litigation is conducted efficiently and expeditiously⁸¹. The Ontario legislation provides a feature not expressly provided in the other class action jurisdictions: each class action case is assigned to an individual judge for management. A similar approach is taken under the English GLO regime.

89. Case management is particularly important where there are individual issues that require resolution in addition to the common issues affecting the class. For this purpose some form of bifurcation or splitting of the proceedings is permitted in all the class action countries, whereby individual issues are resolved in a separate trial. For example, it is common for liability questions to be resolved on a common class wide basis and then damages to be assessed individually. Such individual assessment can however place enormous burdens on judges, and so the laws of Australia, Canada and the US allow for aggregate assessment of damages against defendants on a class wide basis.⁸²

90. Where individual assessment of damages is required both legislators and courts in the class action countries (especially Canada) have sought to reduce the burden on the courts by use of innovative measures such as standardized claim forms, exclusion of oral testimony and the receipt of evidence on a sampling basis.⁸³ In addition, it is common for the claims administration to be undertaken by a third party agency who receives and processes the claims according to criteria established in the award.

91. In other countries a variety of approaches are taken to the resolution of group as opposed to individual issues. In England under the GLO regime the court is empowered to give directions for trial of common or individual issues.⁸⁴ In Brazil, by contrast, the court has no discretion: the group proceeding is limited to the declaration of the defendant's liability with individual proceedings required to show causation and damages suffered.⁸⁵ The new Italian consumer group action law goes a bit further: the court determines liability on a group-wide basis, but also (i) the criteria to be used when fixing quantum and (ii), when possible, the minimum quantum each group member is entitled to. The exact quantum amount for each group member is subsequently set by either settlement or a special court chamber.

92. The proposed guidelines devote section 7 to case management and provide:

7.1. The proceedings in a transnational group action should be managed by a judge who is specially appointed within the tribunal to carry out this task.

7.2. States should make available to this judge all means necessary, notably the appropriate technological means.

7.3. Bifurcation (of the assessment of liability and damages). Unless separation of the proceedings is not in the interests of the proper administration of justice, the tribunal will divide the proceedings into two phases: the first will be dedicated to the question of the defendant's liability, and the second to the evaluation of quantum.

⁸¹ As an example of such powers, one may cite here the proposed Rule 1.05 of the draft Principles on Aggregate Litigation under discussion at the American Law Institute.

⁸² Australia: FCA s 33Z(1)(f); Canada: CPA (Ontario) s 24(1); CPA (BC) s 29(1); United States: *In re Cardizem CD Antitrust Litig* 200 FRD 297, 324 (ED Mich 2001). Some US courts have, however, opposed aggregate assessment.

⁸³ See eg *Anderson v Wilson* (1999) 174 DLR (4th) 409 (Ontario Court of Appeal)

⁸⁴ Practice Direction 19B [15.1], [15.2].

⁸⁵ Gidi, n 13 above, 333.

93. The Committee is aware that the requirement for case management may require special skills by the court. This is why the Committee shares the views of those who have argued for specialized courts and special training for the judges who will be charged with the management of transnational group actions⁸⁶.

94. Section 7.3 provides for bifurcation of the proceedings whenever the proper administration of justice requires it. Bifurcation has become very common in transnational proceedings, both before courts, arbitral tribunals or other dispute resolution mechanisms, and this section is in line with current practice.

8. Transnational Cooperation

95. The idea that courts can cooperate with one another and discuss a matter among them, while fully respecting due process rights of the parties involved in the case giving rise to such cooperation, is not a novel idea within the work of the ILA.

96. Indeed, there is now a fairly long line of precedent on this matter. Already in the Helsinki Resolution proposed by the Committee on Civil and Commercial Litigation,⁸⁷ there was a prudent allusion to cross-border cooperation between courts in Principles 15 and 19 elaborated in paragraph 35 of the report itself.⁸⁸

97. In 2000, the ILA adopted a resolution proposed by the same Committee containing Principles on Declining and Referring Jurisdiction.⁸⁹ These Principles went further in advocating cross border cooperation between courts. In the preamble to the Principles, the Committee urged “enhanced cooperation between courts for the more efficient referral of cases.” Article 5 develops that objective. Referring to the court that sends the case as the “originating court” and to the one that receives it as the “alternative court,” Article 5.2 provides that “[t]he originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted by the respective states. States are encouraged to permit their courts to make, and respond to, such communications.” The remainder of Article 5 provides that the originating court can act on its own motion or by application of one of the parties. If it acts on its own motion, the parties’ due process rights must be respected. Finally, it provides that the form of the communication can be in writing or “otherwise on the record,”⁹⁰ and that the communication must be made in a language acceptable to the alternative court.

98. The idea of cross border communication and dialogue between judges was taken up in a more concrete manner by the Hague Conference on Private International Law in 1998. For the first time in the history of the Hague Conference, judges from numerous countries that either already were or were considering to become a party to the Hague Child Abduction Convention (the “Convention”), convened in the Netherlands, at the invitation of the Permanent Bureau of the Hague Conference. The purpose of the meeting was to discuss issues relevant to the application of the Convention. This meeting, which became known as the “1998 Judicial Seminar”, produced a recommendation on judicial communication noting that “the seminar had been of practical value in promoting mutual understanding and in forwarding the objective of more effective international judicial cooperation in matters of international child protection.”⁹¹ One of the concrete achievements of this recommendation was the creation of the “Judges Newsletter,” which operates as a liaison between judges who are called upon to implement the Convention in concrete cases. In 2006, six cases involving direct cross border

⁸⁶ See Ianika Tzankova, Road to Redress, Legal Week, 13 December 2007.

⁸⁷ Report of 24 June 1996, pages 185 to 204 of the Helsinki ILA Conference Proceedings. Volume 67.

⁸⁸ Principle 15, in fine provides: “The possibility is not even excluded of states conferring on their courts permission where authorised, to communicate directly with relevant judicial authorities in other countries.” In turn, Principle 19 reads as follows: “Further, a court should cooperate where necessary in order to achieve the efficacy of orders issued by other courts, and consider the appropriate local remedy.” Paragraph 35 of the Report explains: “In a development from the ideas in Principles 14 and 15 the Committee preferred by Principle 18 to encourage more general cooperation between the courts in securing the efficacy of provisional and protective orders. In developing areas of international judicial assistance, a relatively general obligation to co-operate may itself achieve tangible results.” [footnote omitted]

⁸⁹ Report of 5 May 2000, pages 137-166 of the London Conference Proceedings, volume 69.

⁹⁰ The report explains this to mean “recorded by official transcript.”

⁹¹ The recommendation is reproduced as an appendix to the Report on Judicial Communications in Relation to International Child Protection, Preliminary document No 8, October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Abduction, The Hague 30 October – 9 November 2006. These conclusions were reiterated by the Second Judicial Seminar of June 2000 and several regional meetings thereafter.

judicial communication were reported to the Hague Conference⁹² and several protocols were concluded between authorities of countries such as England, Ireland, Pakistan and Egypt.⁹³

99. During the same period of time, some EU Member States developed the idea of “liaison judges,” i.e., judges from one country which are in residence in another (usually within the Ministry of Justice) and whose work is to explain the functioning of the judicial system of their home country and help judges and official authorities of the host country to work their way in the system. The scope of activities by liaison judges goes from criminal law to civil and commercial matters and help in a broad range of cross-border disputes. The network of liaison judges now extends beyond the EU countries to include countries such as the United States and Canada, among others.

100. In 2000, the American Law Institute adopted and promulgated Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, as part of the project on Transnational Insolvency – Cooperation among the NAFTA Countries.⁹⁴ The introduction to the Guidelines acknowledged the fact that cross-border communication is one of the most essential elements of cooperation among the administering authorities of the countries involved in a cross-border insolvency case. It recognized, however, that such direct communication does pose questions of procedure and credibility and that the process must be clear and transparent. While the Guidelines were to be applied from their inception between courts in the United States and Canada, Mexico could choose to also use them.

101. The above examples suggest that this Committee can make a useful contribution to transnational cooperation by proposing a set of principles in the context of cross-border group actions that are more elaborate than those already included in the Helsinki and Leuven/London Principles. The guidelines included in the draft resolution are meant to be flexible enough to allow judges around the world to tailor them to the specific needs of each group action. The Committee did not want to displace any procedural rules of the countries of judges who use the transnational cooperation guidelines. It is for this reason that the guidelines were drafted in fairly generic and abstract terms, with more concrete language being provided for illustrative purposes only.

102. In view of the above, the Committee has developed section 8 of the guidelines which provides:

8.1. Whether expressly authorized by States or not, judges from different countries should cooperate with one another to best manage transnational group actions. A Court may communicate with a Court in another different country in connection with matters relating to proceedings in a group action which is also pending or foreseen in other countries with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the administration of justice. A court may appoint a special judge to carry forward the communication.

8.2. These means of cooperation must not be carried out in such a way as to prejudice the rights of the parties to the proceedings. The adversary principle must always be respected by judges during the cooperative process, even if it may be adapted in case of urgency.

8.3. The courts using these principles should clearly inform the parties as to their intention to do so and keep them informed of each step they intend to take.

8.4. Courts using these Principles may communicate in any stage of the proceedings, including as to questions of jurisdiction, the categories of claimants who will be included in the group action, the level of proof necessary to certify or otherwise admit any given category of plaintiff and, more generally, all the issues which are peculiar to cross border group actions.

8.5. Courts may use various means of communication, be they in writing, by telephone, via video conferencing, or other electronic means to communicate with one another. Counsel or representatives of affected parties should be entitled to participate during the communication or, where this is not feasible, to be informed of them. An official transcript of the communication should be kept by the court and made available to all affected parties. Whenever possible a collaborative website should be organized for the group action and all documents pertinent for that group action should be posted on the website.

⁹² Information on the cases may be found in the appendices to the Report mentioned above in footnote 62.

⁹³ See appendices to the Report mentioned in footnote 62.

⁹⁴ The Guidelines were adopted on 16 May 2000 and may be found on the website of the ALI www.ali.org.

8.6. Courts may also conduct one or more joint hearings via video conferencing or other techniques available to the courts. Submissions made during such joint hearings will be considered to be made to all participating courts, unless the courts provided otherwise in advance of the hearing or unless the person making the submission decides that it is directed to only the specified court or courts.

8.7. Courts may wish to coordinate their orders so that they are rendered at the same time and do not conflict with one another.

103. Section 8 does not call for long explanations. Indeed, the principles defined in that section are building on the merging practice explained above. By doing so the Committee is aware that it does not propose groundbreaking principles but adds one more stone to a much needed current in transnational litigation in the hope that courts around the world will indeed use the guidelines more frequently for a better administration of justice and a more meaningful “access to justice”.

9. Costs/Lawyers Fees

104. The question of who bears the burden of costs (including attorney fees) in group action proceedings is very important. Among the four class action countries, there is little uniformity of approach, although on one issue all systems converge: class members (as opposed to representative plaintiffs) cannot be the subject of adverse costs orders.⁹⁵ Beyond that consensus, there is some divergence in approach.

105. In the United States, the traditional approach to costs in civil litigation is that each party bears their own costs regardless of outcome. This approach is also applied to class actions and is often defended on the ground that it provides incentives to representative plaintiffs to commence actions without fear of having to pay the costs of the defendant if unsuccessful.

106. The US approach has been followed in the Canadian province of British Columbia in respect of class actions.⁹⁶ Brazil also takes this approach in its collective action statute.⁹⁷ In Ontario, the normal rule for civil litigation is that the costs follow the event, that is, that the unsuccessful party will pay the winner’s costs. This rule is however modified in the case of class actions to provide discretion to the court not to award costs against representative plaintiffs.⁹⁸ This alteration is seen as necessary to provide an incentive to bring such claims. In Australia, the position is different again: there the normal civil litigation rule that the costs follow the event continues to apply to class actions.⁹⁹ This is also the position in Israel.¹⁰⁰

107. However, each of the class action countries shows more unanimity on another key issue relating to costs—contingency fees—with each jurisdiction accepting this practice.¹⁰¹ The acceptance of contingency fees (where the lawyer is not paid unless the action succeeds) is considered important in class actions because it acts as a means of transferring the burden of financing the litigation from the representative plaintiff to its lawyers and so further lessening the deterrent factor on such parties.

⁹⁵ United States: *Lamb v United Security Life Co* 59 FRD 44, 48 (SD Iowa 1973); Canada: CPA (Ontario) s 31(2); CPA (British Columbia) s 37(4); Australia: FCA s 43(1A).

⁹⁶ CPA s 37(1).

⁹⁷ Brazilian Consumer Code, Art 87 cited in Gidi, n 13 above, 340.

⁹⁸ Courts of Justice Act 1990 s 131(1).

⁹⁹ *Re Wilcox: Venture Industries Pty Ltd (No. 2)* (1996) 141 ALR 727, 729.

¹⁰⁰ Civil Action (Tel-Aviv) 489/93 *Magen Vekeshet Ltd v Elite Industries Ltd* (unpublished).

¹⁰¹ United States: *Wylie v Coxe* 56 US 415 (1853); Canada: CPA (Ontario) ss 32, 33 and CPA (British Columbia) s 38(2); Australia: *Cook v Pasmenco Ltd (No. 2)* (2000) 107 FCR 44 [53]; Israel: Civil Action (Tel-Aviv) 1651/91 *Akerman v Mitelman* District Court Judgments 753(3) 410, 412.

108. The US and Australia also recognize a principle (known in the US as the “common benefit” doctrine) whereby a successful representative plaintiff or its lawyer can recover some of its costs from the damages awarded to the other class members where work was shown to have been done on their behalf.¹⁰²

109. Finally, Ontario has made an innovation which is likely to further facilitate class actions: a class proceedings fund has been established to which a representative plaintiff can apply for assistance.¹⁰³ A successful fund applicant receives no funding for legal fees, which are likely to be financed on a contingent fee basis, but does receive funding for disbursements for expert evidence, etc and is shielded from any costs order made in favor of a defendant.

110. Thus, in summary, whilst there is some diversity of approach on costs in the class action countries, there is a general recognition that measures should be taken to facilitate, not deter, the process.

111. In Section 9 the guidelines provide:

9.1. The judge who has been specially appointed to manage the transnational group action will verify the costs incurred as a result of the proceedings, and the allocation of these costs as between the parties. Fee arrangements must be submitted to the judge for approval.

112. In doing so, the Committee is aware that there is nothing special about cost and fees in transnational group action. However, because the question is central to the very existence of group actions in many jurisdictions, the Committee decided that the guidelines could not remain silent. The proposal here remains modest. To keep in line with the general policy behind the guidelines, the Committee is of the opinion that the court seized of the matter should have an important role in the control of costs and fees. In doing so, the court will have to take into account the different ways in which costs are dealt with in the different countries concerned with the transnational group action, so that the fee arrangement accepted by the court would not hurt the public policy of the countries in which the settlement or the decision will have to develop its effects.

10. *Res Judicata* Effect and Recognition of Foreign Judgments

113. Under the laws of all of the class action countries the principle of *res judicata* applies to any judgment or settlement of a class action suit. This doctrine provides that any further group or individual actions between the same parties on the same cause of action are precluded. For this purpose, actions by absent class members are treated identically to those brought by the plaintiff class representative. The objective of the rule is to provide for finality of litigation and avoidance of harassment of defendants. The doctrine of *res judicata* also forms part of the law of England and European civil law countries, although whether such countries give such effect to class action settlements or judgments involving absent class members is more questionable (see below)¹⁰⁴.

114. Interestingly, Brazil expressly modifies the *res judicata* rule in collective actions by providing that the rule only applies where the court judgment is in favor of the group. If, however, the defendant is successful, class members are not bound by the decision and may bring subsequent individual actions in court.¹⁰⁵

115. The traditional private international law rules for recognition and enforcement of foreign judgments have also been applied to group actions. The specific problem which has arisen is where a judgment in a class action country makes an award or order in respect of absent class members and recognition is sought in a country

¹⁰² United States: *Boeing Co v Van Gemert* 444 US 472, 478 (1980); Australia: FCA s 33ZJ(2).

¹⁰³ Law Society Act (Ontario) s 59.1

¹⁰⁴ English courts will not at common law in principle recognize or give binding preclusive effect to a foreign judgment binding absent class members. English courts do require that the foreign court should have had jurisdiction over the absent person in accordance with English rules of conflicts of laws.

¹⁰⁵ Brazilian Consumer Code Art 103 cited in Gidi n 13 above, 389.

which has no comparable legislation¹⁰⁶. As was discussed above, there have been a number of cases where courts in class action countries have found that such judgments in respect of absent class members would not be recognized and given *res judicata* effect in other jurisdictions.

116. A major problem in respect of recognition relates to the “opt-out” procedure in US-style class action laws whereby persons may become bound to a judgment of which they may have been completely unaware as absent class members. The argument against recognition is based on international public policy (or “*ordre public*”). On that view, a person can only become a party to a particular court proceeding by accepting the court’s jurisdiction. Such acceptance can only be established by an opt-in process where a person’s affirmative consent to proceed is required. Consent cannot be established by an omission (opting out) but only by a positive act (opting in).

117. The German Bundestag alluded to this concern when it enacted the aforementioned *KapMuG*: “In its design of the representative proceeding, the bill is modeled neither on the U.S. class action nor the representative action under British civil procedure. An automatic application of the binding effect to third parties who are not participants in the proceeding would run counter to the legal protection principles of German constitutional and procedural law, which focus on the rights of the individual. The bill, rather, strikes a balance: The binding effect of the decision reached in the representative proceeding is extended only to pending parallel actions.”¹⁰⁷

118. The resistance in Europe to the US-style opt-out model is reinforced by the concern that absent class members may not even have the opportunity to exercise their opt-out right because they may not receive proper notice of the class action. A 1999 decision by the Higher Regional Court of Stuttgart offers apt illustration of that concern.¹⁰⁸ That court had to address a motion of inadmissibility by a German defendant against a suit by a WWII foreign forced laborer, on the basis that the German suit was precluded by a class action judgment rendered against it in the US. The court dismissed the motion in the following terms:

[A] judgment rendered in a class action ... without the active participation of the plaintiff and which may not even have required proper service of process to the defendant, would not be recognizable. ... [S]uch class action is clearly not compatible with fundamental procedural principles ... of German law – and incidentally also of other Continental European laws Pursuant to the Continental European view, judicial relief has to be granted individually and nobody must accept that a binding decision is imposed on him by third parties simply because he is part of a group (“class”) – possibly even without being granted the right to be heard. Even if the law in question allows a plaintiff to opt-out of the class, this does not solve the problem. *Either* the law fully ensures that all members of the “class” are notified about the proceedings. This, however, forbids a class action in the case at hand, because it does not seem that the forced laborers, who are scattered all over the world, could all be reached in a reliable manner *Or* the law does not ensure such notification, whereas in this case there is no possibility to opt-out from the class, which would constitute a violation of the public policy as described above. For even in more prominent cases, the public media merely provide information in a selective manner.

119. It is at least arguable, however, that European (or similar) jurisdictions might adopt a more favourable view of the possibility to recognize US-style class action dispositions, even as towards absent class members. The 1999 decision of the Higher Regional Court cited above hints at a possibility to recognize judgments that have been given in an “opt out” procedure, provided that the “the law [of the originating State] fully ensures that all members of the “class” are notified about the proceedings” – a condition that was apparently not met in the Force Labourers’ case before it, but that might be met in other cases. In fact, the decision of the United States Supreme Court in *Phillips Petroleum Co. v. Shutts* already cited above¹⁰⁹ shows that in the case law of that Court, the due process rights of absent class members within the meaning of the Bill of Rights are implicated and that taking due process seriously means providing for adequate notification to all class members.

¹⁰⁶ See Andrea Pinna, “Recognition and Res Judicata of US Class Action Judgments in European Legal Systems”, *Erasmus Law Review*, volume 1, issue 2, p.31. See also the draft IBA guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress.

¹⁰⁷ Deutscher Bundestag, Drucksache 15/5091, Mar. 14, 2005, p. 17.

¹⁰⁸ Decision of Nov. 24, 1999 IPRax 2001, 240 et seq (Reg. Ct. Stuttgart).

¹⁰⁹ 472 U.S. 797 (1985).

120. Procedural “due process” as defined by US constitutional jurisprudence is not a fundamentally different concept from that of “fair trial” defined by Art. 6 of the European Court of Human Rights or similar international instruments. The Committee is of the opinion that, if a given procedure has, through proper and effective notification as outlined in the Proposed Resolution (paragraph 4), afforded absent class members the opportunity to participate in the class proceedings, or to exclude themselves from them, then the due process or “fair trial” rights of those absent class members have been complied with. In such a case, there should be no obstacle to international recognition deriving from violation of “fair trial” guarantees or from procedural *ordre public*. In cases, on the other hand, where effective notification to a given absent class member has not taken place, there is no obstacle for the requested court to refuse recognition or enforcement on the basis of the violation of its procedural *ordre public*.

121. The four class action countries have had a more lenient attitude towards this question. However, even under this test, there have been cases where courts have refused to recognize judgments given in other class action countries on the basis that the absent members had received inadequate notice of the proceeding.¹¹⁰

122. Another possible public policy objection to recognition and enforcement is that the plaintiff and its interests have not been adequately represented in the proceedings. There is a recent Canadian decision where a Quebec court refused to give preclusive effect to an Ontario judgment in part on the basis that the interests of certain Quebec class members were not adequately taken into account by the court of origin with the result that they were unable to present their case.¹¹¹ However, where there are only fixed, pre-determined categories of entities which have standing to bring a group action with no clear duty of adequate representation, such as in Brazil, such an argument will be more difficult to sustain.¹¹²

123. It seems unlikely that this difference in views will be narrowed until possibly the US class action model is more widely adopted or, conversely the US model is altered in one form or another. Indeed, the American Law Institute has embarked on an ambitious project called “Aggregate Litigation” which may pave the way for some further reform of the US model. However, there is no clear trend in this direction. As described above, with the limited exception of the new Dutch law (which does not enable opt-out group litigation, just opt-out group settlements), the UK GLO procedure and collective action models in Europe reflect a clear preference for opt-in procedures. If this process of international “bifurcation” continues and courts remain reluctant to recognize the judgments and settlements rendered in other countries the future of transnational group actions looks both complex and uncertain.

124. Section 10 of the guidelines is devoted to the recognition and enforcement of the decision taken or settlement approved by the court seized of the matter. It provides:

10.1. The requested court should not refuse to grant *res judicata* effect or enforce a foreign decision merely because the decision was rendered under an opt-out group action model.

10.2. The requested court may review the foreign proceedings having in mind the best practices outlined in this Resolution and, where it is satisfied that the due process rights of the absent claimants have been preserved and that their interests have not been prejudiced by reason of the fact that the matter was decided in the forum where the judgment was rendered, recognize or enforce the foreign decision or give preclusive effect to the foreign settlement, provided that all other requirements for the recognition and enforcement of foreign judgments in the requested country have been fulfilled.

10.3. In particular, the requested court should verify how the absent claimants were notified and satisfy itself that the method chosen in the initial action was proper to reach them.

125. The Committee’s proposal is a response to the present debate existing in many countries which favor opt-in proceedings and their reluctance to give effect to the result of opt-out proceedings. The Committee decided

¹¹⁰ *Currie v McDonalds Restaurants of Canada* (2005) 74 OR (3d) 321.

¹¹¹ *HSBC Canada v Hocking* 2006 QCCS 330.

¹¹² Gidi, n 13 above, 371.

that the requested court should not automatically refuse effect, just because the decision or the settlement presented to it for recognition or enforcement was the result of opt-out proceedings. This is the focus of section 10.1.

126. In 10.2, the Committee recognizes the fact that all the requirements for recognition and enforcement of foreign judgments existing in the requested country may apply, *mutatis mutandis* to transnational group actions. This is the purpose of the last sentence of 10.2. Before that, the Committee wanted to emphasize the fact that respect of due process rights of absent claimants is the major problem in the present practice of transnational group actions. Section 10.2 calls the attention of the requested court to the first part of the guidelines in order to keep a coherent approach. The Committee is convinced that, if all the prudent requirements developed in the first part of the guidelines have been fulfilled by the court seized of the transnational group action, the requested court should rest assured that the due process rights of absent claimants have been respected. Further than that, the Committee considered it to be out of its mandate to give more detailed recommendations to the requested court.

127. Section 10.3 emphasizes again the crucial importance of notification and makes the link with section 4 of the guidelines.

II

DRAFT RESOLUTION

The 73rd Conference of the International Law Association held in Rio de Janeiro, Brazil, 17-21 August 2008:

HAVING CONSIDERED the Report of the Committee on International Civil Litigation in the Interests of the Public on Transnational Group Actions;

ADOPTS the Paris-Rio Guidelines of Best Practices on Transnational Group Actions, as annexed to this Resolution

COMMENDS the Guidelines to the attention of:

1. national courts and law reform agencies, with a view to facilitating the progressive development of the law on this subject, and
2. organizations concerned with international legal co-operation with a view to considering measures at the international level of mutual co-operation in the field of transnational group actions.

REQUESTS the Secretary General of the Association to transmit this resolution and the Committee's Report to International Organisations such as the Hague Conference on Private International Law and the Unidroit;

INVITES the Committee to complete its work, in particular on the subject of Private Litigation for Violation of Human Rights.

ANNEX

PARIS-RIO GUIDELINES OF BEST PRACTICES

FOR TRANSNATIONAL GROUP ACTIONS

RECOGNISING that transnational litigation in a global world has increased the possibility that Group Actions be commenced in one or several countries with claimants from many different countries

DESIRING to promote transnational cooperation between courts with a view to increasing judicial efficiency in cross border collective cases

MINDFUL of the fundamental rights of persons or entities who may be affected by a group action although they have not been participating in the proceedings

HEREBY DECIDES TO ADOPT the following guidelines of best practices:

INITIAL ACTION

1) Who can bring a claim?

1.1. A "public prosecutor" or any other public body which is specifically organized or authorized by the State to represent groups of claimants.

1.2. An association or other group duly accredited in the State within whose territory it was formed and authorized by that State to represent groups of claimants.

1.3. A group of individuals or legal entities who have suffered similar common losses based on the same set of factual circumstances. Foreign nationality or residence outside the State in which the claim is brought must not, as factors in and of themselves, prevent claimants from bringing or participating in a Group Action.

1.4. An individual or legal entity who proves, to the satisfaction of the tribunal, to be capable of managing the proceedings for the benefit of the represented parties, and who has no conflict of interest in respect of the represented parties.

2) Requirements for Bringing a Claim (certification)

2.1. The tribunal may require the claimants to show that their action has a reasonable prospect of success. To evaluate the prospect of success on the merits, the standard of proof is less burdensome than for the establishment of the claim itself at trial, but is more onerous than a simple factual presentation.

2.2. The tribunal may also require that all claimants to the transnational group action have sufficient questions of fact or law in common, that the proceedings will be most efficiently disposed of by a group action rather than by individual claims; that the group proceeding will be manageable; that the principles of due process will be respected, including in respect of non-participating claimants, and that the judgment or settlement obtained will have a reasonable prospect of recognition or enforcement in other countries.

2.3. The fact that several laws may be applicable in a single transnational group action, where it is a factor taken into consideration at the certification level, should not necessarily mean that a group action is inappropriate.

3) Jurisdiction

3.1. A transnational group action may be brought in the defendant's forum. If the defendant is a corporation, the defendant's forum is located at any of the following three places: 1) where the corporation has its statutory seat or is incorporated, or in the state under whose law it was formed; 2) where it has its central administration; 3) where its business, or other professional activity is principally carried on.

3.2. Several defendants may be joined to the transnational group action before the court seized in the defendant's forum if due process requirements, as defined by the *lex fori*, are fulfilled for each of the additional defendants.

3.3. A transnational group action may also be brought in the courts of another country closely connected to the parties and the transactions, provided that trial of the action in that country is reasonably capable of serving the interests of the group and has not been selected to frustrate those interests.

4) Information - Notification

4.1. Information is particularly crucial to Absent Claimants, i.e. claimants who are not parties technically speaking, but who may be bound by the judgment or the settlement because they are deemed to have been represented in the proceedings.

4.2. Absent claimants must be given adequate notice of the claim and an opportunity to exclude themselves from the proceeding. Notification should occur at three stages of the proceedings: 1) at the start; 2) when a settlement is reached; 3) when the court proceeds with the verification of the settlement.

4.3. The adequacy of the notification and the method used to achieve it should be subject to review and approval by the court hearing the matter.

4.4. The type of dispute, the particular composition of the group, the likely location of the group members are elements to be taken into consideration to decide on the adequacy of the notice. In appropriate cases, electronic means of communication should be preferred.

5) *The applicable law on the merits*

5.1. The fact that the action is a transnational group action does not affect the application of the rules on the conflict of laws. The tribunal may thus apply (distributively) several systems of law both in respect of the defendant's liability as well as in respect of the quantum of evaluated losses suffered by the claimants.

6) *Evidence*

6.1. Where the elements of proof are located outside the tribunal's territory, judges situated within these various other territories should cooperate with the tribunal hearing the matter.

6.2. Where witnesses must be heard, whether they appear as witnesses of fact or of law, the modern means of videoconferencing must be considered each time that no aspect of the case requires that the testimony be given by another means.

7) *Management of Proceedings (case management)*

7.1. The proceedings in a transnational group action should be managed by a judge who is specially appointed within the tribunal to carry out this task.

7.2. States should make available to this judge all means necessary, notably the appropriate technological means.

7.3. *Bifurcation* (of the assessment of liability and damages). Unless separation of the proceedings is not in the interests of the proper administration of justice, the tribunal will divide the proceedings into two phases: the first will be dedicated to the question of the defendant's liability, and the second to the evaluation of quantum.

8) *Transnational Judicial Cooperation*

8.1. Whether expressly authorized by States or not, judges from different countries should cooperate with one another to best manage transnational group actions. A Court may communicate with a Court in another different country in connection with matters relating to proceedings in a group action which is also pending or foreseen in other countries with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the administration of justice. A court may appoint a special judge to carry forward the communication.

8.2. These means of cooperation must not be carried out in such a way as to prejudice the rights of the parties to the proceedings. The adversary principle must always be respected by judges during the cooperative process, even if it may be adapted in case of urgency.

8.3. The courts using these principles should clearly inform the parties as to their intention to do so and keep them informed of each step they intend to take.

8.4. Courts using these Principles may communicate in any stage of the proceedings, including as to questions of jurisdiction, the categories of claimants who will be included in the group action, the level of proof necessary to certify or otherwise admit any given category of plaintiff and, more generally, all the issues which are peculiar to cross border group actions.

8.5. Courts may use various means of communication, be they in writing, by telephone, via video conferencing, or other electronic means to communicate with one another. Counsel or representatives of affected parties should be entitled to participate during the communication or, where this is not feasible, to be informed of them. An official transcript of the communication should be kept by the court and made available to all affected parties. Whenever possible a collaborative website should be organized for the group action and all documents pertinent for that group action should be posted on the website.

8.6. Courts may also conduct one or more joint hearings via video conferencing or other techniques available to the courts. Submissions made during such joint hearings will be considered to be made to all participating courts, unless the courts provided otherwise in advance of the hearing or unless the person making the submission decides that it is directed to only the specified court or courts.

8.7. Courts may wish to coordinate their orders so that they are rendered at the same time and do not conflict with one another.

9) Costs, Lawyers' Fees

9.1. The judge who has been specially appointed to manage the transnational group action will verify the costs incurred as a result of the proceedings, and the allocation of these costs as between the parties. Fee arrangements must be submitted to the judge for approval.

RECOGNITION AND ENFORCEMENT

10.1. The requested court should not refuse to grant *res judicata* effect or enforce a foreign decision merely because the decision was rendered under an opt-out group action model.

10.2. The requested court may review the foreign proceedings having in mind the best practices outlined in this Resolution and, where it is satisfied that the due process rights of the absent claimants have been preserved and that their interests have not been prejudiced by reason of the fact that the matter was decided in the forum where the judgment was rendered, recognize or enforce the foreign decision or give preclusive effect to the foreign settlement, provided that all other requirements for the recognition and enforcement of foreign judgments in the requested country have been fulfilled.

10.3. In particular, the requested court should verify how the absent claimants were notified and satisfy itself that the method chosen in the initial action was proper to reach them.