

## **RESOLUTION NO 1/2008**

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

The 73<sup>rd</sup> 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 de Janeiro Guidelines of Best Practices on Transnational Group Actions, as incorporated in the Report and 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 AS ADOPTED BY THE INTERNATIONAL LAW ASSOCIATION AT ITS 73<sup>RD</sup> CONFERENCE HELD IN RIO DE JANEIRO, BRAZIL, 17 – 21 AUGUST 2008**

**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 STATES** 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 on the merits 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 Guidelines 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 Guidelines 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.

Rio de Janeiro, 21 August 2008