

## Preface to the Class Actions Global Guide

Omar Shah, Morgan, Lewis & Bockius LLP

[global.practicallaw.com/7-618-1411](http://global.practicallaw.com/7-618-1411)

"..[I]f he is so powerful that he can act like this and yet prevent you individually from obtaining satisfaction from him, you ought all of you, in common and on behalf of all, now that he is in your grasp, to punish him as the common enemy of the State" (*Demosthenes, Speeches, 21.142, translated by A. T. Murray, Harvard University Press; London, William Heinemann Ltd. 1939*).

"...since [the defendant] has not paid the penalty for his crimes individually, you must exact satisfaction now for all of them collectively" (*Lysias "Against Nicomachus", 30.6, translated by S.C. Todd, University of Texas Press, 2000*).

Since at least antiquity, human societies around the world have grappled with the problem of how to achieve redress, in a fair and just process, for conduct that is alleged to have caused injury to more than one person, and thus to that collective and arguably to society as a whole.

Ancient Athenian democracy opted for a system of private enforcement where individual citizens could bring claims in court (generally pleading in person before a jury of 201 to 501 citizens) on behalf of themselves and also of the state. In the absence of any formal system of public enforcement, private enforcement was encouraged by for example allowing successful prosecutors in suits recovering state property to collect a portion of the judgment. As a result, litigation tended to be irregular and unpredictable, driven by private interests rather than any conception of the public interest. Parties with greater financial resources and social clout had strong advantages both in court (better speeches; better delivery; greater social standing before the jury) and afterwards in terms of ability to enforce (the absence of state mechanisms meant that verdicts also had to be privately enforced) (*Adriaan Lanni, Social Norms in the Courts of Ancient Athens, Journal of Legal Analysis, 2009, 691-736, DOI: 10.1093/jla/1.2.691*).

In grappling with the above problem, other societies have made different political choices to the Ancient Athenians on issues such as:

- The balance between public and private enforcement. Should the state have the monopoly over enforcement in a particular area and if not what should be the proper scope for any system of private enforcement?
- How best to structure a system of private enforcement to achieve the society's goals. Who can sue and for what and on whom is the judgment to be made binding?
- How to encourage private enforcement. Should contingency fees be allowed and/or should the loser pay the costs of the litigation?

As a result of the choices made by different societies around the world to reconcile the different interests of individuals (including corporations both as claimants and defendants), collectives and society as a whole, one can find many collective redress forms in different jurisdictions, some of which are confined to particular fields, while others are of more general application. These include class actions, group actions, test cases, representative actions and derivative actions as well as collective ADR mechanisms including collective arbitration, mediation or voluntary redress (see for example, *Wrbka, Van Utsel and Siems in "Collective actions, enhancing access to justice and reconciling multilayer interests?"*,

*Cambridge University Press 2000, pages 9- 11 who refer to the interests of individuals, collectives and society as a whole as "multilayer interests"*).

Globally, the United States has led the way in this area in terms of the sheer number of class actions mostly in consumer facing industries such as the retail, automotive, insurance, pharmaceutical and financial services. As is detailed in *Class/collective actions in the United States: overview* and the separate analysis chapter entitled *"The use and enforceability of class action waivers in arbitration agreements in the United States"*, this had led to legislative attempts to limit the use of class actions. Although these attempts seem to have stalled at legislative level for now, certain courts have taken steps in this direction for example by limiting class certification or upholding class action waivers. However, in jurisdictions such as California the wave of class action litigation continues unabated.

The publication of the first edition of the *Class and Collective Actions Global Guide* was at the time of the passing by the European Union legislature of the Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) which was facilitated by the depth of harmonisation and convergence between national laws in the specific area of EU competition law. The parallel attempt to introduce a system of collective redress in the EU resulted only in the non-binding Recommendation on Collective Redress (Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)). In the absence of full EU political union and given the diversity of national legal systems and potentially very broad scope of issues that could be affected by collective redress, it did not prove possible to make those explicit political choices in advance and enshrine them in binding EU legislation. At the time of writing, EU legislators are once again grappling with the political choices and trade-offs required to introduce binding legislation to introduce a system of collective redress in the EU. The chapters in this guide relating to the EU and a number of EU member states show how various initiatives such as the Recommendation on Collective Redress, the Anti-trust Damages Directive and sector-specific legislation such as most notably the Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) have created a more harmonised and consistent legal system across the EU member states thereby creating the basis for this renewed attempt at an EU-wide system of collective redress.

There have also been important developments in a number of other jurisdictions around the world which are reflected in their respective national chapters. It will be interesting to see in this context if international developments in public enforcement, particularly in cases with a cross-border dimension (for example, environmental, transport, competition law and data breaches), will impact on the availability and use of class actions for private enforcement in these jurisdictions in the future.

This linkage between public and private enforcement and across jurisdictions naturally gives rise to strategic and tactical decisions to be made by claimants and defendants in private enforcement

---

actions to advance/protect their interests as effectively as possible in several jurisdictions at the same time. Some of those decisions result in particular outcomes, for example, regarding the scope of disclosure, that then drive changes to public enforcement worldwide.

Overall, this guide, written in the form of specific national chapters as well as broader thematic chapters of more general application by leading firms in each jurisdiction, sets out how different societies around the world have made their choices in solving key aspects of the problem of collective redress. It should therefore allow parties seeking to bring or defend collective actions and public enforcers to analyse the current position as well as the future dynamic on key aspects of collective redress on a consistent basis across 18 strategically important jurisdictions worldwide.

My thanks go to all the chapter authors, Professor Danov for his lucid foreword, the highly professional team at Thomson Reuters and all my colleagues at Morgan, Lewis & Bockius including in particular the business development team of Ian Pegram, Amanda Nassar and Bhavisha Arora, without whom this would not have been possible.