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Class action in selected places

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Executive summary

1. This research studies the class action and group litigation schemes in the United States (US), Australia and the United Kingdom (UK), each of which has certain distinctive features in relation to multi-party litigation. In Hong Kong, there is no legal provision for class actions, and the sole machinery for dealing with multi-party litigation is a rule on representative proceedings under the Rules of the High Court.

2. Class action is a procedural device by which a group of persons with similar cause of action and standing can bring a claim to court through a single representative. While the rule on representative proceedings applies similarly when numerous people have the same interest in a grievance and seek the same relief, both the named plaintiffs and those they represent must be clearly defined. On the contrary, class action enables one person to litigate on behalf of a group, not all of whom necessarily know they are being affected and thus many may not actually participate in the action, but all of whom will be bound by the judgment. This study focuses on the schemes' underlying legislations, procedures, recent reforms and development, as well as issues and concerns.

<u>The United States</u>

3. In the US class action regime, certification by the court is required before a class action can proceed, and eligible cases should meet the threshold requirements of numerosity, commonality, typicality and adequacy of representation. In addition, judicial approval of the settlement agreement is required in order to render it binding and enforceable. Nonetheless, class members have the right to opt out so as to be excluded from the proceeding.

4. Although assessment of aggregate damages is not specified in the relevant legislation, aggregate judgments have been widely used in antitrust and securities class actions. The damages awarded may be distributed either by the defendant directly, or by a court fund or other repository. Reversion of the unclaimed fund to the defendant has been approved in some instances. On the other hand, class members are generally not liable for costs of unsuccessful suits. A controversial feature of the US class action regime is the contingency fee agreement, under which an attorney is paid nothing if the case is lost, while a percentage of the damages recovered would be paid if the case is successful.

Australia

5. Similar to the US system, Australian class actions belong to an opt-out regime, court approval is required before a settlement can take legal effect, and group members are immune from an adverse costs order. However, no certification is required and a class action proceeds unless the court orders otherwise in Australia. Although numerosity and commonality are the threshold requirements as in the US, predomination of common issues over individual issues is not required.

6. The court has the power to make both aggregate award and provision for the distribution of damages. Reversion to the defendant has been statutorily mandated as the first preference to deal with any unclaimed fund. While contingency fee agreements are disallowed, there are conditional fee agreements, under which if the lawsuit is successful, the lawyer can get the normal fee or the normal fee plus a percentage on top of that fee. There are also commercial litigation funders who receive an agreed percentage of any monies awarded to the claimant.

The United Kingdom

7. In the UK, the class action device is not adopted. Instead, Group Litigation Order (GLO) is used for multi-party litigation. While GLO carries some similar features as class action like cases in common being grouped and judgment binding on the parties to all claims, it is different from class action in several essential aspects. In particular, GLO merely serves as an "umbrella" under which a number of claims are managed, and each litigant is a party to the litigation without any representative party.

8. In addition to the requirements of numerosity and commonality, consent of the appropriate official should be sought in GLO. To obtain court approval, GLO should be the most appropriate method of litigation for the case concerned and be able to facilitate the court to deal with the case justly, and the group has to be clearly defined. The GLO scheme is an opt-in regime such that litigants have to choose affirmatively to litigate by entering their names on the group register. While it does not have any provision for aggregate damages, common costs of group litigation are shared equally among group litigants. Although contingency fee is banned, there are conditional fees and professional litigation funders as in Australia.

Major issues

9. There are three major controversial issues on the class action and group litigation schemes in the selected places, which are: litigious abuse under opt-out class actions, closed litigation under opt-in mechanism, and funding of litigation. Those who oppose opt-out class actions mainly point to the threat of abuse which has put serious litigious pressure on companies. Nevertheless, the opt-out procedure is favoured by others on grounds of equity and efficiency.

10. While opting-in preserves the liberty of individuals to participate in litigation only if they wish to do so and reduces the chances of abuse or litigation becoming unmanageable, the narrow scope of opt-in group litigation in the UK has led to barriers to the access to justice and calls for legal reforms.

11. Until recently the UK remains unwilling to adopt the US-style class action device. During the debate associated with the reform on multi-party litigation in the UK, contingency fee and its potential risks are the major concerns. In Australia, although the Australian Law Reform Commission had recommended that class representatives should be allowed to enter into contingency fee agreements with the class solicitor, this recommendation was not adopted. Such arrangement, if adopted, would have provided a means of financing multi-party litigation and overcoming the costs disincentives to representative plaintiffs.

12. In recent years, litigation funding and the arrangement of contingency fees have been under consideration in Australia and the UK. No matter whether contingency fee agreements are allowed, it is generally agreed that some methods have to be adopted to provide class representatives with financial resources to meet the significant costs of litigation. It is under such circumstances that the involvement of commercial litigation funders in multi-party litigation has grown in the two places in recent times.

Class action in selected places

Chapter 1 – Introduction

1.1 Background

1.1.1 The Panel on Administration of Justice and Legal Services, at its meeting on 14 October 2008, agreed that in view of the Lehman Brother's minibond incident in which a large number of investors might need to take legal action individually for their losses, it would be opportune for the Panel to take up the issue of multi-party litigation and class action with the Administration.

1.1.2 In Hong Kong, there is no legal provision for class action, and the sole machinery for dealing with multi-party litigation is a rule on representative proceeding under the Rules of the High Court. In November 2006, the Law Reform Commission established a class actions subcommittee to consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to devise a suitable scheme. The subcommittee has released its proposal for consultation in November 2009, proposing class action to be initially introduced in the Court of First Instance and extended to the District Court after at least five years.

1.1.3 Under the proposal, a certification system would be in place for the court to filter out unsuitable cases for class action. The basic requirements for class action are: enough people of similar backgrounds pursuing a case; capability of the representative party to represent the interests of others; common interest and backgrounds of the parties; enough merit to pursue their cases; and class action being the best option.

1.1.4 Once the court has certified the class action, people in similar situations are automatically covered by it unless they choose to opt out and take legal action individually. While class members do not have to pay the costs if the case is lost, the representative party should bear the costs as the costs rule of Hong Kong specifies that the losing party pays the winning side's costs. In order to cover the costs of the representative party, the proposal suggests the Government to either inject more funds into the Consumer Legal Action Fund or widen the scope of legal aid to cover class action. The establishment of litigation fund companies, which would pay legal costs and share in awards when actions are successful, could also be considered.

1.1.5 While the issue of class action has not been formally discussed in the Legislative Council, it was touched upon during deliberations of other issues on several occasions. In 1994, representative proceedings and class action were mentioned during the discussion on the Government's proposal to set up the Consumer Legal Action Fund to help consumers file their claims. Overseas experience of class action, in particular the United States (US) practice, was also cited as reference in the discussion on the Disability Discrimination Bill (1995), legal problems associated with the millennium bug, the Securities and Futures Bill and Banking (Amendment) Bill (2000), the Companies (Amendment) Bill (2002), the Interim Report and Consultative Paper on the Civil Justice Reform, enhancement of the regulation of listed companies and corporate governance, the Securities and Futures (Amendment) (No.2) Bill (2005), limited liability for professional practices, and reform of the legal aid services respectively.

1.1.6 Multi-party litigation can be initiated by several devices, with class action being a frequently considered option among overseas places. To facilitate the Panel's discussion on the issue of multi-party litigation, particularly class action, the Research and Library Services Division was requested to conduct a research on the relevant schemes implemented in selected overseas jurisdictions.

1.2 Class action

1.2.1 Class action is a procedural device by which a group of persons with similar cause of action and standing can bring a claim to court through a representative. Under such cases, individual litigation may not constitute an efficient use of resources because individual claims often involve a fairly small monetary value or some victims would not or could not initiate litigation.

1.2.2 In spite of some similarities, there is a distinctive difference between class action and representative proceeding. Representative proceeding arises when a large number of people have the same interest in a grievance and seek the same relief. Both the named plaintiffs and those they represent must be clearly defined. On the contrary, class action enables one person to carry on proceedings on behalf of a group of people, not all of whom necessarily be identified and know that they are being affected, but all of whom will be bound by the judgment.

1.2.3 Class action may increase the efficiency of the legal process and reduce the costs of litigation by enabling common issues to be dealt with in one proceeding. Under class action, while small claimants can acquire legal access previously denied, defendants can also avoid inconsistent decisions over long period of time and possibly in different courts. Besides, defendants such as large corporate wrongdoers are faced with proceedings to be taken seriously, leading to long-term social benefits in the form of higher product safety standards.

1.2.4 On the other hand, abusive class action may harm class members[1] with legitimate claims and defendants that have acted responsibly. In the US, plaintiffs' attorneys sometimes exploit the leverage provided to them by class action to force defendants into large settlements of frivolous claims. In view of the huge costs of litigation, defendants may at times be subject to significant settlement pressure irrespective of the merits of the plaintiffs' claims. At the same time, while plaintiffs' attorneys are awarded a substantial fee, class members may receive little or no monetary benefit from class action.

1.2.5 Class action usually provides an opt-out mechanism. Under an opt-out model, relevant persons are bound as members of a class unless they take an affirmative step to indicate that they wish to be excluded from the action. As such, persons of little means are able to get access to justice, which may be denied otherwise. On the contrary, representative proceeding is an opt-in regime under which relevant persons have to choose affirmatively by indicating their wish to litigate.

1.2.6 This research aims to provide a general picture of the class action and group litigation schemes in the selected places. In this connection, the underlying legislation and procedures of the devices are described, along with recent reforms and development of the systems, and major issues and concerns.

[1] The persons, both named and unnamed, who fall within the definition of the class in a class action are "class members". Those people who fall within the class description but do not actually participate in the action are "absent class members".

1.3 Selected overseas jurisdictions

1.3.1 This research studies the following three places, each of which has certain distinctive features in relation to multi-party litigation:

(a) the US;

(b) Australia; and

(c) the United Kingdom (UK).

1.3.2 The US is chosen because class action originated in the US, and some European countries have either adopted or actively considered embracing the American class action procedures in their recent legal reforms. In the US class action system, litigation abuse has been the major concern of legal experts and related parties. In fact, the US Chamber Institute for Legal Reform[2] regards the abusive securities class action litigation as a serious threat to the health of the US economy, and therefore calls for reforms of the litigation procedures.

1.3.3 In addition to the US, Australia and the UK are selected because they all adopt the common law system. Australia is the major class action regime outside North America, with features distinctively different from the US experience. For instance, unlike the US, Australia does not have any threshold requirement that the proceedings be certified by the court as appropriate to be brought in as a class action.

1.3.4 The UK is chosen as the legal system in Hong Kong primarily follows the UK system. Although there is no class action procedure in the UK, there are several mechanisms in place that permit multi-party litigation. Unlike the opt-out rule of the US and Australia, the group litigation scheme in the UK is an opt-in regime, which has been criticized by some legal practitioners as limiting people's means to collective redress. In recent years, there have been reforms in the UK to expand access to multi-party litigation. However, the UK legal profession remains largely unwilling to adopt the US-style class action.

[2] Founded in 1998, the US Chamber Institute for Legal Reform is an affiliate of the US Chamber of Commerce to address the growing number of litigation. It advocates comprehensive reforms, not only through changing the laws, but also by changing the legal culture and the legislators and judges creating that culture.

1.4 Scope of research

1.4.1 This study focuses on the following aspects of multi-party litigation schemes in the selected places:

(a) underlying legislation;

(b) procedures;

(c) recent reforms and development; and

(d) issues and concerns.

1.4.2 This research is confined to the class action schemes in the federal level of the US and Australia, as well as group actions under the Group Litigation Order in England and Wales of the UK.

1.5 Research method

1.5.1 This research adopts a desk research method, which involves literature review, documentation analysis, Internet research and correspondence with relevant authorities.

Chapter 2 – The United States

2.1 Background

2.1.1 Class action originated in the US over 80 years ago. In 1938, Congress promulgated the first Federal Rules of Civil Procedure (FRCP), of which Rule 23 made class action suits for damages available in the US for the first time. Before 1938, the related procedural rules in the US federal courts had varied from state to state. Opting for an inter-state uniformity, Congress in 1934 passed the *Rules Enabling Act*, conferring on the Supreme Court the power to make federal procedural rules.

2.1.2 In 1938, the first FRCP was issued by the Supreme Court and approved by Congress. Rule 23 of this first FRCP contained broad provisions for joining parties and claims to a lawsuit. However, this piece of legislation was heavily criticised by both legal practitioners and the public for the difficulties of its implementation in actual practice. Overall, the mechanisms were considered difficult to implement, and the categorisation of class actions was regarded as "highly conceptualised" and "distracting attention from the real issues".[3]

2.1.3 In 1966, Rule 23 was completely rewritten so as to describe "in more practical terms the occasions for maintaining class actions".[4] The amended Rule 23 aims at addressing the shortcomings of its predecessor, and establishes four prerequisites to all categories of class actions. Notwithstanding some minor adjustments in practice,[5] there has been no major amendment and the Rule has operated in its present form since then.

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3 See Mulheron (2004) pp.9-10 and Seiger & Healy (2006) p.18.

4 Rules Advisory Committee's *Notes to the 1966 Amendments*, cited from Mulheron (2004) p.10.

5 In December 1998, the addition of a new Rule 23(f) introduced a regime for permissive interlocutory appeals from orders granting or denying class certification. In December 2003, there was a new round of amendments to Rule 23, particularly focusing on four areas: timing of certification decision and notice, judicial oversights of settlements, attorney appointment and attorney compensation.

2.1.4 Despite improvements instituted by the 1966 amendments to Rule 23, a major problem has persisted, stemming not from the Rule itself, but from its application, and federal courts' lack of power to adjudicate class action lawsuits proceeded in state courts. Since most state courts are relatively lenient in certification,[6] some plaintiffs' attorneys are used to "forum shopping", looking for a favourable state court so that class action can commence more easily. Meanwhile, federal courts are less attractive to plaintiffs due to their stringent requirements.[7]

2.1.5 The issue of "coupon settlements" has also aroused public concern. In coupon settlements, class members are awarded coupons for use with future purchases of particular products, which are often manufactured by the defendants. At issue is that coupon settlements may benefit only the attorneys representing the class, who are paid in cash, and the defendants who can rely on a coupon design and redemption process so that very few coupons would eventually be redeemed, leaving the vast majority of the class members with little monetary benefits.[8] To deal with these two problems, Congress enacted the *Class Action Fairness Act of 2005* (*CAFA*) in February 2005. The United States Code (USC) was amended accordingly.

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6 Certification is the procedure through which the parties concerned demonstrate to the court that they have satisfied all the prerequisites stated in the statutes in order to bring in a class action. For details, please refer to paragraphs 2.3.1 to 2.3.7.

7 See Vairo (2005) p.2. In particular, the Supreme Court's decision in *Amchem Products, Inc. v Windsor* has raised the certification standards of Rule 23, and its decisions in the 1986 Trilogy of Summary Judgement cases, together with its decision in *Daubert v Merrell Dow Pharmaceuticals*, have made it tougher for plaintiffs to survive motions for summary judgments in federal courts.

8 For instance, in *In re Domestic Air Transportation Antitrust Litigation*, the settlement provided for over US$400 million (HK$3.1 billion) in flight coupons and US$50 million (HK$390 million) in cash for attorneys' fees and administrative costs. The coupons were regarded by the class members as nearly worthless because of the numerous restrictions on their use. See Dickerson & Mechmann (2000) pp.6-7. In *Hoffman v BancBoston*, the court approved a settlement in which each class member received a payment up to only US$8.76 (HK$68), while the approved attorneys' fees totalled US$8.5 million (HK$66.3 million) and were paid directly out of the class members' accounts. As a result, the accounts of many class members were actually debited in excess of the award obtained from the settlement, producing a net out-of-pocket loss for these class members. See Roedder (2006) pp.446-447.

2.1.6 In the US, the class action device can be used to amalgamate a large number of claims raised by individuals in various areas of litigation like tort, contract, antitrust, employee benefits and rights, as well as securities fraud. Among these categories, securities class actions comprise the lion's share. For instance, securities class actions accounted for almost half of all class actions pending in federal courts in 2004.[9] Recent data shows that securities class action filings appear to be on the rise as well. For example, a total of 210 federal securities class actions were filed in 2008, which was a 19% increase over the 176 filings in 2007, and a 9% increase over the annual average of 192 filings observed between 1997 and 2007.[10]

2.2 Underlying legislation

2.2.1 In the US, class actions can generally be filed in either federal or state courts,[11] and each state may have its own law on class actions. There are disparities among related state legislations, and this study only covers the class action scheme in the federal level. In the US federal courts, class actions are governed by FRCP Rule 23 and the relevant provisions of USC, particularly Title 28.

2.2.2 Since 2005, class action practices have also been subject to the regulation of *CAFA*. This legislation alters the rules for federal diversity jurisdiction and removal, enabling most major class actions to be filed in, or removed to, federal courts. Compared with state courts, federal courts are perceived to be more neutral and less willing to certify class actions brought in on questionable grounds since federal judges are tenured and need not pander to any constituencies or the plaintiffs' bar.[12] At the same time, a "consumer class action bill of rights" is implemented to protect plaintiffs from unfair class settlements.

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9 The Administrative Office of the United States Courts (2004). Relevant figures after 2004 are not available.

10 Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse (2009) p.2.

11 Under the federalism system, both the federal government and each of the state governments have their own court systems.

12 Seiger & Healy (2006) p.21. In the US, there is a division between lawyers who specialise in acting for plaintiffs and those who specialise in defending. "Plaintiffs' lawyers" are those lawyers representing plaintiffs, while "defence lawyers" are those acting for defendants. "Plaintiffs' bar" is a general term of plaintiffs' lawyer group, and it usually refers to the American Association for Justice, a national bar group for plaintiffs' lawyers, which is the largest association of plaintiffs' lawyers in the US.

2.2.3 In addition to the above legislation, extra control is imposed over securities class actions, which often involve huge amount of settlements. The *Private Securities Litigation Reform Act* (*PSLRA*) was passed by Congress in 1995 to address concerns over abuses of securities class action litigation. Compared with class actions in other areas of litigation, more stringent requirements and control are imposed on securities class actions.[13] For instance, under *PSLRA*, there are a heightened pleading standard for securities class actions, damage caps and mandatory sanctions for frivolous litigation. The behaviour of "professional plaintiffs" who constantly act as class representatives to bring in class actions are restricted by law in that a person may not be a lead plaintiff in more than five securities class actions during any three-year period. Awarding class representatives a share of settlement larger than those awarded to other members is not permitted in securities class actions as well.

2.2.4 In 1998, the *Securities Litigation Uniform Standards Act* (*SLUSA*) was passed. The purpose of *SLUSA* is to prevent plaintiffs from seeking to evade the protection of the federal law against abusive litigation by filing suit in state courts instead of in federal courts, a common phenomenon after the enactment of *PSLRA*.[14] *SLUSA* provides for removal of covered class actions from state courts to federal courts – these rules for federal diversity jurisdiction had been introduced before *CAFA* came into effect in 2005.

2.3 Procedures

Commencement of proceedings

2.3.1 The US class action regime contains a certification procedure. Under FRCP Rule 23, in order to bring in a class action, the parties should demonstrate to the court that they have satisfied all the prerequisites stated in Rule 23(a) and any one of the three alternative conditions listed in Rule 23(b).

Threshold requirements

2.3.2 The four threshold requirements set out in Rule 23(a) are commonly referred to as numerosity, commonality, typicality and adequacy of representation, which are:

[13] 15 USC §78u-4.
[14] 15 USC §78a.

(a) the class is so numerous that joinder of all members is impracticable;[15]

(b) there are questions of law or fact common to the class;[16]

(c) the claims or defences of the representative parties are typical of the claims or defences of the class;[17] and

(d) the representative parties will fairly and adequately protect the interests of the class.[18]

2.3.3 In addition, to be certified as a class action, a case must also meet any one of the conditions provided in Rule 23(b):

(a) prosecuting separate actions by or against individual class members would either establish incompatible standards of conduct for the party opposing the class, or practically impair the interests of class members who are not parties to the adjudications (class certified under Rule 23(b)(1)); or

(b) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole (class certified under Rule 23(b)(2)); or

(c) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (class certified under Rule 23(b)(3)).

The above three conditions are mutually exclusive. A case which satisfies all threshold requirements stated in Rule 23(a) and meets any one of these conditions can be certified.

15 FRCP Rule 23(a)(1).
16 FRCP Rule 23(a)(2).
17 FRCP Rule 23(a)(3).
18 FRCP Rule 23(a)(4).

2.3.4 Other than the conditions listed above, the Supreme Court has stated that, under FRCP Rule 23, the representative plaintiffs need not demonstrate a probability of success on the merits in order to get certification.[19]

Certification order

2.3.5 At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.[20]

2.3.6 The certification order must define the class and the class claims, issues or defences, and must appoint class counsel under Rule 23(g).[21] As such, the court not only creates the class by certifying it, but also supervises those who conduct the litigation on behalf of the class. The court must ensure that a lawyer seeking appointment as class counsel will fairly and adequately represent the interests of the class.[22] In most cases, the lawyers who file the suit will be the obvious or only choice to be the appointed counsel for the class. In such cases, the court will determine whether the applicant is able to provide adequate representation for the class in the light of Rule 23(g)(1)(C).

2.3.7 When a Rule 23(b)(3) class is certified, notice to class members is required. In fact, notice is a critical part of the class action practice. It provides the structural assurance of fairness that permits representative parties to bind absent class members.[23] Certification notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so.

Case management

Status of class members

2.3.8 The Supreme Court has explained the status of an absent class member under the FRCP Rule 23 regime as a passive party, not physically present but represented before the court.[24]

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19 *Eisen v Carlisle and Jacquelin.* See Mulheron (2004) p.131.
20 FRCP Rule 23(c)(1)(A).
21 FRCP Rule 23(c)(1)(B).
22 *Manual for Complex Litigation*, Fourth, §21.272 and FRCP Rule 23(g).
23 *Manual for Complex Litigation*, Fourth, §21.31.
24 *Phillips Petroleum Co v Shutts.* See Mulheron (2004) p.36.

Right to opt out

2.3.9 FRCP Rule 23 contains opt-out provisions for class actions brought under (b)(3) only, but not for (b)(1) and (b)(2) class actions. For the latter two categories, it is at the discretion of the court to direct opt-out notice to the class.

Opt-out notice

2.3.10 For class actions certified under Rule 23(b)(3), notice must be sent to all class members who can be identified through reasonable effort. Notice delivered to individuals is generally preferable.[25] For those class members who cannot be identified, the court must direct to them the best notice practicable under the circumstances.[26]

2.3.11 The notice must contain the following items:[27]

(a) the nature of the action;

(b) the definition of the class certified;

(c) the class claims, issues or defences;

(d) that a class member may enter an appearance through an attorney if the member so desires;

(e) that the court will exclude from the class any member who requests exclusion;

(f) the time and manner for requesting exclusion; and

(g) the binding effect of a class judgment on members.

2.3.12 Opt-out notice must be judicially approved before it is sent to class members. Opt-out notice, though usually drafted by one of the parties' attorney, is issued in the court's name. The court must ensure that the notice is accurate, objective and understandable.[28]

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25 *Manual for Complex Litigation*, Fourth, §21.311.

26 Notice can be delivered by publication, Internet, and posting in public places likely to be frequented by class members.

27 FRCP Rule 23(c)(2)(B).

28 *Manual for Complex Litigation*, Fourth, §21.31 and Mulheron (2004) p.354.

Opt-out procedure

2.3.13 As mentioned in paragraph 2.3.11, opt-out notice includes the time and manner for opting-out. The opt-out procedure is designed to be simple and to allow class members a reasonable time to exercise their option. The court usually establishes a period of 30 to 60 days following mailing or publication of the notice for class members to opt out.[29] The opt-out procedure commonly involves filling out an opt-out form or submitting a written opt-out request. Class members who wish to opt out must submit the appropriate materials by the deadline specified in the opt-out notice. Failure to do so will result in being included in the class action.

2.3.14 For those class members who choose to opt out, they can bring their own proceedings against the defendant, or dissociate from the litigation altogether, but they are not entitled to share in any relief obtained by the class action.

Class representative

2.3.15 Being a party to the litigation, a class representative can communicate with the attorneys about the progress of the lawsuit and express his or her view and demand to the attorneys during the litigation, which may influence the way the attorneys handle the case and even the outcome of settlements. FRCP 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class". Meanwhile, FRCP 23(a)(4) stipulates that the class representative "will fairly and adequately protect the interest of the class". The latter provision implies that the representative must have no interest conflicting with the interests of the other class members.[30]

2.3.16 The court requires that a class representative be knowledgeable about the issues involved in the case concerned, but does not require any legal experience or expertise. Nor is any particular level of education or sophistication required. The representative must be free of conflicts, and represent the class adequately throughout the litigation. The court must ensure that the representative understands his or her responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class, including subjecting himself or herself to discovery.[31]

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29 *Manual for Complex Litigation*, Fourth, §21.321.

30 *General Telephone Co of Southwest v Falcon*, *Eisen v Carlisle and Jacquelin*, and also *Sosna v Iowa*. See Mulheron (2004) p.276 and *Manual for Complex Litigation*, Fourth, §21.26.

31 *Manual for Complex Litigation*, Fourth, §21.26.

2.3.17 More than one member of the class can act as the class representative. However, whether the class representative must be a class member is an issue subject to debate.[32] This debate necessarily entails consideration of whether organizations like consumer advocacy groups, charities, trade associations, or labour unions could commence a class action on behalf of their members. In the US, an organization which seeks to bring in a class action on behalf of its members may possess "representational standing" to bring in the suit. The Supreme Court has ruled on such requests based upon three requirements of representational standing: where individual members would have standing to sue in their own right, the interests the organization is seeking to protect are germane to the organization's purposes, and individual participation by members is not needed to pursue the suit or relief sought.[33]

2.3.18 If the representative's individual claim has been mooted or significantly altered, or if the representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation, replacement of a class representative may become necessary and appropriate.[34] In such circumstances, the court generally allows class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit this person to participate in the litigation or simply designate that person as the new class representative.

2.3.19 When there are divergent interests among class members, subclasses can be created to avoid actual or potential conflicts of interest that would otherwise render the representation inadequate. Under FRCP Rule 23(c)(5), a class may be divided into subclasses each of which is treated as a class. Each subclass must independently satisfy Rules 23(a) and (b).[35]

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32 For a summary of the competing arguments on the issue, see Mulheron (2004) p.304.

33 *United Food & Commercial Workers Union Local 751 v Brown Group.* See Mulheron (2004) p.305.

34 *Manual for Complex Litigation*, Fourth, §21.26.

35 *Manual for Complex Litigation*, Fourth, §21.24.

Trial and judgment

Managing individual issues

2.3.20 Common issues are the basis for class actions. FRCP Rule 23(a)(2) stipulates that in order to commence a class action, there should be questions of law or fact common to the class. In addition, Rule 23(b)(3) requires that such common issues should predominate over the individual issues. It is because class action suits intend to "achieve economies of time, effort, and expenses, and promote uniformity of decision as to persons similarly situated. … It is only where this predominance exists that economies can be achieved by means of the class action device".[36] However, class actions may also involve individual issues which are not predominant. In addition to the common issues, class members may have different claims leading to individual issues which require individual determination by the court.

2.3.21 Since there is no provision under FRCP Rule 23 for dealing with individual issues, it has been at the behest of judicial creativity.[37] In jury cases, the court may consider trying common issues first and preserving individual issues for later determination.[38] Such orders must be carefully drawn to protect the parties' right to a fair and balanced presentation of their claims and defences, and their right to have the same jury determining separate claims.

Binding effect of judgment

2.3.22 The judgment in a class action, whether or not favourable to the class, is binding on all class members of action certified under Rules 23(b)(1) and (b)(2), and all class members of action certified under Rule 23(b)(3) who have not requested exclusion.[39]

[36] Rules Advisory Committee's *Notes to the 1966 Amendments*, cited from Mulheron (2004) p.193.
[37] Mulheron (2004) pp.363-364.
[38] *Manual for Complex Litigation*, Fourth, §21.5.
[39] FRCP Rule 23(c)(3).

Settlement

2.3.23 Many class actions are settled instead of going to trial. Unlike unitary litigation where the action can be ceased without court approval, judicial approval of the settlement agreement is required for class action in order to render it binding and enforceable. The court must ensure that the interests of all class members have been served by the settlement in the view that all class members (including absent class members) are affected by the result.

Judicial approval

2.3.24 The parties seeking approval for proposed settlement must file a statement identifying any agreement made in connection with the proposal,[40] and all class members should be notified by a notice of settlement on the proposed settlement.

2.3.25 The court may approve a proposed settlement only after a hearing and on finding that it is fair, reasonable and adequate.[41] The judge cannot rewrite the agreement. However, the judge's statement of conditions for approval, reasons for disapproval, or discussion of reservations about the terms of the proposed settlement may lead the parties concerned to revise the agreement.[42]

2.3.26 In approving the proposal, the court normally takes into account the amount offered to each class member and the prospects of success in the proceeding. The risk of continued litigation forcing the defendant into bankruptcy, thus undermining whatever benefits class members may derive, is also recognised by the court to be important when assessing the fairness and adequacy of a settlement offer. Besides, class members' express consent to the offer is judicially recognised as an important factor for judicial approval as well.[43]

40 FRCP Rule 23(e)(3).
41 FRCP Rule 23(e)(2).
42 *Manual for Complex Litigation*, Fourth, §21.61.
43 Mulheron (2004) pp.397-404 and *Manual for Complex Litigation*, Fourth, §21.62.

Coupon settlements and protection under CAFA

2.3.27 Regarding coupon settlements, *CAFA* requires that before approving such a settlement, a judge must hold a fairness hearing to ascertain that the settlement is fair, reasonable, and adequate, and prepare a written finding of the hearing.[44] This provision restates the requirements of FRCP Rule 23(e)(2), while adding the requirement that the court's finding be written.

2.3.28 *CAFA* further strengthens the protection of class members in two aspects. Firstly, settlements may not constitute a net financial loss to any individual class member, unless the court makes a written finding that non-monetary benefits to the class member substantially outweigh the monetary loss.[45] Secondly, in view of the court's preferential treatment for local class members in some cases, *CAFA* prohibits settlements that accord extra monies to certain class members based solely on their geographic proximity to the court.[46] However, this provision is only intended to prohibit preferential treatment with no legitimate legal basis for differentiation. Claims such as toxic spill still justify differentiation because claimants who are closer to the spill would likely incur more substantial damages.

2.3.29 *CAFA* requires that governmental officials be notified of pending class action settlements and be given time to comment upon them before the settlement is finalized. Within 10 days of filing a proposed class action settlement, each defendant must serve upon the appropriate state official of each state in which a class member resides and the appropriate federal official a notice of the proposed settlement. Although *CAFA* does not require these government officials to do anything, the federal court may not issue the final approval of the proposed settlement earlier than 90 days after the last date of service on the government officials.[47] In general, class members may refuse to comply with or choose not to be bound by a settlement that does not comply with these notice provisions.

44 28 USC §1712(e).
45 28 USC §1713.
46 28 USC §1714.
47 28 USC §1715.

Assessment and distribution of monetary relief

Assessment of aggregate damages

2.3.30 FRCP Rule 23 does not contain any provisions on the assessment of aggregate damages. Although in earlier times it was regarded as violating the defendant's due process or jury trial rights to contest each member's claim individually, more recently it has been recognised as feasible and reasonable in some occasions. In particular, aggregate judgments have been widely used in antitrust and securities class actions.[48]

Distribution of monetary relief

2.3.31 No matter whether compensation arises via a judgment or a judicially approved settlement, it should be distributed to class members. In cases where the names of class members and their entitlements could be assessed on the basis of the defendant's records, the damages awarded should be distributed by the defendant directly to class members, whether by payment of monies or by abatement or credit.[49]

2.3.32 In cases where the defendant does not have the relevant information or resources to distribute the money, or where the proof of each class member's entitlement to the payment must be established prior to distribution, the defendant is required to pay the money into a court fund or other repository, from which a designated party will administer and distribute the amounts ordered to be paid to class members.[50]

Undistributed or unclaimed fund

2.3.33 The US experience indicates that in the majority of cases, not all putative class members can be individually identified or located for damages distribution.[51] Some class members may miss out on receiving the notice of class judgment or settlement. Of those who do receive the notice, not all will file proofs of claim so as to share in the recovery of damages. Even where notice has been received and a claim has been submitted by the class members, the claim may be filed too late, or cheques for compensation may be mailed but returned as undeliverable or uncashed.

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48 Mulheron (2004) pp.408-409 and pp.413-414.
49 Mulheron (2004) pp.423-425.
50 Mulheron (2004) pp.423-425 and *Manual for Complex Litigation*, Fourth, §21.661.
51 Mulheron (2004) p.431.

2.3.34 The appropriate approach to deal with the undistributed portion of an aggregate award has been controversial. Reversion to the defendant the unclaimed funds following individual distribution has been judicially permitted in the US, but this option has also been rejected on occasions as defeating the deterrence aims of the underlying statute.[52]

2.3.35 The problem of unclaimed award is more serious in coupon settlements. The average redemption rates on food and beverage coupons have consistently been between 2% and 6%.[53] Accordingly, *CAFA* authorizes the court in its discretion to require that a proposed settlement agreement be provided for the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations.[54]

Costs and funding

Costs rule

2.3.36 In the US, litigation expenses that constitute "costs" are usually awarded to the prevailing party.[55] However, attorneys' fees are generally not allowed as "costs". In other words, regardless of the outcome of litigation, each party should bear his or her own costs of retaining lawyers. Hence, there is no costs-shifting from the winner to the loser. This costs rule is referred to as the "no-way costs rule" or the "American rule".

Costs immunity for class members

2.3.37 The unilateral costs immunity for class members is a feature of class action regimes. Under FRCP Rule 23, absent class members are not liable for costs of litigation or attorneys' fees in the event of an adverse judgment against the class. The cost burden is solely on the shoulders of the class representative.

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52 For example, reversion of unclaimed funds to the defendant was approved in *Wilson v Southwest Airlines Inc* and *Friedman v Lansdale Parking Authority*, but it was rejected in *In re Motorsports Merchandise Antitrust Litigation*. See Mulheron (2004) pp.432-433.

53 Dickerson & Mechmann (2000) p.7.

54 28 USC §1712(e).

55 FRCP 54(d)(1).

Shifting financial burden of class representative

2.3.38 No matter whether a class action is successful or not, the class representative is exposed to heavy financial burden. Because of the costs immunity for class members, the cost burden is on the class representative if the lawsuit loses. Even if the litigation is successful, the class representative may need to pay for the attorneys' fees since the plaintiffs' attorneys' fees would not be granted by the court as costs paid by the losing defendant. In view of such financial burden, an economically rational person may not volunteer to be a representative plaintiff. Hence, there are some mechanisms to shift the financial burden of class actions to class members, and to encourage people to act as class representatives.

2.3.39 Under the "common fund doctrine" in the US, "when a class action successfully recovers a fund for the benefit of the class …then the lawyers who created that class recovery are entitled to be reimbursed from the common fund for their reasonable litigation expenses, including reasonable attorney's fees".[56] That is to say, the lawyers can be reimbursed from the pool of compensation recovered from the lawsuit. In such a way, given that litigation expenses are awarded to the prevailing party, the class representative may have the costs of litigation partially or fully covered if the lawsuit is successful.

2.3.40 Some courts in the US are prepared to make "incentive awards" to the class representatives, which has the dual function of encouraging class actions and compensating representative plaintiffs for their effort and having assumed risks during the course of litigation. Other courts, however, are not prepared to make compensatory awards where requested, in the fear that the representative may be tempted to accept suboptimal settlements at the expense of class members whose interests they are appointed to guard.[57] In particular, extra payments to class representatives are not permitted for securities class actions.[58]

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56 *Report of the Third Circuit Task Force*, cited from Mulheron (2004) p.440.

57 See Mulheron (2004) p.467.

58 15 USC §78u-4(a)(2)(A)(vi).

Contingency fee agreements

2.3.41 While the common fund doctrine spreads the financial burden amongst class members in the event of successful suits, the use of contingency fee agreements means that the risk is transferred from the class representative to the class attorneys in the event of losing suits. Contingency fee is the most discussed calculation method for attorneys' fees. In the US, contingency fee has been long established and widespread. Under a contingency fee agreement, an attorney is paid nothing if the case is lost, which is the so-called "no win, no pay" principle. For successful cases, normally a percentage of damages recovered for a claimant would be paid to the attorneys.

2.3.42 Since most ordinary litigants are unable to assess the work of their lawyers, the court must maintain a duty to protect the class. The calculation of attorneys' fees in settlements is subject to court supervision. As indicated in paragraph 2.1.4, a criticism of coupon settlements is that the class attorneys are paid in cash while class members often receive little or no monetary benefit. *CAFA* attempts to address this concern by requiring that the calculation of percentage fees attributable to coupon settlements should be based on the value of the coupons class members actually redeem instead of the value of the coupons available.[59]

2.3.43 *CAFA* also states that fees, if not calculated based on a percentage of the recovery of the coupons to class members, should be computed based on the amount of time the class counsel reasonably expends working on the action.[60] In addition, any attorneys' fee under a coupon settlement should be subject to approval by the court.[61] The court should refuse to allow attorneys to receive fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members.[62]

2.3.44 In addition to *CAFA*, various jurisdictions in the US have sought to regulate contingency fee agreements in different ways.[63] Regulating the level of contingency fees charged in higher-value cases (reducing the percentage chargeable as damages increase) and encouraging cross-checking of contingency fees against hourly equivalents through a lodestar calculation[64] are two examples.

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59 28 USC §1712(a).
60 28 USC §1712(b)(1).
61 28 USC §1712(b)(2).
62 *Manual for Complex Litigation*, Fourth, §21.71.
63 Moorhead & Hurst (2008) p.17.
64 In its simplest version, lodestar is reasonable hours multiplied by a reasonable rate.

2.4 Recent reforms and development

2.4.1 The enactment of *CAFA* in 2005 has extended federal diversity jurisdiction and implemented a "consumer class action bill of rights" that seeks to protect plaintiffs from unfair class settlements.

Extension of federal diversity jurisdiction and facilitating removal of class actions from state courts

2.4.2 In essence, *CAFA* federalises class action litigation, removing many of the abuses that have occurred in class action lawsuits filed in more lenient state courts. Firstly, *CAFA* expands federal diversity jurisdiction for class action lawsuits significantly by creating, with certain narrow exceptions, federal jurisdiction for class action litigation involving 100 or more class members if at least one class member is of diverse citizenship from at least one defendant (which is easier to satisfy than the conventional requirement that all class representatives and all defendants must be of completely diverse citizenship), and more than US$5 million (HK$39 million) is in controversy.[65]

2.4.3 Secondly, *CAFA* facilitates removal of class action litigation from state courts to federal courts by lifting the general one-year limitation on removal prescribed by 28 USC §1447(d); loosening the citizenship requirement that only out-of-state defendants can remove cases by allowing any defendant to remove; providing each defendant an individual right of removal, even without the consent of all defendants; and by granting the courts of appeals discretion to review an order granting or denying remand, where the appeal is requested within seven days of entry of the order.[66]

Consumer class action bill of rights

2.4.4 The heart of *CAFA* is the consumer class action bill of rights, specifying a series of provisions meant to rein in coupon settlements and to alter other settlement processes. These initiatives are introduced in paragraphs 2.3.27 to 2.3.29.

[65] 28 USC §1332.
[66] 28 USC §1453.

2.4.5 Since the calculation of attorneys' fees is subject to court supervision under *CAFA*, the plaintiffs' class counsel may be forced to properly evaluate each case before filing, which in turn may result in a significant reduction in the number of frivolous cases.

2.5 Issues and concerns

Contingency fees

2.5.1 The major controversy over class action in the US comes in connection with the fees awarded to the attorneys, particularly contingency fees.

2.5.2 One of the perceived problems of contingency fees is that certain types of claims would be poorly served by attorneys because incentives to take the claims are not sufficient to outweigh the risks of proceeding. There is a concern that cases of larger-value claims can give rise to a contingency fee disproportionate to the attorneys' effort. In other words, with similar efforts by the attorney, larger-value claims will generate larger fees as compared with other cases. Areas of litigation such as personal injury are effectively supported through a contingency fee system because they always give rise to larger-value cases. Areas where larger-value cases are less likely to occur, or where the costs of bringing in a case are high in relation to the damages awarded or settlement agreed, would be less likely to be served by attorneys under a contingency fee system.

2.5.3 Another problem is that contingency fees may impose limits on the amount of work done on a case as it is uneconomic, resulting in good cases (those claims with merits and thus with some prospect of success) being dropped and under-settlements. For instance, a contingent-fee attorney may settle a case too soon in order to reduce the costs of additional litigation.[67] As such, the best interests of the clients may not be served.

[67] Epstein (2002).

2.5.4 In cases where class members take their percentage of the settlement in the form of vouchers or coupons and the attorneys take their percentage in the form of cash, the plaintiffs' attorneys and the defendant (and/or the defence counsels) may have strong incentives to form collusion. This situation occurs when the defendant convinces the plaintiffs' attorneys to settle for an amount less than the projected outcome at trial. The defendant and the plaintiffs' attorneys then split the difference.[68] In such a way, both the plaintiffs' attorneys and the defendant are better off, at the expense of the class.

2.5.5 Notwithstanding these potential risks, a study of the operation of contingency fees in the US has found that the system can operate efficiently.[69] According to the findings of the study, contingency fees in the US are generally not excessive, and the rate charged by lawyers rarely exceeds 50% of the damages recovered for the claimant. Lower-value cases are served as lawyers tend to cross-subsidise these claims through contingency fee recoveries in larger-value cases. There is no strong evidence suggesting that contingency fees provide improper incentives to settle; and contingency fees do not appear to promote high rates of litigation, frivolous claims or a litigation culture.

2.5.6 As noted in paragraph 2.3.37, since class members are not liable for the adverse costs of litigation, the cost burden is solely on the shoulders of the class representative. The threat of a potential financial burden may deter the representative plaintiff from proceeding with a class action. Under contingency fee agreements, this risk is transferred from the class representative to the class attorneys in losing cases. This shifting of the cost burden facilitates the proceeding of class actions, which may improve access to justice.

2.5.7 Contingency fees also have the potential of reducing significantly the transaction costs of litigation. If an hourly rate is used instead of contingency fees, the plaintiff may have to spend time negotiating with the attorney on the rate applicable and keeping track of the attorney's work. However, most ordinary people are unable to assess the effort and quality of their attorney's work. As such, contingency fees can help reduce the transaction costs involved because the fees are calculated by reference to compensation paid and not by a detailed itemisation of work done.

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68 Henrichsen (1999).

69 Moorhead & Hurst (2008). It was a research project commissioned by the Civil Justice Council of the UK in 2008.

Abuse of class action litigation

2.5.8 Under the opt-out mechanism, persons with no individual litigious interest are brought into the action. Coupled with the contingency fee arrangement under which class members bear no financial risk and costs of litigation, there is a risk of abuse or a bent for litigation. Some attorneys may simply "discover" a cause of action, "find" a plaintiff and then boilerplate a class action suit.[70] There is thus a fear that abusive class actions may only enrich a small number of attorneys. Without such class actions, some class members may not have contemplated bringing action against the defendant.

2.5.9 Another risk of abuse comes from those class actions certified for settlement purposes only.[71] Parties frequently settle before the court has decided whether to certify a class. Such settlements typically stipulate that the court may certify a class as defined in the agreement, but only for the purpose of settlement.[72] In some cases, the wide interpretation of FRCP Rule 23 permits groups of plaintiffs to be certified as a class for settlement purposes, even though there is insufficient commonality of interest for the cases to be tried on that basis.[73] Not being able to take the class to court, the only inducement to settle which the plaintiffs' attorneys can offer to the defendant is the disposal of all present and future possible claims of the relevant type. Such settlement is detrimental to the interests of the present and future claimants.

2.5.10 Class action procedures are susceptible to abuse from both defendants and plaintiffs. In addition to the scenarios mentioned above that defendants may take advantage of the settlement process, the plaintiff side can also make use of the leverage. In many cases, defendants are coerced to settle. There are at least two major factors for such pressure: first is the staggering cost of defending class litigation, and second is the risk that even a completely unfounded claim may be sustained in litigation.[74]

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70 Pengilley (1993) p.7.

71 There has been legal debate over whether or not FRCP Rule 23 permits this type of certification. In *Amchem Products Inc v Windsor*, the Court of Appeals for the Third Circuit held that Rule 23 did permit class certification for settlement purposes only, but all the requirements of the rule had to be met on the basis that the case was able to be litigated. See Hawke (1998) p.37.

72 *Manual for Complex Litigation*, Fourth, §21.132.

73 See Hawke (1998) pp.37-38.

74 Cooper (2002) p.433.

2.5.11 A large number of potential lawsuits, coupled with the huge costs of defending them and the inherent uncertainties of adversarial litigation, have given rise to a form of litigation pressure on defendant companies. In particular, a substantial class action may force a viable company into liquidation.[75] If the defendant business goes bankrupt, not only is the livelihood of both the shareholders and employees threatened, but it also brings negative effect to the community as a whole (for example, when the withdrawal of the product in question from the market is due to litigious rather than scientific considerations), irrespective of the merits of the allegations against it.[76] Such abuse of class action litigation may result in less product selection, and in turn less market competition.

Securities class actions

2.5.12 The risk of abusive litigation is more profound in securities class actions. Even if the allegations made in a securities class action lack merit, the defendant company still has to face a stark choice between settling and fighting. Companies are often forced to settle because proceeding towards trial is simply too costly, involving not only huge legal bills, but also substantial time and attention of the management and risk of potentially catastrophic liability. In making such decisions, companies may weigh the effects of related media articles on their stock price and the reputational harm incurred.

2.5.13 Because of the rise in both the number of lawsuits and amount of settlement payments, settlement costs of securities class actions have increased dramatically over the past decade.[77] The total value of securities class action settlements in 2007 was nearly 15 times the total in 1998. The first six months of 2008 alone produced two mega settlements together worth more than US$1.5 billion (HK$11.7 billion).[78] According to some recent studies, the costs and uncertainties associated with securities class action litigation have posed a serious threat to the capital markets and the overall economy of the US.[79] They point out that the enormous financial burden of securities class actions has contributed to a negative perception among global executives and investors regarding the predictability of the US legal system, and the belief that it is particularly ineffective at discouraging abusive litigation, which has aroused the concern of the business sector in the US.

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75 See Hawke (1998) p.35.
76 Hawke (1998) pp.35-36.
77 See the Committee on Capital Markets Regulation (2006) p.75.
78 US Chamber Institute for Legal Reform (2008a) p.8.
79 US Chamber Institute for Legal Reform (2008a) p.i, pp.7-9 and p.14.

2.5.14 The US Chamber Institute for Legal Reform has claimed that securities class actions do not protect the average shareholders.[80] First of all, settlement payments in such suits are not financed by the wrongdoers. Instead, they flow in a circular fashion from some innocent investors (those who own shares of the company concerned at the time of the settlement) to another group of innocent shareholders (the claimants). Secondly, after attorneys' fees and other costs of the litigation are deducted, the actual compensation for injured investors generally amounts only to pennies on the dollar of the alleged investor loss. Thirdly, the average retail investors (the category of plaintiff who is the primary intended beneficiary of a class action system premised on the aggregation of small, individual claims) are perversely the least able to take advantage of the class action mechanism. It is because individual retail investors generally buy stock and hold it for the long run, reducing the likelihood that they acquire shares during the "class period" (the period of time within which the stock must have been purchased for the buyer to be legally entitled to participate in a class action).

2.5.15 In view of the actual and potential litigation abuses, there have been reforms during the past decade (the enactment of *PSLRA*, *SLUSA* and *CAFA*) so as to strengthen the regulation and control on the conduct of both general and securities class actions. Nevertheless, problems of securities class actions and loopholes of the system remain. For instance, unlike plaintiffs in securities class actions (and defendants in other class actions) who can appeal a decision granting a motion to dismiss the case, defendants in securities class actions have no right to appeal a denial of such motion.[81] If the court erroneously denies a motion to dismiss, the defendant may then be forced to pay a substantial settlement as indicated above. Hence, there are calls for further reform to the securities class action procedures, including the enactment of legislation permitting appeals along the lines of FRCP Rule 23(f), so that the litigation can proceed in a fair and expeditious manner.[82]

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80 US Chamber Institute for Legal Reform (2008a) pp.15-22.

81 For class actions in general, under FRCP Rule 23(f), appeal from an order granting or denying class action certification may be permitted if the petition for permission to appeal is filed within 10 days after the order is entered.

82 US Chamber Institute for Legal Reform (2008a) and (2008b).

Chapter 3 – Australia

3.1 Background

3.1.1 Prior to 1992, Australian law had not incorporated the concept of class action. At that time, while the rules of various courts had provided for representative actions that allowed more than one plaintiff to join in an action against a defendant or group of defendants where numerous persons had the same interest in the proceeding, a number of procedural constraints had restricted their use in extremely limited circumstances. The major limitation of this device was the preclusion of damage actions from being brought in representative form because each claimant's entitlement to damages had to be independently assessed.[83] The limitations of representative actions were discussed by the Australian Law Reform Commission (ALRC) in a 1988 report that led to the introduction of the class action device.

3.1.2 The procedure regulating class actions was established in March 1992 with the insertion of Part IVA into the *Federal Court of Australia Act 1976* (*FCA*). Based on the recommendations contained in a report on class action reform by ALRC tabled in Parliament in 1988, this statutory regime provides a new procedure to advance access to the courts and judicial economy, while providing safeguards against abuse.[84] Overall, class actions are introduced as part of a reform package intended to increase the level of product liability litigation in Australia.

3.1.3 Although the ALRC Report forms the foundation of the class action regime, Part IVA of *FCA* does not follow precisely its recommendations. In particular, ALRC's proposals on fee agreements and a public assistance fund are not accepted. Besides, while a group proceedings approach under which each group member would constitute a party to the proceedings is recommended by ALRC, a class action scheme is adopted whereby class members are not parties to the proceedings.[85]

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83 See Australian Law Reform Commission (1988) pp.40-46 and Clark & Harris (2008) pp.8-9.
84 Australian Law Reform Commission (1988) p.2.
85 See Mulheron (2004) p.7.

3.1.4 Under Part IVA of *FCA*, a proceeding may be initiated by a representative party, not only on his or her own behalf but also on behalf of others. Hence, it should be noted that the "representative proceeding" referred to in Part IVA is in fact a kind of "class action", which is judicially acknowledged to "extend well beyond what was traditionally regarded as the scope of [the representative] rule".[86] In order to avoid confusion, except for those direct quotations, this report uses the term "class action" rather than "representative proceeding" when referring to the Australian system.

3.1.5 In the initial years right after the reform, there appeared to be little interest in the class action device. Class actions constituted only a small percentage of actions brought before the Federal Court, with some 30 cases commenced between 1992 and 1997.[87] However, the number of class actions gradually increased, with legal practitioners and claimants becoming more familiar with the procedures. In 2000, there were 20 class actions before the Federal Court. By December 2005, the Chief Justice of the Federal Court estimated that 166 class actions had been concluded in the Court.[88]

3.1.6 Class action suits in Australia have been filed in various circumstances, including medical product and medical negligence claims; financial loss claims; consumer claims, either against product manufacturers or service providers; tobacco claims; environmental problems; disasters and accidents; real estate disputes; occupational health or other employment-related complaints; commercial claims, such as misrepresentations in financial matters or alleged cartel activity; and claims against governments or agencies.[89]

3.1.7 The decision in *Philip Morris (Australia) Ltd v Nixon* suggests that class actions are best suited for plaintiffs' cases that involve allegations arising from a single event, such as an airline crash, or a pattern of closely-related conduct occurring over a short period of time, like food poisoning. On the other hand, cases which involve diverse allegations about disparate conduct over many years such as drug or medical device litigation will be more difficult to initiate because the diversity of facts makes it difficult to plead any substantial common issue of law or fact.[90]

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86 *Esanda Finance Corporation Ltd v Carnie*, cited from Mulheron (2004) p.6.
87 Australian Law Reform Commission (1999) paragraph 7.91.
88 Cited from Murphy & Cameron (2006) p.411.
89 See Mulheron (2004) p.13.
90 Clark & Harris (2001) pp.117-119.

3.1.8 Many of the early Australian class action suits, particularly those involving product liability claims, had their genesis in the US. Shortly after proceedings commenced in the US, identical or similar proceedings were filed in Australia.[91] Over the years, while the Australian class action procedure has remained similar to the US class action regime in many aspects, there are a number of significant differences between them.

3.2 Underlying legislation

3.2.1 In Australia, the Federal Court system operates in parallel with that of the states and territories.[92] Plaintiffs are free to commence any claim involving a matter of federal law in either the state or federal system. Since product liability, corporation protection and consumer protection are mostly governed by federal statutes in Australia, it is possible to commence a class action in the Federal Court in relation to virtually any claim.[93]

3.2.2 So far, the two Australian legislatures that have enacted the class action procedure are the Federal and Victorian Parliaments. Effective on 5 March 1992, Part IVA of *FCA* has established the first statutory procedure for class action to be brought to the Federal Court of Australia. The class action procedure is implemented in Victoria by a substantially identical procedure, contained in Part 4A of the *Supreme Court Act 1986 (Vic)*, which commenced operation in January 2000. While the procedural requirements in relation to class actions are largely similar in the Federal Court and Victorian state courts, there are two important differences. First, while the Federal Court class action procedure applies only to federal claims, no such restriction applies in Victoria. Second, unlike the Supreme Court of Victoria where juries are not uncommon, there is no jury trial in the Federal Court.[94] This study only covers the federal class action regime.

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91 Clark & Harris (2008) p.7.

92 The Federal Court of Australia is a superior court which has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Federal Court, and from the Federal Magistrates Court on non-family law matters. In the Australian court hierarchy, the Federal Court occupies a position equivalent to the Supreme Courts of the states and territories. The Federal Court and Supreme Courts of the states and territories are all below the High Court of Australia, the highest court in the Australian judicial system.

93 Clark & Harris (2001) p.116.

94 See Clark & Harris (2001) pp.116-117.

3.2.3 The general objectives of Part IVA are to provide access to a real remedy for those plaintiffs with claims so small that they would be economically unviable to recover in individual actions, and to deal efficiently with those plaintiffs having claims large enough to justify individual actions but their number is numerous. In other words, the class action procedure aims at allowing groups of plaintiffs to obtain redress and to do so more cost-effective and efficient than the case with individual actions.[95]

3.3 Procedures

Commencement of proceedings

3.3.1 The Australian class action regime does not have a certification procedure. Once a class action has commenced, it will continue until resolved unless the defendant[96] successfully applies to the court for an order terminating the proceeding as a class action.

Threshold requirements

3.3.2 Under Section 33C of *FCA*, there are three threshold requirements for the commencement of a class action:

(a) seven or more persons having claims against the same person;

(b) the claims of all those persons being in respect of, or arising out of, the same, similar or related circumstances; and

(c) the claims of all those persons giving rise to a substantial common issue of law or fact.

3.3.3 To meet the first threshold requirement, an applicant should plead a claim which would lead the court to conclude that it is likely that there are claims by seven or more persons. The applicant is not required to give any evidence to support the inference that there are seven or more persons with a claim. There is also no need for the applicant to name, identify or specify the number of group members. A mere description is sufficient.[97]

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95 See Mulheron (2004) p.7 and Murphy & Cameron (2006) p.4.

96 In the Australian federal regime, the term "respondent" is used instead of "defendant". However, for the sake of consistency, this report uses the term "defendant" across the selected places.

97 Mulheron (2004) p.322 and Grave & Adams (2005) p.96.

3.3.4 In the second threshold requirement, the word "related" suggests a connection wider than identity or similarity.[98] The court ordinarily concludes that the requirement is satisfied when there is a generic or basic claim with some uniting characteristics as opposed to claims that have only a superficial common feature.[99] For example, in *Philip Morris (Australia) Ltd v Nixon*, all the claims involved injury from the smoking of cigarettes manufactured or marketed by one of the defendants. The Full Court of the Federal Court[100] did not regard such claims as being sufficiently related. The Full Court considered that it was not the broad circumstances of injury from cigarette smoking following an advertising campaign, but the specific advertisements each smoker saw and the effect on them, which had to be related.[101]

3.3.5 Under the third threshold requirement, the applicant is required to show that there is a common issue of law or fact. This requirement is interpreted by the court in a manner relatively easy for applicants to satisfy. Substantiality is not assessed in numerical terms by weighing the number of common issues against the number of non-common issues. The common issue needs not be a major issue or the core of the dispute. The High Court has established that the common issue is "real and substantial (real or of substance)",[102] and it is not necessary for the issue to be of special significance or likely to have a major impact on the litigation. It is enough to show that a single common issue is a real issue.

3.3.6 Where an applicant cannot satisfy the above threshold requirements, the proceeding cannot continue as a class action. However, the proceeding can still continue by the representative party on his or her own behalf against the defendant[103] or a joinder of group members as applicants in the proceeding.[104]

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98 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*. See Grave & Adams (2005) p.115.

99 *Marks v GIO Australia Holdings Ltd* and *Soverina Pty Ltd v Natwest Australia Bank Ltd*. See Grave & Adams (2005) p.117.

100 A Full Court consists of three or more judges sitting together. In exercising its jurisdiction, the Federal Court may be constituted by a single judge or as a Full Court. Normally, cases are heard at first instance by a single judge, but if the Chief Justice considers that a matter is of sufficient importance, it can be heard by a Full Court. Meanwhile, the appellate jurisdiction of the Federal Court is exercised by a Full Court.

101 See Grave & Adams (2005) p.116.

102 *Wong v Silkfield Pty Ltd*. See Mulheron (2004) p.196 and Grave & Adams (2005) p.120.

103 Section 33P(a), *FCA*.

104 Section 33P(b), *FCA*.

Termination by court

3.3.7 Where a proceeding is brought on behalf of a class in the Federal Court and some or all of the threshold requirements have not been met, the defendant may seek the intervention of the court and have the class action terminated.

3.3.8 The court may, on application by the defendant or of its own motion, order that a class action be discontinued where it is satisfied that it is in the interests of justice for it to so order because:[105]

(a) the costs incurred if the proceeding continues as a class action are likely to exceed the costs incurred if each group member conducts a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a class action; or

(c) the class action will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a class action.

3.3.9 As such, despite the lack of a certification procedure in Australia, there is a mechanism for the court to help prevent plaintiffs from bringing class actions that may be unfair for defendants or class members.

Case management

3.3.10 Part IVA of *FCA* only has a few provisions on the roles and functions of group members. In general, participation of group members in the proceeding is limited. Nonetheless, to protect the interests of group members, the Federal Court is given extensive powers to manage the conduct of class actions and to act on its own motion in a number of circumstances.

[105] Section 33N(1), *FCA*.

Status of group members

3.3.11 "Group member" is defined by *FCA* as "a member of a group of persons on whose behalf a representative proceeding has been commenced".[106] Group members to whom the proceeding relates must be described or otherwise identified in the proceeding.[107] A person becomes a group member by falling within the description of group members as set out in the proceeding. There is no need to name or specify the number of group members,[108] and the consent of a person to be a group member is not required.[109]

3.3.12 Group members have limited power to affect the conduct of a class action. In fact, a group member may not participate in the proceeding at all unless or until it becomes necessary to prove individual issues associated with the claim.[110] In most cases, a group member is not a party to the proceeding.[111]

Right to opt out

3.3.13 Like the US, Australia also implements an opt-out regime. Group members have the right to opt out of the class action prior to a date fixed by the court. Except with the leave of the court, the hearing of the class action must not commence earlier than that date before which a group member may opt out of the proceeding.[112] Related persons remain as group members by not opting out by the fixed date.

Opt-out notice

3.3.14 Notice must be given to group members on the commencement of the class action and the right of group members to opt out of the proceeding before a specified date.[113] The notice will also inform group members the consequences of exercising or not exercising that right, so that they are able to make an informed decision.

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106 Section 33A, *FCA*.
107 Section 33H(1)(a), *FCA*.
108 Section 33H(2), *FCA*.
109 Section 33E(1), *FCA*.
110 Grave & Adams (2005) pp.155-156.
111 As the Federal Court explained in *King v AG Australia Holdings Ltd*. See Mulheron (2004) p.36.
112 Section 33J, *FCA*.
113 Section 33X(1)(a), *FCA*.

3.3.15 The court is responsible for approving the form, content and way in which such notice is provided to group members. The court may require that notice be given by press advertisement, radio or television broadcast, or by other means. Nonetheless, the court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.[114]

Opt-out procedure

3.3.16 Group members may opt out of the class action by written notice given under the Rules of Court before the date fixed by the court.[115] An application would need to be made to the court for extending the period during which a group member may opt out of the class action.[116]

Representative party

3.3.17 According to *FCA*, "representative party" means "a person who commences a representative proceeding".[117] As stated in Section 33D, a person "who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons". A class action may be initiated by one or more persons as the representative party. There is no special requirement on the representative party other than that he or she has a standing to bring his or her own claims.

3.3.18 Under Section 33D of *FCA*, a person who has a sufficient interest to commence a proceeding can commence a representative proceeding on behalf of other persons. Hence, any member of the class may act as the representative party. Meanwhile, class actions can also be instituted by a union or a regulator like the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). Based upon a specific statutory entitlement,[118] these entities have a statutory standing to sue defendants for relief for themselves and others. This statutory standing means that they have a "claim" within the terms of Section 33C(1)(a), and thus can act as a representative party.

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114 Section 33Y, *FCA*.
115 Section 33J(2), *FCA*.
116 Section 33J(3), *FCA*.
117 Section 33A, *FCA*.
118 Section 178(5)(d) of the *Workplace Relations Act 1996* for unions, Section 80(1) and Section 87(1) of the *Trade Practices Act 1974* and Section 33ZH of *FCA* for ACCC, and Section 50 of the *Australian Securities and Investments Commission Act 2001* for ASIC. See Mulheron (2004) pp.306-308 and Grave & Adams (2005) pp.147-149.

3.3.19 Unlike the US class action regime that requires claims of the class representative to be typical of those of the class, the representative party's claim need not be typical of group members' claims in Australia.[119] Even if the relief claimed by the representative party and group members is different, or the claims arise from different circumstances, the representative party can still represent the group. For instance, there were cases where the representative party sought injunctive relief to stop the defendant's activities while the rest of the class sought damages for their respective losses.[120] As such, the Australian class action regime merely requires adequate representation. However, there is no provision in Part IVA of *FCA* as to what constitutes adequate representation. In general, the court requires that there should be no conflict between the representative party's claim and the group members' claims.[121]

3.3.20 On the application by a group member, if it appears to the court that the representative party is not adequately representing the interests of all group members, the court may substitute another group member as the representative party.[122] However, the burden of proving inadequate representation is on the group member who seeks the removal of the representative party. The group member must establish that the collective interests of all group members are not adequately represented. Merely disagreement between the representative party and group members on the way the case is being run cannot be a reason for seeking removal.

3.3.21 Even if a group member does establish that the collective interests of all group members are not being adequately represented and the representative party is removed, it does not follow that he or she is appointed as the new representative party. The court may order notice to be given to all group members of the proposed appointment of a new representative party so that other group members may seek to be appointed as the representative party.[123] What constitutes adequate representation is a matter to be determined in the circumstances of each proceeding. The court retains the discretion with respect to this matter, and may substitute another group member as the representative party as it thinks fit.[124]

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119 Section 33C(2), *FCA*.

120 For example, *ACCC v Chats House Investments Pty Ltd*, *ACCC v Golden Sphere Intl Inc*, and *ACCC v Giraffe World Aust Pty Ltd*. See Mulheron (2004) p.279.

121 Grave & Adams (2005) p.145.

122 Section 33T, *FCA*.

123 Grave & Adams (2005) p.145.

124 Section 33T, *FCA*.

3.3.22 Subgroups may be created to avoid actual or potential conflicts of interest that would otherwise render the representation inadequate. This is a technique used by the court to accommodate differences within the class that would otherwise hinder the progress of a class action. If there are issues common to the claims of only some group members, the court may establish a subgroup consisting of these group members and appoint a person to be the subgroup representative party on behalf of the subgroup members.[125] In other words, the group can be divided into different subgroups during the determination of issues not common to the whole group. This does not affect the determination of the common issues. The requirements on and the manner of the court's management of subgroups are the same as those of the group.

Trial and judgment

Managing individual issues

3.3.23 Claims must arise out of related circumstances in order to commence a class action. However, the claims of group members need not be completely the same. In most class actions, there are both common and individual questions in contention. Hence, the court's determination of issues common to all group members may not incorporate the claims of all group members. In these cases, the court may give directions in relation to the determination of the remaining issues,[126] i.e. the individual issues, including directions establishing a subgroup consisting of relevant group members and appointing a person to act as the subgroup representative party. The representative party can be appointed as a subgroup representative party. Nonetheless, if the court appoints a person other than the representative party to be a subgroup representative party, that person, and not the representative party, is liable for the costs associated with the determination of the issues common to the subgroup members.

3.3.24 If an issue not common to the group relates only to an individual group member, the court may permit that member to appear in the proceeding for the purpose of determining that single issue. In such a case, the individual group member is solely liable for costs associated with the determination of the issue.[127] This arrangement is not a formation of subgroup as there is only one member, but like the case of forming subgroups, this arrangement does not affect the determination of common issues relating to the claims of that individual member.

[125] Section 33Q, *FCA*.
[126] Ibid.
[127] Section 33R, *FCA*.

3.3.25 Where an individual issue cannot properly or conveniently be dealt with through the above practices, the court may:[128]

(a) if the issue concerns only the claim of a particular member – give directions relating to the commencement and conduct of a separate proceeding by that member; or

(b) if the issue is common to the claims of all members of a subgroup – give directions relating to the commencement and conduct of a class action in relation to the claims of those members.

Binding effect of judgment

3.3.26 Despite the fact that only the representative party and the defendants are parties to the proceeding, group members are bound by the outcome of the class action unless they have opted out of the proceeding under Section 33J of *FCA*.[129]

Settlement

3.3.27 In order to protect the interests of group members, there is a requirement for court approval before the settlement of a class action can take legal effect. In other words, the class action cannot be settled or discontinued without the approval of the court.[130]

Judicial approval

3.3.28 Although Section 33V of *FCA* does not specify the factors that the court must take into account when it considers an application for the approval of a proposed settlement, through a number of decisions it is possible to identify the factors relevant to the exercise of the court's discretion on this issue.[131] Generally speaking, the court will take into account:

(a) the amount of compensation offered to each group member;

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128 Section 33S, *FCA*.
129 Section 33ZB, *FCA*.
130 Section 33V, *FCA*.
131 See Mulheron (2004) pp.403-404, Grave & Adams (2005) p.390 and Murphy & Cameron (2006) p.428.

(b) the prospects of success in the proceeding;

(c) the likelihood of group members obtaining judgment for an amount significantly in excess of the settlement offer;

(d) the terms of any advice received from counsel and/or any independent expert in relation to the issues that arise in the proceeding;

(e) the likely duration and cost of the proceeding if continued to judgment; and

(f) the attitude of group members to the settlement.

3.3.29 An application for court approval is made once an agreement has been reached to settle a class action. Since the attitude of group members to any proposed settlement is an important factor of consideration, the court must ensure that notice has been given to all group members of any proposed settlement before considering an application for approval. The notice is given to all group members as defined in the proceeding and not just to those who will be receiving payments as part of the proposed settlement. In such a way, all group members are provided an opportunity to voice objections or concerns.

3.3.30 Notice of a proposed class action settlement is mandatory, unless the court considers it just to dispense with that notice.[132] For example, if a settlement is considered to be obviously in the interests of group members, then the court would dispense with the giving of notice. This would avoid costs and bring the litigation to a speedy ending.[133]

[132] Section 33X(4), *FCA.*
[133] Grave & Adams (2005) p.388.

Assessment and distribution of monetary relief

Assessment of aggregate damages

3.3.31 The court has the power to make an award of damages for group members, subgroup members or individual group members, consisting of specified amounts. Alternatively, the court may award damages in an aggregate sum without specifying amounts awarded in respect of individual group members.[134] However, the court will not make an aggregate award unless a reasonably accurate assessment can be made of the total amount to which group members are entitled under the judgment.[135]

Distribution of monetary relief

3.3.32 In making an order for an award of damages, the court must specify provisions for the payment to entitled group members.[136] At the same time, the court has broad power to give such directions as it thinks just in relation to:[137]

(a) the manner in which a group member is to establish his or her entitlement to share in the damages; and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

3.3.33 Regarding the distribution of money to group members, the court may provide for the constitution and administration of a fund consisting of the money to be distributed such that the costs of administering the fund are to be borne by the fund itself or by the defendant as the court directs.[138]

3.3.34 Where the court orders the constitution of a fund, the order must:[139]

(a) require notice to be given to group members in such a manner as specified in the order;

134 Section 33Z(1), *FCA*.
135 Section 33Z(3), *FCA*.
136 Section 33Z(2), *FCA*.
137 Section 33Z(4), *FCA*.
138 Section 33ZA(1) and (2), *FCA*.
139 Section 33ZA(3), *FCA*.

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment;

(c) specify a day on or before which group members are to make a claim for payment out of the fund; and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

Undistributed or unclaimed fund

3.3.35 Reversion to the defendant has been statutorily mandated in Australia as the first preference by which to deal with any unclaimed fund.[140] As mentioned above, where the court orders the constitution of a fund, the court must specify a day on or before which group members are to make a claim for payment out of the fund. After that day, on application by the defendant, the court may make such order for the payment of the money remaining in the fund to the defendant.

Costs and funding

Costs rule

3.3.36 The costs or expenses incurred in litigation include out-of-pocket expenses like expert fees, disbursements and legal fees. In civil litigation, the court has a wide discretion to make an award in respect of the costs. The costs rule that costs should follow the event, i.e. the unsuccessful party in litigation should pay the costs of the successful party, is commonly referred to as the "costs indemnity rule", "two-way costs rule", "costs-shifting rule" or the "English rule". The most fundamental costs rule adopted in Australia is the costs indemnity rule, which aims to indemnify or compensate a successful party, not to punish an unsuccessful party.[141]

[140] Section 33ZA(5), *FCA*.
[141] Mulheron (2004) pp.443-444 and Grave & Adams (2005) p.441.

3.3.37 Costs are usually awarded on a party and party basis, which means that in the absence of any mitigating circumstances, the unsuccessful party pays the successful party's costs. The costs awarded to the successful party are referred to as "party-party costs". Nevertheless, under the current arrangement, even for the successful party, the award will not cover all the costs. Party-party costs are generally assessed by reference to a court scale or order. The costs awarded to the successful party would normally be in the range of one-half to two-thirds of the total costs actually incurred.[142]

3.3.38 In the Australian class action regime, the existence of a public interest element may be a reason for departing from the usual costs indemnity rule. This option has occasionally been used to deprive a successful defendant of its party-party costs. However, such cases are disparate and the decisions made depend on the facts of each case in question.[143] Although there is no clear definition of a public interest, there are some factors which may indicate the involvement of a public interest in the proceeding. A case challenging the validity of a public statute, a case where the plaintiff is a municipal corporation affected by the statute and where the minister responsible for the statute is a defendant, prosecutions and most constitutional and administrative law matters, and defamation actions involving the defence of fair comment on a matter of public interest are some examples. Under such circumstances, the litigation is pursued in the public interest and not for the private gain of the plaintiff. Nonetheless, the fact that a proceeding is a class action does not necessarily warrant departure from the usual costs rule, even if the number of persons represented by the representative party is significant.

Costs immunity for class members

3.3.39 Like class members in the US, group members in Australia are not a party to the proceeding and thus they are immune from an adverse costs order, under which the court orders costs against the unsuccessful party. In other words, they are not liable for costs if the class action litigation loses. However, in two exceptional circumstances, group members may be liable for an adverse costs order:

(a) in respect of costs incurred as a subgroup representative party,[144] or

[142] Morabito (2001) p.504 and Grave & Adams (2005) p.442.
[143] Mulheron (2004) p.446 and Grave & Adams (2005) pp.438-439, 461-463.
[144] Section 33Q, *FCA*.

(b) in relation to the determination of issues relating only to the individual group member's claim.[145]

Costs reimbursement

3.3.40 A representative party is exposed to adverse costs orders. This exposure is a significant disincentive for a person to be the representative party, which in turn discourages the commencement of a class action. Even if the class wins the litigation, it will usually involve the representative party's out-of-pocket expenses when the solicitor costs incurred exceed the party-party costs recovered from the losing defendant.[146] The Australian regime therefore provides a means of protecting the representative party in relation to the costs incurred in conducting a class action, in that a representative party or a subgroup representative party can apply to the court for reimbursement. If the court is satisfied that the costs reasonably incurred in relation to the class action by the representative party or subgroup representative party are likely to exceed the costs recoverable from the defendant, the court may order that an amount equal to the whole or part of the excess be paid to that person out of the damages awarded to group members.[147]

Security for costs

3.3.41 Security for costs is a sum payable by a claimant to a civil action as a condition of being permitted to continue with the action. It is generally ordered by the court shortly after the commencement of a proceeding to address the financial risk imposed upon a defendant.[148] When security for costs is ordered, the claimant is usually required to pay a sum into the court. The purpose of a security for costs rule is to enable a successful defendant to be partially protected since the litigation may cause the defendant considerable hardship when the defendant eventually wins but cannot recover the costs involved in the proceeding. The practical effect of allowing security for costs is to deter modest claims.[149]

145 Section 33R, *FCA*.
146 Mulheron (2004) p.461.
147 Section 33ZJ, *FCA*.
148 Grave & Adams (2005) p.255.
149 Mulheron (2004) p.368.

3.3.42 The Australian statute is unique in specifying that the normal rules as to security for costs apply to class action.[150] It is stated in *FCA* that nothing in Part IVA affects the court's ordinary powers to order security for costs in class action.[151] In other words, an order for security for costs is entirely at the court's discretion. Nevertheless, the court has been disinclined to make orders that might have the effect of forcing group members to contribute to a pool of funds to conduct the action. For example, the decision in *Bray v F Hoffman-La Roche Ltd* illustrated the court's concern that security for costs would undermine the intent of the class action legislation. In the appeal of that case, the Full Court ruled that whether an order should be made might depend on the financial circumstances of group members and whether an order for security for costs might stifle litigation.[152]

Conditional fee agreements

3.3.43 In its 1988 report, ALRC recommended the introduction of fee agreements for litigation cases in the federal class action regime, under which the party-party costs paid by the defendant would provide partial remuneration for the plaintiff's lawyer.[153] However, this proposal was not accepted. The courts of Australia have long rejected contingency fee agreements which are considered as "contrary to public policy".[154] The arrangement of contingency fees that calculates the costs of a lawsuit as a proportion of the amount recovered violates the common law rule against maintenance (improperly encouraging litigation) and champerty (funding another person's litigation for profit).[155]

150 Mulheron (2004) p.444.
151 Section 33ZG, *FCA*.
152 See Murphy & Cameron (2006) pp.420-421.
153 Australian Law Reform Commission (1988) pp.118-123.
154 The legal concept of "public policy" identifies a set of fundamental values that qualify or override the specific rules of statute or precedent. Public policy offers a conceptual framework through which the law is able to reconcile its specific provisions with the fundamental rights of people or the need to protect social institutions.
155 Australian Law Reform Commission (1988) p.114, Grave & Adams (2005) p.470 and Black (2006).

3.3.44 Contingency fees are distinguishable from two other types of fee agreements: "conditional uplift" costs agreement and "no win, no fee" agreement. Under a conditional uplift costs agreement, a lawyer recovers the normal fee plus a "success uplift" which is usually expressed as a percentage of the normal fee. A "no win, no fee" agreement is where the lawyer will recover the normal fee for successful cases only. These two types of agreements are referred to as "conditional fee" agreements.

3.3.45 In Australia, while the contingency fee arrangement is banned, it is lawful for a solicitor to enter into an agreement with a client, provided that the client will only be charged if a successful outcome is achieved,[156] i.e. a "no win, no fee" agreement. Since the enactment of Part IVA of *FCA*, the legislatures of several Australian states have enacted statutes that allow plaintiffs' lawyers to enter into conditional fee agreements with their clients, under which uplift fees are charged in the event of a successful outcome of the proceeding.[157] This kind of arrangement is judicially accepted "in order to facilitate the bringing of claims that might otherwise not be brought at all".[158] In other words, lawyers can charge a higher than normal fee on the successful conclusion of a case but not a percentage of the award.

3.3.46 Under ALRC's proposal, fee agreements could not come into effect without judicial approval. Before giving the approval, the court would need to be satisfied that the method of calculating the fees was fair and reasonable.[159] However, this proposal was rejected, and the subsequently enacted Part IVA of *FCA* did not deal with the issue of fee agreements. Unlike the position in the US where fee agreements with class representatives and class members must be approved by the court, conditional fee agreements are not subject to court approval in Australia though they have been admitted as evidence in applications for approval of class action settlements, where the court must consider the reasonableness of costs to be paid as part of the proposed settlements.[160]

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156 Grave & Adams (2005) pp.468-469.

157 Mulheron (2004) pp.475-476, Morabito (2005) and Grave & Adams (2005) pp.469-470.

158 *Cook v Pasminco Ltd (No 2).* The use of an uplift fee was also approved in *Williams v FAI Home Security Pty Ltd (No 3).* See Mulheron (2004) p.476.

159 Australian Law Reform Commission (1988) p.121.

160 Clark & Harris (2008) pp.77-78.

Litigation funding companies

3.3.47 Australia has recently seen the development of class actions financed by litigation funders. A litigation funder is a non-lawyer or corporation (also known as the promoter) who identifies a potential claim and enters into agreements with potential claimants. The litigation funder pays the litigation costs and accepts the risk of paying the other party's costs if the case fails. In return, if the case succeeds, the funder is paid a share of the proceeds. The share of the proceeds is agreed with the clients ahead, and is typically between one-third and two-thirds of the proceeds (in some insolvency cases up to 75% of the award).[161] In the class action proceeding, the promoter retains a lawyer who conducts the litigation on behalf of group members and gets the normal fee.

3.3.48 The existence of rules which prevent Australian lawyers from entering into the US-style contingency fee agreements has led to the development of the litigation funding industry. Although lawyers in Australia can enter into conditional fee agreements with their clients, there are legislative caps on the allowable uplift, with most states imposing a maximum uplift of 25% of the legal costs.[162] These restrictions have effectively limited the amount plaintiffs' lawyers can earn and prevented them from receiving the enormous fees their class action counterparts are accustomed to in the US. While these restrictions apply to lawyers, non-lawyers are not so constrained. Hence, litigation funders can take advantage of the loophole and make fee agreements with clients with minimal constraints.

3.3.49 While early decisions invoked the doctrines of maintenance and champerty to invalidate litigation funding agreements with commercial funders,[163] in recent decisions, judges are suggesting that commercial litigation funding has an important role to play in ensuring that plaintiffs are able to obtain access to the court.[164] In the landmark decision in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, the High Court held that litigation funding agreements entered into as between the litigation funder and individual plaintiffs were lawful. As at September 2006, there were five litigation funding companies operating in Australia.[165]

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161 Standing Committee of Attorneys-General (2006) p.4.

162 Clark & Harris (2008) pp.78-79.

163 Despite numerous challenges in the last decade, no funding agreements have been struck down in Australian courts. See Standing Committee of Attorneys-General (2006) p.5 and Murphy & Cameron (2006) p.435.

164 For example, *QPSX Ltd v Ericsson Australia Pty Ltd*, *J P Morgan Portfolio Services Ltd v Deloitte Touche Tohmatsu* and *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*. See Cameron (2006), Murphy & Cameron (2006) pp.435-438 and Clark & Harris (2008) p.81.

165 Law Council of Australia (2006) p.6.

3.4 Recent reforms and development

Litigation funding

3.4.1 In a number of recent class actions, there were agreements providing that the litigation funder would receive up to 75% of the proceeds of the action plus the benefit of any costs order made in favour of the class.[166] As the loser pays the winner costs under the costs rule in Australia, the litigation funder has the prospect of not only receiving up to 75% of the proceeds of the action, but also the prospect of recovering a substantial proportion of the costs incurred in running the proceedings. This new arrangement is potentially more lucrative than the contingency fee agreements in the US. In view of the enormous potential profit, litigation funders have developed in Australia rapidly. In particular, all the securities class actions commenced in Australian courts since mid-2005 have been funded by commercial litigation funders.[167]

3.4.2 As aforementioned, although there is no federal legislation on funding agreements, class lawyers have been able to enter into conditional fee agreements with class representatives and class members as a result of several state statutes authorizing conditional fee agreements since the commencement of Part IVA. In view of such development, many cases have moved from federal to state courts, with litigation funders flocking to those state courts which judicially allow litigation funding agreements.[168]

3.4.3 In November 2005, the Standing Committee of Attorneys-General (SCAG)[169] agreed that consultation and research should be undertaken on regulating the litigation funding industry. A discussion paper was released in May 2006. After the consultation, the working group of SCAG has been developing a draft regulation impact statement outlining strategies for the regulation of litigation funding.[170]

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166 Clark (2007) p.141 and Clark & Harris (2008) pp.80-81.

167 Clark & Harris (2008) p.82.

168 Ferguson (2009).

169 The Standing Committee of Attorneys-General comprises the Attorneys-General of the Commonwealth, States and Territories as well as the Attorney-General of New Zealand. It provides a forum for Attorneys-General to discuss and progress matters of mutual interest, and seeks to achieve uniform or harmonised actions within the portfolio responsibilities of its members.

170 Standing Committee of Attorneys-General (2008).

Securities class actions

3.4.4 Securities class action is a relatively recent development in Australia. In 2003, Australia's first securities class action, *King v AG Australia Holdings Ltd*, was settled. The settlement not only gave the group members what they wanted, but also delivered a handsome reward to the plaintiffs' lawyers. Like their US counterparts, Australian corporations are willing to pay a premium to "buy" peace, as evidenced by the settlements of many prominent securities class actions since *King*.[171]

3.4.5 There is a very high share-owning population in Australia. In 2006, approximately 7.3 million people or 46% of the Australian population owned shares either directly or indirectly via a managed fund or a self-managed superannuation fund.[172] It is unsurprising that there is a growing trend towards "shareholder vigilance"[173] as people are concerned with the principles of corporate governance. Securities class action, as a means for recovering losses that arise when companies ignore those principles, is thus also an area of growth in Australia.

3.4.6 Litigation funders are commercial operations in a profit-making business. Provided that securities class action is the most lucrative type of class actions, securities class action is the main "project" of these funders. For example, the value[174] of securities class actions led by litigation funder IMF (Australia) Ltd.[175] tripled in the past two years, up from AUS$400 million (HK$1.9 billion) in 2007 to more than AUS$1.2 billion (HK$5.9 billion) in 2008.[176] As litigation funders bear all the costs of litigation including the payment of adverse costs orders when losing the suit, individual investors may feel less burdened to participate in securities class actions so as to claim damages for their losses.[177]

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171 See Slade & Tang (2005) pp.13-17 and Clark & Harris (2008) pp.67-68.

172 Australian Securities Exchange (2007) p.3.

173 Clark & Harris (2008) p.69.

174 "Value" is the monetary amount of claims.

175 IMF (Australia) Ltd. is a publicly-listed company providing funding of legal claims and other related services where the claim size is over AUS$2 million (HK$9.8 million). According to the company, it has brought together major participants in the litigation funding market in Australia to become the country's largest litigation funder. It is also the first of such companies to be listed on the Australian Stock Exchange.

176 Ferguson (2009).

177 Ibid.

3.5 Issues and concerns

Fear of entrepreneurial litigation

3.5.1 A recurrent concern regarding class actions in Australia is that they may be opening the door to "entrepreneurial litigation" (predatory litigation run by opportunistic class action lawyers).[178] In particular, certain features of the class action regime that are different from traditional litigation practices make some lawyers and judges uncomfortable. One of these features is the relationship between class lawyers and members of the class, in that the class is so large that it is always impracticable for class lawyers and members of the class to interact in a manner that conforms to the traditional solicitor-client relationship. A related source of discomfort is the role of class lawyers in advertising or soliciting for people to join the class.

3.5.2 There are also concerns about the "dangers of US-style litigation", where many cases with little merit are allegedly brought and pursued solely to bring about a large amount of settlement.[179] Nevertheless, a study of the evolution of class actions in Australia since the early 1990s suggests that there has not been any flood of litigation and that business interests have not been impeded by such litigation.[180] ALRC has confirmed that concerns about a flood of litigation have not materialised. Instead, there has been "a gradual adoption of the procedure in many appropriate cases with more than adequate restraint and control being exercised by the Court as judges and the profession seek to come to grips with a procedure which undoubtedly has the potential to contribute significantly to the administration of justice", and "procedures for representative proceedings generally appear to be working well and in accordance with legislative intentions. The Federal Court does not view such cases as more problematic than other complex cases".[181]

178 See Grave & Adams (2005) pp.10-13 and Murphy & Cameron (2006) pp.405-412.
179 Ibid.
180 Murphy & Cameron (2006) p.410.
181 Australian Law Reform Commission (1999) pp.477-479.

Contingency fees and commercial litigation funders

3.5.3 Although contingency fee agreements are not allowed in Australia, the fee agreement under commercial litigation funding is, in essence, a kind of contingency fee agreements entered by claimants and litigation funders in the view that the agreements provide for funders to receive an agreed percentage of any monies that come to claimants. The only difference between these agreements and contingency fee agreements is that such agreements are made with litigation funders rather than lawyers who are subject to the contingency fee ban. The pros and cons of contingency fees have been discussed in Chapter 2 and will not be repeated here.

3.5.4 The landmark decision in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* has given a green light to litigation funders. The court's acceptance of commercial litigation funding and the fee agreement under this arrangement implies a possibility that the prohibition on contingency fees for lawyers may be removed in the near future so as to further increase competition in litigation funding.[182]

3.5.5 As mentioned in Chapter 2, security class action has the potential to sink a company. In Australia, notable examples are the so-called "blockbuster" settlements, including the collapses of the HIH Insurance Group (the largest corporate collapse in Australian legal history), Sons of Gwalia (mining) and Westpoint (mezzanine finance).[183] The development of commercial litigation funders has put further litigation pressure on the business sector in relation to class action. Particularly, large corporations are facing a well organised and resourceful opponent in litigation since these litigation funders are large companies with teams of people having legal training and investigation expertise.

3.5.6 Litigation funding may help ensure access to justice for some meritorious claims which would otherwise be abandoned. This advantage is of particular importance in class actions, where the expense is too great to be borne by any one claimant; and in complex matters, where the initial costs of investigation and collecting expert evidence may be prohibitive.

[182] Clark & Harris (2008) pp.82-83.
[183] See Clark & Harris (2008) pp.68-69.

3.5.7 As a means to enhance access to justice, commercial litigation funding has a limitation: it is usually limited to commercial litigation with large claims (over AUS$500,000 (HK$2.4 million) in general and over AUS$2 million (HK$9.8 million) for some large litigation funders like IMF). Commercial litigation funders are generally not involved in personal injury type matters or other smaller claims, as the associated costs and risks make them unviable.[184] Individuals with small claims thus continue to face financial barriers on access to justice.

Free riders and limited groups

3.5.8 Group members are bound by the outcome of class action though they are not parties to the litigation. This arrangement also confers upon them immunity from adverse costs orders. Since no retainer agreement has been entered between individual group members and the lawyers hired by the representative party, group members are not liable for the costs and fees incurred in running the proceeding. The term "free riders" has thus been used to describe the position of group members in a class action.[185]

3.5.9 Litigation funders and plaintiffs' lawyers have recently sought to limit the definition of group members to those claimants who have entered into an arrangement with a litigation funder and/or those represented by a particular firm of solicitors so as to exclude free riders who do not contribute to the costs of litigation.[186] In such a way, the group will be limited to those who have entered into the agreement with litigation funders and/or law firms.

3.5.10 While there are potential merits in limiting the definition of group, such as providing group members with incentives to contribute, and thus minimising the costs for each claimant included in the group, making it easier to settle the action and increasing the prospect of obtaining a higher proportion of the compensation, there is a concern that such so-called "limited group" may be counter to the objective of promoting efficiency in the use of court resources since there may be multiple class actions brought in by independent self-aggregated groups which are represented by different litigation funders and/or law firms.[187]

184 Standing Committee of Attorneys-General (2006) p.4.
185 Morabito (2007) p.31.
186 Clark & Harris (2008) p.87.
187 Clark & Harris (2008) pp.84-89.

3.5.11 Under the existing opt-out regime in Australia, a person becomes a group member by falling within the class description as set out in the proceeding. However, if groups are limited by agreements, class members may be under an obligation to take a positive act so as to join the group – by proactively entering into a client retainer agreement with the law firm which conducts the proceeding, or by entering into a contract with the litigation funder. This may in effect turn the system into an opt-in regime.

3.5.12 Although it is stated in Section 33C(1) of *FCA* that "a proceeding may be commenced by one or more of those persons as representing some or all of them", there is no provision on omitting any potential claimant from the group. Recent decisions have shown differing views of the Australian courts on the issue of limited groups. Some judges have considered that such a class definition contravenes the spirit of an opt-out regime, subverts the legislation by imposing an opt-in requirement, and defines the class other than by reference to the cause of action itself. On the other hand, the Full Court of the Federal Court has recently held that Part IVA of *FCA* expressly allows limited groups, provided that such a group was formed prior to the commencement of the class action.[188]

[188] In cases like *Dorajay Pty Ltd v Aristocrat Leisure Ltd*, *Rod Investment (Vic) Pty Ltd v Clark* and *Jameson v Professional Investment Services Pty Ltd*, the formation of a limited group was rejected; while in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*, it was endorsed. See Mulheron (2008a) p.21 and Clark & Harris (2008) pp.87-88.

Chapter 4 – The United Kingdom

4.1 Background

4.1.1 Multi-party litigation or group action, where a large number of individual plaintiffs seek to bring similar claims against one or more defendants, is not confined solely to class actions. One notable jurisdiction which does not adopt the class action system is the UK. Unlike other major common law jurisdictions such as the US, Australia and Canada, the UK has set its face against the class action mechanism. However, the UK jurisprudence with respect to multi-party litigation has had a profound influence upon the development of class actions in other common law jurisdictions such as Canada and Australia,[189] particularly as to what to avoid: limited utility and inflexibility. For instance, the Australian class action regime only requires a "common issue of fact or law", rather than "same interest in a claim".

4.1.2 The UK system has a very long history of multi-party litigation, which can be traced back to the 19th century. The longstanding pillar of multi-party litigation is the representative action, which is a form of case management co-ordinating a number of similar claims. The representative rule was originally applied in the courts of Chancery,[190] and was invoked for the sake of convenience and judicial economy. Under the *Supreme Court of Judicature Act 1873*, the English court system was reorganized to establish the High Court and the Court of Appeal, and the courts of Chancery were merged with the courts of law. The first representative rule was enacted in Rule 10 of the Rules of Procedure scheduled to the *Supreme Court of Judicature Act 1873*. It was reproduced almost precisely in Order 16, Rule 9 of the Rules of the Supreme Court 1883, which was later replaced by Order 15, Rule 12 of the Rules of the Supreme Court 1965. The rule was incorporated into the Civil Procedure Rules (CPR) in 2000. Throughout these successive enactments till today, the basic tenets of the representative rules have virtually been the same as those introduced in 1873.

189 Mulheron (2004) p.67.

190 The courts of Chancery were also known as the courts of equity, which were originally developed from the Lord Chancellor's jurisdiction. Determination of the courts of equity was based on principles of equity rather than strict letter of the law as in the courts of law.

4.1.3 The representative rule contains two prerequisites: numerosity requirement of "more than one person" and the "same interest in a claim" requirement.[191] The latter requirement is considered by both legal practitioners and academics as the most problematic and least workable aspect of the rule, which can be manifested in an old ruling almost a century ago. The decision in *Markt & Co Ltd v Knight Steamship Co Ltd*, a landmark case in 1910, "narrowed the availability of the representative action in a way congenial to common law procedures but frustrating of the rule of court and of the procedures of Chancery from which that rule had been derived. … Gradually over a period of more than 80 years, the judges of common law countries have been struggling to recover from the setback of *Markt*".[192]

4.1.4 The application of the "same interest" criterion in *Markt* required three conditions to be satisfied simultaneously: the same contract between all plaintiff members and the defendant, the same defences pleaded by the defendant against the members, and the same measure of damages claimed by all members (damages are recovered for a collective fund rather than for individuals). These three sub-criteria implicit in the "same interest" criterion are extremely difficult to meet, thus severely restricting the use of the criterion, and in turn the representative rule.[193] The general view of both legal practitioners and academics is that the representative rule has not been successful in facilitating multi-party litigation due to its extremely limited utility.[194]

4.1.5 The inapplicability of the representative rule has led to the infrequent commencement of the representative action, which hinders the court's effectiveness in managing large numbers of claims sharing a common legal or factual basis. This inadequacy was particularly acute during the 1980s and the 1990s when the court was required to deal with a series of multi-party litigation arising from transport and product liability disasters, insurance claims and environmental claims.[195]

191 CPR 19.6(1).
192 Justice Kirby in *Esanda Finance Corp Ltd v Carnie*, cited from Mulheron (2004) p.79.
193 Mulheron (2004) pp.67-68 and pp.78-82.
194 See Mulheron (2004) p.68.
195 Civil Justice Council (2008a) p.28.

4.1.6 Since the mid-1980s, judges have been astute to tailor special ad hoc procedures to the requirements of group litigation on a case-by-case basis.[196] In fact, there have been several judicial relaxations upon the strictness of the representative rule in order to allow easier commencement of group litigation.[197] Firstly, the requirement of "same interest" has been loosened in some instances. For example, in *Prudential Assurance Co Ltd v Newman Industries Ltd*, the judge espoused the view that there must be a "common ingredient" in the cause of action of each member of the group in order to be qualified as representative actions.[198] Secondly, the requirement of same contract between all plaintiff members and the defendant was undermined in the 1990s. Separate contracts and separate defences were allowed in representative actions like *Irish Shipping Ltd v Commercial Union Assurance Co Ltd* and *Bank of America National Trust and Savings Association v Taylor*. Thirdly, innovative attempts were made to allow representative actions to include claims for damages by individual group members, such as seeking a declaration of the group members' entitlement to damages. These changes have made the representative rule easier to apply.

4.1.7 As the aforementioned case management by the court in the 1980s and the 1990s was on a case-by-case basis, there were calls for a formal multi-party procedure. After investigating possible ways of improving access to justice and reducing the cost of litigation, Lord Woolf's Final Report on Access to Justice[199] published in 1996 declined the class action device. Instead, the concept of "multi-party situation" (MPS) was introduced in the Report. Under the MPS arrangement, part of the proceedings could be common to some or all of the claimants, and other parts could be limited to individual claimants. In such a way, individual and common proceedings should take place in parallel, providing maximum flexibility in case management. Meanwhile, the court should have power to implement the MPS procedure on an opt-out or opt-in basis, whichever contributes best to the effective and efficient disposition of the case.[200]

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196 See Mulheron (2004) p.95 and Mildred (2007) p.598.

197 For example, *Prudential Assurance Co Ltd v Newman Industries Ltd*, *Irish Shipping Ltd v Commercial Union Assurance Co Ltd*, *Bank of America National Trust and Savings Association v Taylor* and *CBS Songs Ltd v Amstrad Consumer Electronics plc*. See Mulheron (2004) pp.83-90 and Mildred (2007) p.593.

198 Cited from Mulheron (2004) p.83.

199 In March 1994, Lord Woolf accepted an invitation from the Lord Chancellor to review the rules and procedures of the civil courts in England and Wales. He published an interim report to the Lord Chancellor in June 1995, and the final report was released in July 1996.

200 Lord Woolf (1996) and Mildred (2007) pp.618-619.

4.1.8 The Lord Chancellor's Department (LCD)[201] had initially intended to propose introducing MPS in 1997, but it abandoned the idea in favour of the Group Litigation Order (GLO) instead in the final proposal. The concern was that the high flexibility characteristic of MPS might come at the expense of predictability. Retaining some key features of MPS such as drawing together related claims, individual and common proceedings taking place in parallel, and establishing a register, GLO accentuated two major differences: limiting the wide-ranging case management powers of the court as suggested by MPS and restricting the scope of litigation by adopting an opt-in mechanism.

4.1.9 The GLO device launched in 2000 which has been in place since then is basically a form of case management where a number of similar claims can be formally co-ordinated. Under CPR 19.10, the court can make GLO "to provide for the case management of claims which give rise to common or related issues of fact or law", unlike the representative rule which requires "same interest" in the claims.[202]

4.2 Underlying legislation

4.2.1 There are three distinct legal jurisdictions in the UK: England and Wales, Northern Ireland, and Scotland, with three distinct legal systems. The scope of this study is confined to England and Wales or the English legal system. However, for convenience, the term "UK" is used in this report.

4.2.2 GLO is a relatively recent innovation on multi-party litigation in the UK. Through the enactment of the Civil Procedure (Amendment) Rules 2000, the newly-inserted Section III of Part 19 of CPR, effective from 2 May 2000, contains provisions to deal with group litigation. The new provisions complement the other parts of CPR rather than establishing a free standing code to govern group actions.[203] Hence, all group actions under this new device must achieve the overriding objective set out in Part 1: enabling the court to deal with cases justly.

[201] It was renamed the Department for Constitutional Affairs in June 2003, and all the responsibilities of this department were taken over by the Ministry of Justice in May 2007.

[202] CPR 19.10.

[203] Mildred (2007) p.617.

4.2.3 Rules contained in CPR are supplemented by Practice Directions, which are expected to flesh out the generality of the rules and build in guidelines from the practical aspects. They may be developed and changed swiftly to meet the needs of practice without the need for amending statutory instruments.[204] In particular, Section III of CPR 19 comes with the supplement, Practice Direction 19B (PD 19B), which contains some practical guidelines about applying for GLO, setting cut-off dates, publicising GLO and the like.

4.2.4 The introduction of GLO does not repeal the old device of representative action. On the same date of the introduction of GLO, CPR 19.6 came into effect, preserving the representative action. In such a way, there are two main strands to multi-party jurisprudence in the UK: the representative action and GLO. The conversion of the old rule to CPR has resulted in some changes to the words used, but there is no change to the substance of the rule on representative action.[205] For example, the numerosity requirement of "numerous persons" in the old rule has been amended to "more than one person" in CPR 19.6(1). However, the requirement of "same interest" remains. In view of the representative rule being little used, this chapter is confined to the practice of GLO.

4.3 Procedures

Commencement of proceedings

4.3.1 Under the GLO regime, one should file one's own claim individually before initiating group litigation. According to PD 19B, "a claim must be issued before it can be entered on a group register".[206] A claimant must use a claim form provided by the court to start a claim. Proceedings are started when the court issues a claim form at the request of the claimant.[207] Even before a claim has been issued, one may apply for GLO. If the application for GLO is successful, the claim will be entered on the group register after it has been issued.

[204] Mildred (2007) p.617.
[205] Mildred (2007) p.592.
[206] PD 19B, paragraph 6.1A.
[207] See CPR 7.2

4.3.2 After claims have been issued for all the claimants, the claimants' solicitors should apply for GLO from the court so as to initiate group litigation. According to PD 19B, before applying for GLO, a solicitor acting for an applicant should consult the Law Society's Multi-Party Action Information Service in order to obtain information about other cases giving rise to the proposed GLO issues. PD 19B also recites that it will often be convenient for the claimants' solicitors to form a Solicitors' Group and choose one from among themselves to take the lead in applying for GLO and litigating the GLO issues. However, in reality, in a case where more than one firm with adequate resources to lead the litigation are involved, the selection process is keenly contested.[208] The lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing.[209]

Threshold requirements

4.3.3 There are six threshold requirements for GLO as stipulated in CPR and PD 19B:[210]

(a) there are or are likely to be a number of claims giving rise to the GLO issues;[211]

(b) the claims must give rise to common or related issues of fact or law;[212]

(c) managing the litigation by means of GLO must be consistent with the overriding objective of CPR, which is to enable the court to deal with such cases justly;[213]

(d) GLO may not be made without the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whoever is appropriate);[214]

(e) GLO will not be granted if consolidation of the claims, or a representative proceeding under CPR 19.6, would be more appropriate;[215] and

[208] Mildred (2007) p.622.
[209] PD 19B, paragraphs 2.1-2.2.
[210] Also see Mulheron (2004) pp.91-102.
[211] CPR 19.11(1).
[212] CPR 19.10 and 19.11(1).
[213] CPR 1.1(1).
[214] PD 19B, paragraph 3.3.
[215] PD 19B, paragraph 2.3.

(f) the group has to be defined by the number and nature of claims already issued, and the number of parties likely to be involved, with the provision of subgroups if necessary.[216]

Application procedure

4.3.4 Application for GLO must be made to the court. It may be made at any time before or after any relevant claims have been issued and either by a claimant or by a defendant.[217] Application should be made to the respective court, based on the location of the court where the case is filed.[218]

4.3.5 The following information should be included in the application notice or in written evidence filed in support of the application:[219]

(a) a summary of the nature of the litigation;

(b) the number and nature of claims already issued;

(c) the number of parties likely to be involved;

(d) the common issues of fact or law (i.e. the GLO issues) that are likely to arise in the litigation; and

(e) whether there are any matters that distinguish smaller groups of claims within the wider group.

4.3.6 In addition to the application made by the parties of proceedings, the court may also on its own initiative make GLO where there are or are likely to be a number of claims giving rise to the GLO issues.[220]

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216 PD 19B, paragraphs 3.2(2), 3.2(3) and 3.2(5).

217 PD 19B, paragraph 3.1.

218 For cases in the High Court in London, application should be made to the Senior Master in the Queen's Bench Division or the Chief Chancery Master in the Chancery Division. Outside London, application should be made to a Presiding Judge or a Chancery Supervising Judge of the Circuit in which the District Registry issuing the application notice is situated. For county courts, application should be made to the Designated Civil Judge for the area in which the county court issuing the application notice is situated. See PD 19B, paragraphs 3.5-3.9.

219 PD 19B, paragraph 3.2.

220 CPR 19.11(1).

Group Litigation Order

4.3.7 GLO must:[221]

(a) contain directions about the establishment of a register (the group register) on which the claims managed under GLO will be entered;

(b) specify the GLO issues which will identify the claims to be managed as a group under GLO; and

(c) specify the court (the management court) which will manage the claims on the group register.

4.3.8 Meanwhile, GLO may:[222]

(a) in relation to claims which raise one or more of the GLO issues, direct their transfer to the management court; order their stay until further order; and direct their entry on the group register;

(b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and

(c) give directions for publicising GLO.

4.3.9 Under this provision, all existing claims raising a GLO issue will be brought within the management of the same court, either by transfer of existing claims or by providing for all future claims to be issued out of the same court. For publicising, after GLO has been made, a copy should be supplied to the Law Society and the Senior Master of the Queen's Bench Division.[223] The purpose of informing the Society is to inform its Multi-Party Action Information Service, helping to put the applicants in touch with other parties who may be interested in applying for GLO owing to same or similar claims.[224] On the other hand, the aim of informing the Queen's Bench Division is to facilitate co-ordination and transfer between all the courts in the jurisdiction.[225]

221 CPR 19.11(2).
222 CPR 19.11(3).
223 PD 19B, paragraph 11.
224 Her Majesty's Court Service (2009).
225 Mildred (2007) p.633.

4.3.10 Notwithstanding the above provision, the court does not have the power to order all claims raising any of the GLO issues to be entered on the group register. The GLO device is an opt-in regime, as will be discussed later.

4.3.11 The court to which the application for GLO is made will, if minded to make GLO, send to the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice, as appropriate:[226]

(a) a copy of the application notice;

(b) a copy of any relevant written evidence; and

(c) a written statement as to why GLO is considered to be desirable.

4.3.12 A list of GLO is posted on the website of Her Majesty's Court Service, with date of order made, judge, management court, contact details of lead solicitors and a summary of the GLO issues.

Case management

4.3.13 The management court's powers of case management are wide-ranging. It may give the following directions:[227]

(a) varying the GLO issues;

(b) providing for one or more claims on the group register to proceed as test claims;[228]

(c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;

(d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;

[226] PD 19B, paragraph 3.4.
[227] CPR 19.13.
[228] Test claim is a case brought to test a principle of law that, once established, can be applied in other similar cases.

(e) specifying a date after which no claim may be added to the group register unless the court gives permission; and

(f) providing directions for the entry of any particular claim which meets one or more of the GLO issues on the group register.

Group register

4.3.14 After GLO has been made, a group register will be set up to manage all the claims of the group. The group register will normally be maintained by and kept at the court, but the court may direct this task to be done by the solicitor for one of the parties to a case entered on the register.[229]

4.3.15 A party to a claim on the group register may request documents relating to other claims on the group register. Where the register is maintained by a solicitor, any person may inspect the group register during normal business hours and upon giving reasonable notice to the solicitor and payment of a fee not exceeding the fee prescribed for a search at the court office.[230]

Status of group members

4.3.16 Unlike class members who are a represented non-party in the situation of the US and Australia, each litigant under GLO is a member of and a party to the litigation.[231]

Right to opt-in

4.3.17 Once certified, a group register will be established on which details of the cases managed under GLO are entered.[232] A list of these group registers (one for each GLO) is maintained by Her Majesty's Court Service. The GLO regime is an opt-in regime in which litigants have to choose affirmatively to litigate by entering their names on the group register.

[229] PD 19B, paragraph 6.5..
[230] PD 19B, paragraph 6.6..
[231] Mulheron (2004) p.99.
[232] PD 19B, paragraph 6.1.

Opt-in procedure

4.3.18 The purpose of GLO is to provide for the case management of claims which give rise to common or related issues of fact or law. In other words, it is a device grouping individual cases for the sake of judicial economy. It therefore does not merely require litigants to opt in, but it also requires that each litigant issues his or her individual claim, i.e. issuing a claim form providing details of the case which gives rise to at least one of the GLO issues.[233]

4.3.19 The management court may specify a date after which no claim may be added to the group register unless the court gives permission.[234] According to PD19B, an early cut-off date may be appropriate in the case of "instant disasters" such as transport accidents. On the other hand, in the case of consumer claims, and particularly pharmaceutical claims, it may be necessary to delay the ordering of a cut-off date.[235] This cut-off date simply limits entry to membership of a particular group register, but it does not imply that a particular claim is out of time. A claim can still be filed after the cut-off date. A claimant who wishes to join the group litigation after the cut-off date must apply to the court for permission. Alternatively, another group may be established for latecomers. However, Part 19 of CPR and PD 19B contain no provision as to the criteria according to which such an application should be determined.

4.3.20 Application for cases to be entered on a group register may be made by any party to the case.[236] The process of registering details of the claims to the group register is managed by the court. The court, if not satisfied that a case can be conveniently managed with the other cases on the group register, or convinced that the entry of the case on the register would adversely affect the case management of the other cases on the register, may refuse to allow the case to be entered on the group register, or order its removal from the register if already entered, although the case gives rise to one or more of the GLO issues.[237] Disputes over qualification to be entered on the group register are to be resolved by application to the court.[238]

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233 PD 19B, paragraphs 6.1A and 6.3.
234 CPR 19.13(e).
235 PD 19B, paragraph 13.
236 PD 19B, paragraph 6.2.
237 PD 19B, paragraph 6.4.
238 Mildred (2007) p.626.

Removal from the register

4.3.21 A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register. If the management court orders the claim to be removed from the register, it may give directions about the future management of the claim.[239]

4.3.22 Although it is not explicit in the rule, the directions made on removal of a claim may include a continuing liability for the common costs of the group litigation.[240] This is to prevent claimants taking the benefits but avoiding the financial burdens of the group litigation. Where a claim is removed from the group register, the court may make an order for costs such that the claimants may need to pay a proportion of the common costs incurred up to the date on which the claim is removed from the group register.[241]

Representative party

4.3.23 As GLO is intended to serve as a case management tool, it is not brought in as an action by a representative claimant on behalf of a number of unnamed class members. Instead, GLO serves as an "umbrella" under which a number of claims are managed.[242] Under GLO, there are no representative claimants or defendants as all litigants are parties to the group litigation.

4.3.24 The GLO regime adopts an essentially individualistic approach to group litigation, in the view that claimants must commence their proceedings as if they were unitary claimants.[243] Accordingly, litigants lodge a claim under GLO are treated as numerous individual claims. By the use of GLO, individual claims are brought within an overarching managerial framework.

4.3.25 In this connection, the GLO regime allows each group member's claim to be pleaded so that both the common and individual issues can be fully considered by the court. However, the court may provide for one or more claims on the group register to proceed as test claims.

239 CPR 19.14.
240 Mildred (2007) p.638.
241 CPR 48.6A(7).
242 Mulheron (2008a) p.144 and Civil Justice Council (2008a) p.31.
243 Mulheron (2008a) p.29.

Trial and judgment

Managing individual issues

4.3.26 The management court may give directions for the trial of both common and individual issues. Common issues and test claims will normally be tried at the management court, while individual issues may be directed to be tried at other courts the locality of which is convenient for the parties.[244]

Binding effect of judgment

4.3.27 Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise. The court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.[245]

4.3.28 A party to a claim which is entered on the group register after a judgment or order binding on that party has been given or made may not apply for the judgment or order to be set aside, varied or stayed; or appeal the judgment or order, but may apply to the court for an order that the judgment or order is not binding on him or her.[246] However, no guidance is given in CPR and PD 19B as to how this application is to be handled by the court.

Settlement

4.3.29 Some issues associated with the conduct of litigation are not covered by the GLO regime as stipulated by CPR. Settlement is one of the noticeable omissions. Under the GLO regime, there is no special rule for the court to scrutinize or approve any proposed settlement.[247] Settlement in such cases is handled in the same way as in other civil actions, i.e. unless the plaintiff is a child or protected party (who lacks capacity to conduct the proceedings) that no settlement shall be valid without the approval of the court, it is a matter for the parties concerned themselves.

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[244] PD 19B, paragraphs 15.1 and 15.2.
[245] CPR 19.12(1).
[246] CPR 19.12(3).
[247] Civil Justice Council (2008a) p.87.

Assessment and distribution of monetary relief

Assessment of aggregate damages

4.3.30 There is no provision on aggregate damages under the GLO regime. The court does not have any capacity to either assess damages on an aggregate basis or award damages on the basis of an average, pro rata or proportional basis.[248] As a result, damages are dealt with on an individual basis by the court.

Distribution of monetary relief

4.3.31 Since each individual claimant should prove their own particular loss and make their own claims under the GLO regime, there is no need to stipulate the method of award distribution.

Costs and funding

Costs rule

4.3.32 The English costs rule is that the losing party pays the winning side's costs, which is the same as that of Australia. In other words, these two places are different from the US where the loser does not pay the winner's legal costs such as the attorney's fees.

4.3.33 Special costs rules apply under the GLO regime. CPR 48.6A distinguishes between "individual costs" and "common costs", in that the former means the costs incurred in relation to an individual claim on the group register while the latter means the costs incurred in relation to the GLO issues, a test claim, and the lead solicitor in administering the group litigation.[249]

4.3.34 Unless the court orders otherwise, common costs are shared equally among each litigant. As a general rule, each litigant is to pay the individual costs of his or her own claim and an equal proportion of the common costs shared by all group litigants.[250]

[248] Civil Justice Council (2008a) p.87 and Mulheron (2004) p.102.
[249] CPR 48.6A(2).
[250] CPR 48.6A(3) and 48.6A(4).

4.3.35 Where the court makes a costs order in relation to any application or hearing involving one or more GLO issues and issues relevant only to individual claims, the court will distinguish between common and individual costs involved and allocate the proportion of the costs relating to common costs and individual costs respectively.[251] Where common costs have been incurred before a claim is entered on the group register, the court may order the group litigants to be liable for a proportion of those costs.[252]

Conditional fee agreements

4.3.36 In the UK, contingency fee agreements are generally unenforceable because they are considered to be champertous arrangements, which are contrary to the "public policy" and the common law.[253] However, like Australia, there has also been a significant growth of litigation funded by conditional fee agreements in the UK.[254] Conditional fee agreements were first introduced in 1995 for personal injury, some insolvency work and cases before the European Commission of Human Rights and the European Court of Human Rights. Since 1998, conditional fee agreements have been extended to all types of proceedings except family and criminal cases.[255]

4.3.37 In the UK, there are various types of conditional fee agreements.[256] Under conditional fee agreements without success fee, the client must pay ordinary costs if he or she wins, and either no costs or reduced costs in a loss. Under conditional fee agreements with success fee,[257] the maximum success fee, often referred to as the amount of uplift, that can be charged is 100%.[258]

[251] CPR 48.6A(5).
[252] CPR 48.6A(6).
[253] The Law Society (2008) p.14.
[254] Kemal-Brooke (2009).
[255] The Law Society (2008) p.20.
[256] The Law Society (2008) p.7.
[257] The success fee is intended to cover two elements: the risk element and the deferred fee element. The client may be able to recover some or all of the risk element from an opposing party. However, according to CPR 44.3B(1)(a), the deferment element cannot be recovered from the opposing party. See the Law Society (2008) p.7.
[258] Article 4 of the Conditional Fee Agreements Order 2000.

4.3.38 The current operation of conditional fee agreements is backed by the after-the-event (ATE) insurance. ATE insurance is purchased to protect the client against an adverse costs order. It may cover the opponents' legal fees and own legal fees, for both plaintiffs and defendants. The premium is often 20% to 40% of the total legal charges protected against. The usual basis of the insurance policy is that payment is made if the insured fails completely with the case. The *Access to Justice Act 1999* allows the court to include the premium in a costs order. If the case is successful, the opponent is required to pay the success fee of the solicitor and the insurance premium. If the claim is unsuccessful, the claimant is not liable for any costs.[259]

Litigation funders

4.3.39 Professional litigation funders have emerged in the UK in recent years. It is a growing market that involves, in general terms, third-party litigation funders investing in litigation cases, giving claimants with limited means the ability to access justice and to offset some of the risks of litigation costs.[260] Like those in Australia, these litigation funders contract with plaintiffs to sponsor their lawsuits, agreeing to front the costs of the litigation in exchange for a share of the recovery if the plaintiffs prevail. This arrangement is in essence analogous to the US contingency fee relationship, except that the plaintiff enters into an agreement with a third party rather than his or her lawyer.

4.3.40 Access to justice has become an important consideration for the court to assess new funding arrangements. Where challenged by defendants on the grounds of maintenance and champerty, it is the importance of access to justice which has generally led the court in Australia and the UK to approve proceedings funded by litigation funders.[261] In the UK, a landmark case was the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd & Ors* in 2005. In that case, the Court of Appeal gave qualified support to third-party funders, and ruled that if the funder did not simply fund the proceedings but substantially controlled or benefited from them, it should potentially be liable for the opposing party's costs up to the extent of the funding provided. Consequently, professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount.[262]

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259 Standing Committee of Attorneys-General (2006) p.15, Law Council of Australia (2006) p.31 and the Law Society (2008) p.20.

260 Beisner & Borden (2006), Kemal-Brooke (2009) and HBMSayers, 16 May 2008.

261 Standing Committee of Attorneys-General (2006) p.5.

262 Civil Justice Council (2005) pp.44-49 and Kean & McLauchlan (2007).

4.3.41 The growth of litigation funding has sparked calls for regulation of the sector. This issue indeed is part of an ongoing discussion about the funding system and the debate over class actions in the UK. The Civil Justice Council (CJC)[263] has set up a management group to draft proposals of "light-touch" regulation of funders, i.e. mainly via self-regulatory measures. The management group is examining major licensing requirements such as those relating to ethics, best practice and financial security, while the Law Society and the Solicitors Regulation Authority are considering possible changes to the Code of Conduct to ensure that solicitors are not prohibited from working with funders.[264]

4.4 Recent reforms and development

4.4.1 Early efforts by Lord Woolf in the inquiry into access to justice pointed out that costs of multi-party actions should be taken into consideration as early as possible and kept under review, which was justified by the difficulty in constraining and predicting costs in multiple-party proceedings.[265] In December 2001, CJC, as part of its terms of reference to monitor the civil justice system following the introduction of CPR in 1998, began a review of problems relating to the funding of civil claims. Based on the review findings, it has provided recommendations to the Lord Chancellor as to reforming the litigation procedures, particularly focusing on the funding schemes for all kinds of civil litigation.

First report: Access to Justice – Funding Options and Proportionate Costs (2005)

4.4.2 CJC's first report published in August 2005 offers a costs package across the spectrum of litigation, from fast track (small claims) to multi-track (including representative actions and GLO). In particular, CJC recognizes that group actions involve complex issues and potentially very high costs, and require particularly close attention if access to justice in terms of funding is to be improved.

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263 The Civil Justice Council is a non-departmental public body sponsored by the Ministry of Justice. It was established under the *Civil Procedure Act 1997* to be responsible for overseeing and co-ordinating the modernisation of the civil justice system. It advises the Lord Chancellor on how the civil justice system can be improved, reviews related policies and procedures to ensure that they improve access to justice, and monitors system procedures to assess whether they achieve their stated policy aims.

264 The Law Gazette, 8 May 2008.

265 Mildred (2007) p.676.

4.4.3 There are 21 recommendations in the report, among which the most controversial one may be the introduction of contingency fees as a "last resort additional means of plugging the funding gap and promoting access to justice".[266] In Recommendation 11, CJC suggests that the US-style contingency fees should not be introduced because the arrangement would require the abolition of the fee-shifting rule that costs should follow the event (the losing party paying the costs of the successful party). Instead, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario of Canada by the *Solicitors' Act 2002*, particularly to assist access to justice in group actions and complex cases where no other method of funding is available.[267]

4.4.4 Another related issue is third-party funding. The report admits that in the search for financial support to permit access to justice, the use of funding by a third party is becoming more prevalent. The *Arkin* case aforementioned has been explained in details in view of its importance to funding and access to justice. In Recommendation 13, CJC points out that building on the judgment of the Court of Appeal in the *Arkin* case, third-party funding merits further examination as a "last resort means of providing access to justice".[268]

Second report: The Future Funding of Litigation – Alternative Funding Structures (2007)

4.4.5 Following further research of the funding mechanism of litigation in other jurisdictions, CJC published its second report in July 2007. The report recommends that properly regulated third-party funding should be recognised as an acceptable option for mainstream litigation. Court rules should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding. In particular, third-party funding has the potential to increase access to justice in areas of consumer rights and multi-party action though it must be effectively regulated and rigorously controlled by the courts.[269]

[266] Civil Justice Council (2005) p.32.
[267] Civil Justice Council (2005) pp.32-39.
[268] Civil Justice Council (2005) p.49.
[269] Civil Justice Council (2007a) pp.53-67.

4.4.6 Regarding contingency fee funding in multi-party claims, the report summarizes the following comments of stakeholders on the existing multi-party litigation system:[270]

(a) Funding is considered to be the greatest barrier to bringing legitimate multi-party consumer redress claims.

(b) It is widely accepted that proposals for alternative funding systems for multi-party claims would take a percentage of damages.

(c) The current group litigation procedure works reasonably well but could be improved.

(d) An opt-out procedure is appropriate in some consumer claims.

(e) The judiciary should play a more proactive role in controlling and managing multi-party litigation.

4.4.7 The report recommends that in multi-party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice.[271] Unlike in the first report where contingency fees are regarded as a last resort, in this second report, CJC suggests that in the absence of legal aid, contingency fees "may need to become a mainstream funding alternative".[272]

Final report: Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions (2008)

4.4.8 CJC published its final report on improving access to justice in December 2008. This report reviews various procedural mechanisms for managing multi-party litigation of civil cases, and recommends that a generic collective action be introduced. However, the introduction of such action needs not preclude the development of further reform in other areas both within the civil courts and in other civil and regulatory jurisdictions. For instance, it should not preclude further reform on the GLO mechanism.[273]

[270] Civil Justice Council (2007a) pp.70-71.
[271] Civil Justice Council (2007a) pp.68-73.
[272] Civil Justice Council (2007a) p.72.
[273] Civil Justice Council (2008a) pp.137-140.

4.4.9 Highlighting the main recommendations of the report, the Chief Executive of CJC, Robert Musgrove said, "It is important that no case should proceed unless the responsible judge ascertains there is clear merit, and a reasonable expectation that the claimant will recover a substantial element of their loss. Funding arrangements will be tested, rigorous case management applied, and there will be judicial authority over any class settlement."[274] As such, the report recommends that collective claims should be subject to enhanced case management including a strict certification procedure for the claims, the power of the court to aggregate damages, and approval of agreed settlement by the court with a fairness hearing.

4.4.10 CJC recommends that any new collective action mechanism should incorporate a certification process, which should be applied rigorously by the court as early as possible in the litigation.[275] Certification can enable the court to assess a claim on a case-by-case basis so as to decide on the most appropriate mechanism through which the claim should progress i.e. as an opt-in collective action, opt-out collective action, traditional unitary action, or through GLO.

4.4.11 The report suggests that the court should have the power to deal with aggregate damages in an appropriate case. While pointing out that damage aggregation plays a beneficial and essential role in the development of a mature and successful collective action mechanism, given its interrelation with the substantive law, CJC does not offer any recommendation on the reform of the substantive law of damages. Instead, it only recommends the Lord Chancellor to "conduct a wider policy consultation into such a reform".[276]

4.4.12 CJC recommends that any settlement must be approved by the court in a fairness hearing before it can bind the represented class of claimants.[277] In approving a settlement, the court should take account of a number of issues to ensure that the represented class are given adequate opportunity to claim their share of the settlement.

[274] Civil Justice Council (2008b).
[275] Civil Justice Council (2008a) pp.141-158.
[276] Civil Justice Council (2008a) p.165.
[277] Civil Justice Council (2008a) pp.169-171.

4.5 Issues and concerns

Opt-in or opt-out

4.5.1 The issue of "opt-in or opt-out" is one of the major concerns in reforming the multi-party litigation system in the UK. The GLO device is an opt-in regime, in contrast with the opt-out mechanism of class action regimes like those in the US and Australia.

4.5.2 From the introduction of the GLO mechanism in 2000 to the end of February 2009, only 68 such orders were made.[278] A research study commissioned by CJC has compared the GLO regime with the opt-out class action regimes of Australia and Ontario, and found that the types of GLO claims of the former are not as wide-ranging, and the numbers of private grievance claims are not as frequent as those of the latter over the same time period.[279] There are some 20 reasons revealed in the report as to why class members may not opt in to litigation conducted on an opt-in basis.[280] These reasons can be grouped into social and psychological reasons, reasons to do with the defendant, procedural reasons and economic reasons. An opt-out system is thus recommended by that report to supplement the existing opt-in regime.

4.5.3 CJC's final report has also pointed out that since the opt-in GLO regime requires individuals to take positive steps to commence litigation or join the group register, there has been little take-up or use of GLO where claims are individually small even though the totality of the claim when aggregated may be large.[281] Hence, the report regards the GLO regime setting up barriers disallowing effective access to justice for those individuals whose claims are of limited individual quantum and where the litigation risk or cost far outweighs the potential value of a successful judgment.[282] In any event, CJC remains neutral and impartial when presenting its findings as it recommends that "collective claims may be brought in on an opt-in or opt-out basis".[283] In other words, the court should decide whether opt-in or opt-out is most appropriate for any particular claim, taking into account all the relevant circumstances of the case.[284]

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278 Her Majesty's Court Service (2009).
279 Mulheron (2008a) p.15.
280 Mulheron (2008a) p.32.
281 Civil Justice Council (2008a) p.51.
282 Civil Justice Council (2008a) p.86.
283 Civil Justice Council (2008a) p.6.
284 Civil Justice Council (2008a) pp.18-19.

US-style class actions and contingency fees

4.5.4 Until recently there has been a recurring view amongst judges and academics in the UK that the US class action model is too didactic and does not permit sufficient creativity on the part of the managing judge, and that personal scenarios differ widely so that different procedural solutions will be required. It has been suggested by some academics that the GLO regime is more flexible than a formal class action. There are also views that the GLO mechanism allows for each group member's claim to be pleaded, so that the court is able to fully consider both common issues and individual divergences.[285]

4.5.5 However, in the reports on access to justice mentioned above, the shortcomings of the current system of multi-party litigation like the barrier to entry have also led to calls for reform. Experiences of other places, including the class action regime of the US, are reviewed in the reports. Particularly, in the funding of multi-party claims, contingency fees are regarded as a viable funding method for improving access to justice in the first and second reports of CJC.

4.5.6 In 2008, a research paper on the operation of contingency fees in the US was published by CJC. According to the findings of that study, if fee-shifting is done away with, and contingency fees are permitted and properly regulated, the new regime would operate satisfactorily. That study remains, however, cautious that if contingency fees are introduced, consideration would need to be given to consumer protection measures around the setting and charging of such fees and the settlement clauses.[286] Similarly, in CJC's final report on improving access to justice, there are also recommendations on imposing regulatory procedures on the certification of actions, settlement and funding of litigation.

[285] Mulheron (2004) p.69.
[286] Moorhead & Hurst (2008) p.36.

Chapter 5 – Analysis

5.1 Introduction

5.1.1 Based on the findings in the previous chapters, this chapter highlights some controversial issues relating to multi-party litigation in the selected overseas jurisdictions. The analysis will also compare the class action and group litigation regimes in the three selected places and Hong Kong in the following aspects:

(a) commencement of proceedings;

(b) case management;

(c) trial and judgment;

(d) settlement;

(e) assessment and distribution of monetary relief; and

(f) costs and funding.

5.1.2 To facilitate Members' deliberation on the issue, the key features of multi-party litigation schemes in the three selected places and Hong Kong, as well as the class action scheme proposed by the Law Reform Commission of Hong Kong are summarized in the **Appendix**.

5.2 Controversial issues relating to multi-party litigation

5.2.1 In general, there are three major controversial issues on the class action and group litigation schemes adopted in the selected places, which are: litigious abuse under opt-out class actions, closed litigation under opt-in mechanism, and funding of litigation.

Opt-out class actions and litigious abuse

5.2.2 Those who oppose opt-out class actions mainly point to the threat of litigious abuse. There has been a fear that lawyers may discover a cause of action, find a plaintiff and then boilerplate a class action lawsuit.[287] Accordingly, the parties having the real interest in such litigation are the lawyers involved rather than the plaintiffs.

5.2.3 Notwithstanding that opt-out class action is a great deterrence to breach of the law, one likely result of such litigation may be to put serious litigious pressure on companies or even to bankrupt the defendant businesses. In the United States (US), litigious abuse has already aroused the concern of the business sector, and it is this threat of litigious abuse which has deterred the legal profession in the United Kingdom (UK) from adopting the class action device.

5.2.4 Under the opt-out mechanism of class actions, the plaintiffs can commence proceedings on behalf of persons with no individual litigious interest or persons who do not even know the existence of the class action. In other words, some people are involved in litigation merely because they fall within the class description and have not opted out. These people's right to plead a contestable case is regarded as being infringed under the opt-out regime.[288]

5.2.5 Nevertheless, there are views that the opt-out procedure is preferable on grounds of equity and efficiency. People with little means or resources can get access to justice even though they may not be able to take the positive step to include themselves in the proceedings. Similar cases being brought through a single class action can also save time and effort by the court. Besides, there is no evidence showing a flood of litigation under the Australian class action regime.

Closed litigation under opt-in mechanism

5.2.6 The issues concerning the opt-in mechanism are indeed the other face of the coin: while it can rectify some problems of the opt-out mechanism, it also carries other inherent defects.

[287] Pengilley (1993) p.7.
[288] Pengilley (1993) p.22.

5.2.7 Under the opt-in regime, individual participates in litigation only if he or she wishes to do so. No one will be included in the class as a result of mere silence. Opting-in therefore is consistent with the usual procedures for commencing a lawsuit in that people who desire to litigate should file the claim affirmatively. If a person does not opt in due to a conscious decision or ignorance, then this person may bring his or her own action separately.

5.2.8 With the requirement of taking positive steps to participate, opting-in reduces the chances of abuse or litigation becoming unmanageable. It helps the defendant ascertain the size of the potential plaintiffs, and all who stand to benefit from the litigation have shown at least some minimal interest in the class action by taking the affirmative action to join.

5.2.9 However, since people have to take affirmative action to participate in the group litigation, the scope of opt-in litigation is often relatively narrow. In fact, the narrow scope of opt-in group litigation in the UK has led to barriers to the access to justice and calls for legal reforms. Empirical studies undertaken in the US have confirmed that mechanisms rendering membership of the representative group dependent on expressing interest in being bound by the litigation have an adverse impact on the size of the group.[289]

Funding of litigation

5.2.10 Another controversial issue is in relation to contingency fees, which is a major factor that makes some jurisdictions like the UK unwilling to adopt the US-style class action device.

5.2.11 In Australia, the Australian Law Reform Commission (ALRC) had recommended that class representatives should be allowed to enter into contingency fee agreements with the class solicitor, but this recommendation was not adopted when the *Federal Court of Australia Act 1976* (*FCA*) was being amended in 1992. This arrangement, if adopted, would have provided a means of financing multi-party litigation and overcoming the costs disincentives to representative plaintiffs. Meanwhile, the arrangement of contingency fees has also been under consideration in the UK recently.

[289] Morabito (2007) p.22.

5.2.12 No matter whether contingency fee agreements are allowed, it is agreed that some methods have to be adopted to provide class representatives with financial resources to meet the significant costs entailed in running a group proceeding. It is under such circumstances that the involvement of commercial litigation funders in multi-party litigation has grown in Australia and the UK recently.

5.2.13 Nonetheless, the financial support to class representatives provided by these third parties comes at a cost. A significant percentage of the proceeds procured on behalf of the class have to be paid to such litigation funders. Some commercial litigation funders in Australia have even tried to restrict the pool of benefiting claimants in a class action to only those clients of the solicitors concerned by forming "limited groups".

5.2.14 The agreements entered into between the plaintiffs and the litigation funders are in essence a kind of contingency fee agreement, even though contingency fees are banned in Australia and the UK. Unlike the situation in the US where contingency fee agreements are subject to judicial supervision, those commercial litigation funders in Australia and the UK are operating without much supervision from the court as their involvement is a recent phenomenon. Nevertheless, a regulatory framework for litigation funders is under consideration in the two places.

5.3 Key features of multi-party litigation schemes

Multi-party litigation schemes

5.3.1 In the US and Australia, class actions can be initiated in a variety of cases, including multiple plaintiffs' claims for damage due to defective goods, personal injuries, and losses due to alleged misrepresentations and misinformation related to a company's financial position.

5.3.2 The Group Litigation Order (GLO) mechanism adopted in the UK is a somewhat different approach to multi-party litigation. It is a case management tool, instead of something brought in as an action by a representative claimant on behalf of a number of unnamed class members. GLO serves as an "umbrella" under which a number of claims by identified claimants are managed.

5.3.3 As regards multi-party litigation schemes, there are "representative proceedings" under the current civil procedure in Hong Kong. In particular, representative proceedings are governed by Order 15 rule 12 of the Rules of the High Court (RHC). Representative proceedings are intended to be a flexible tool of convenience in the administration of justice.[290] However, since they could only be applied in a restrictive manner, they are seldom used in Hong Kong.

Commencement of proceedings

Certification

5.3.4 Certification by the court before a class action can proceed is required under the US class action regime. The certification order must define the class and the class claims, issues or defences, and must appoint class counsel. The Australian class actions operate differently in this aspect, in that no certification is required and a class action proceeds unless the court orders otherwise.

5.3.5 In the UK, the claimants' solicitors need to apply for GLO from the court before initiating group litigation under the GLO regime. GLO must contain directions about the establishment of the group register, and specify the GLO issues and the management court.

5.3.6 In Hong Kong, representative proceedings do not have any certification procedure. Where the threshold requirement of having the same interest is satisfied, representative proceedings may begin and continue unless the court orders otherwise.[291]

Threshold requirements

5.3.7 The threshold requirements of the US and Australia are similar in that both require numerosity and commonality, and there is no need for the applicant to name or to specify the number of class members.

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290 *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd*, cited from Wilkinson, Booth & Cheung (2005) p.220.

291 Order 15 rule 12(1), RHC.

5.3.8 Unlike the situation in the US, there is no requirement in Australia that the common issues among class members must predominate over individual issues. It merely requires that there be at least one substantial common issue of law or fact. Besides, the representative parties' claims need not be typical in Australia.

5.3.9 There are more threshold requirements in the GLO regime of the UK than the class action regimes in the US and Australia. In addition to numerosity and commonality, consent of the appropriate official should be sought. Another requirement is that GLO should be the most appropriate method of litigation for the cases and be able to facilitate the court to deal with the cases justly. It is also required that the group be defined by the number and nature of claims, as well as the number of parties involved.

5.3.10 In Hong Kong, representative proceedings arise when numerous persons have the same interest in any proceedings. The prerequisite is that the persons to be represented and the person representing them should have the same interest in the proceedings.[292] The test is threefold: all the members of the alleged class should have a common interest; they should all have a common grievance, and the relief should in its nature be beneficial to all of them. Although it is not necessary to name every plaintiff or defendant in the group, it is essential to define the group represented with sufficient clarity.[293]

Case management

Status of group members

5.3.11 In the class action regimes of the US and Australia, class members are not parties to the proceeding. The representative plaintiffs represent them before the court. In the UK, each litigant under GLO is a party to the litigation. GLO merely serves as an "umbrella" under which a number of claims are managed. Claimants under GLO are required to commence their own individual proceedings as if they were unitary claimants. In Hong Kong, the represented group members are not parties to the representative proceeding.[294]

[292] Wilkinson, Booth & Cheung (2005) pp.222-223.
[293] Wilkinson, Booth & Cheung (2005) p.221 and Cameron & Kelly (2009) p.69.
[294] Wilkinson, Booth &Cheung (2005) p.224.

Opt-out/opt-in mechanism

5.3.12 Under the class action regime, class members have the right to exclude themselves from the proceeding, i.e. to opt out. However, the methods of delivering opt-out notices are different in the US and Australia. In the US regime, opt-out notices are mostly delivered individually, whilst notices may not be given personally in Australia. Instead, notices are usually given by means of press advertisement, radio or television broadcast. Otherwise, the opt-out procedures of the two jurisdictions are similar, with written notices being signed and lodged with the court.

5.3.13 The GLO scheme in the UK is an opt-in regime. People have to choose affirmatively to litigate by entering their names on the group register. To opt in, each litigant must issue a claim form providing details of the case which gives rise to at least one of the GLO issues.

5.3.14 Representative proceeding in Hong Kong is different from both the class action schemes and the UK group litigation. Under representative proceedings, parties being represented are predetermined when the litigation commences. There is no mechanism for people to opt in to or opt out from the representative proceeding.

Representative party

5.3.15 Under the class action regimes of the US and Australia, the representative party should fairly and adequately represent the class. In Australia, group members have the right to request the court to replace the representative party if they can convince the court that their interests are not being adequately advanced by the existing class representative. In the US, although it is not specified in the Federal Rules of Civil Procedure (FRCP), it is implicit in the scheme that a representative party may be replaced if necessary. Additionally, in both the US and Australia, subclasses may be created where there are divergent interests among group members.

5.3.16 In both the US and Australia, organizations like consumer advocacy groups and labour unions can commence a proceeding on behalf of their members. In the US, organizations which possess "representational standing" to bring in a suit can bring in a class action on behalf of their members. Similarly, in Australia, based upon a specific statutory entitlement, some entities with a statutory standing to sue defendants for relief, like the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), can institute class actions.

5.3.17 In the UK, as GLO is intended as a case management tool, it is not brought in as an action by a representative claimant on behalf of a number of unnamed class members. Instead, GLO serves as an "umbrella" under which a number of claims are managed. Hence, there is no representative party under GLO. Each litigant in the group action is a party to the litigation. Accordingly, consumer advocacy groups and unions cannot use GLO to commence proceedings on behalf of their members.

5.3.18 In Hong Kong, the court has the power at any stage of a representative proceeding to appoint representative plaintiffs.[295] Changes of the representative party can only be made by a court order. Order 15 rule 12 of RHC has not specified whether organizations can commence a representative proceeding on behalf of their members. Unlike the arrangement of the multi-party litigation regimes studied in this report under which subclasses can be formed to accommodate divergent interests, representative proceeding is not possible if there are divergent interests among group members.[296]

Trial and judgment

Managing individual issues

5.3.19 In the US, the trial procedure of individual issues under a class action is not specified in the relevant legislation. As such, the handling of individual issues has been at the behest of judicial creativity. Under the Australian class action regime, the court may give directions in relation to the determination of individual issues, including establishing subclasses.

5.3.20 In the UK, the management court may give directions for the trial of common and individual issues. Common issues and test claims will normally be tried at the management court, while individual issues may be directed to other courts, the locality of which is convenient for the parties involved.

5.3.21 In Hong Kong, if there are too many individual issues that warrant separate trials, a representative proceeding may not be initiated in the first place. To have recourse to representative proceedings, it is very often that the same facts giving rise to the same or similar cause of action will be the basis. Hence, it is very rare that separate trials would be ordered for individual issues.

[295] Order 15 rule 12(2), RHC.
[296] Cameron & Kelly (2009) p.69.

Binding effect of judgment

5.3.22 It is a distinctive feature of the class action regimes that absent class members are bound by a class action judgment, whether favourable to the class or not, except for those class members who have opted out. As such, in both the US and Australia, the group members who do not opt out of a class action will be bound by the judicial determination of the common issues or settlement of the action.

5.3.23 In the UK, the judgment of group litigation is binding on the parties to all claims that are on the group register at the time the judgment is given unless the court orders otherwise.

5.3.24 In Hong Kong, a judgment or order given in representative proceedings shall be binding on all the represented persons.[297] However, an affected person who is bound by the judgment may dispute such liability on the ground that by reason of facts and matters particular to his or her case, he or she is entitled to be exempted from such liability.[298]

Settlement

5.3.25 In the class action regimes of the US and Australia, judicial approval is needed before any settlements can take legal effect. Most of the time, the court may approve a proposed settlement if it is fair and reasonable. In considering the settlement proposal, the court in the US and Australia will normally take into account criteria such as the amount offered to each group member, the prospects of success in the proceeding, the likelihood of obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and independent expert, the likely duration and cost of the proceeding if continued to judgment, and the attitude of group members to the settlement.

5.3.26 In view of the problem of coupon settlements,[299] there is an explicit requirement in the US that settlements cannot constitute a net financial loss to individual class members, unless the non-monetary benefits to class members substantially outweigh the monetary loss. Besides, the court may not approve settlements that accord extra monies to class members located in closer geographic proximity to the court.

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[297] Order 15 rule 12(3), RHC.

[298] Order 15 rule 12(5), RHC.

[299] In coupon settlements, class members are awarded coupons for use with future purchases of particular products, which are often manufactured by the defendants. For details, please refer to paragraph 2.1.5.

5.3.27 Under the GLO regime, there is no special rule for the court to scrutinize and approve any proposed settlement. Settlement in such cases is handled in the same way as in other civil actions, i.e. unless the plaintiff is a child or protected party (who lacks capacity to conduct the proceedings) that no settlement shall be valid without the approval of the court, it is a matter for the parties concerned themselves.

5.3.28 In Hong Kong, settlement of a representative proceeding is no different from any other civil action. Unless the plaintiff falls within one of those categories of persons whose settlement of claims requires sanction of the court (such as minors and persons otherwise without capacity), settlement is a matter for the parties concerned themselves.

Assessment and distribution of monetary relief

Assessment of aggregate damages

5.3.29 Under the US class action regime, although FRCP Rule 23 does not contain any provisions on the assessment of damages, aggregate judgments have been widely used in antitrust and securities class actions. In Australia, the court may make an award of damages consisting of specified amounts, or in an aggregate amount without specifying amounts awarded in respect of individual group members.

5.3.30 In the UK, there is no provision on aggregate damages under the GLO regime. The court does not have any capacity to either assess damages on an aggregate basis or award damages on the basis of an average, pro rata or proportional basis.

5.3.31 In Hong Kong, there is no special rule for assessment of damages under representative proceedings. Unless a special rule of law or statute is applicable, all assessment of damages must be based on the factual circumstances of each plaintiff.

Distribution of monetary relief

5.3.32 Under the US class action regime, in cases where the names of class members and their entitlements could be assessed on the basis of the defendant's records, the damages awarded may be distributed by the defendant directly to class members. In cases where the defendant does not have the relevant information or resources, the defendant may be required to pay the money into a court fund or other repository.

5.3.33 In Australia, the court may provide for the constitution and administration of a fund consisting of the money to be distributed such that the costs of administering the fund are to be borne by the fund or by the defendant as the court directs.

5.3.34 In the UK, each individual claimant should prove their own particular loss and make their own claims under the GLO regime. Since there is no aggregate award of damages, there is no specified method of award distribution available.

5.3.35 Similar to the situation in the UK, all assessment of damages in Hong Kong must be based on the factual circumstances of each plaintiff. As the assessment of damages is on individual basis, there is no aggregate award distribution for representative proceedings.

Undistributed or unclaimed fund

5.3.36 In the US, undistributed fund for the class may be reverted to the defendant in some cases. Alternatively, under the *Class Action Fairness Act of 2005* (*CAFA*), a portion of the value of unclaimed coupons may be distributed to charitable or governmental organizations. Under the Australian class action regime, reversion to the defendant has been statutorily mandated as the first preference for handling undistributed fund.

5.3.37 In the UK and Hong Kong, the respective practice of group litigation and representative proceedings is different from that of the class action regimes. There is no aggregate award of damage, and thus the issue of undistributed fund does not exist.

Costs and funding

Costs immunity for group members

5.3.38 Under the class action regimes of the US and Australia, as non-parties, class members are generally not liable for adverse costs of the litigation. In the UK, common costs of group litigation are shared equally among each group litigant under GLO.

5.3.39 In Hong Kong, as represented parties are not parties to litigation, they are not liable for costs. However, the court has jurisdiction to order in anticipation of the outcome of the litigation that costs be borne by all group members.[300]

Source of funding

5.3.40 Because of the costs immunity for class members, the cost burden is on the class representative. Hence, to facilitate the commencement of class actions, there are some mechanisms to provide litigation funding for the class representative. In the US, the financial burden of class action is shifted to class members by the "common fund doctrine", under which the lawyers can be reimbursed from the pool of compensation recovered from the lawsuit. Meanwhile, under contingency fee agreements, the financial risk is transferred from the class representative to the class attorneys in the event of losing suits.

5.3.41 In Australia, the representative party can apply to the court for costs reimbursement. If the court is satisfied that the costs reasonably incurred by the representative party are likely to exceed the costs recoverable from the defendant, the court may order that an amount equal to the whole or part of the excess be paid to that person out of the damages awarded to group members. In addition, under conditional fee agreements, the client will only be charged if a successful outcome is achieved. There are also litigation funding companies which pay the litigation costs for the representative party and accept the risk of paying the other party's costs if the case loses.

5.3.42 Under the GLO regime in the UK, common costs of litigation are shared equally among each litigant. There are conditional fee agreements under which the clients have to pay either no costs or reduced costs in a loss. Like Australia, there are also professional litigation funders to sponsor lawsuits and front the costs of the litigation in exchange for a share of the recovery if the suit is successful.

5.3.43 In Hong Kong, there is no special source of funding to facilitate a potential representative party to commence representative proceedings. The Consumer Legal Action Fund can assist consumers to bring in a representative action, but no such case has commenced so far.

[300] Wilkinson, Booth & Cheung (2005) p.224.

Fee agreements

5.3.44 The contingency fee agreement arrangement is a feature of the US class actions. An attorney is paid nothing if the case is lost, while a percentage of the damages recovered by the claimants would be paid if the case is successful. Contingency fee agreements are under the supervision of the court.

5.3.45 Australia adopts the class action system but not contingency fee agreements. Instead, there are conditional fee agreements, under which if a class action is successful, the plaintiff's lawyer can recover the normal fee or the normal fee plus a percentage on top of that fee to compensate for the risk of funding the litigation in the first place. At the same time, there are commercial litigation funders or promoters in Australia. Generally, under a fee agreement with a promoter, the promoter receives an agreed percentage of any monies that come to the claimant, while the lawyer hired by the promoter receives the normal fee. Both the conditional fee agreements and the agreements between the plaintiffs and the commercial litigation funders are not subject to court approval.

5.3.46 In the UK, contingency fee agreements are not allowed. However, like the situation in Australia, there are conditional fees and professional litigation funders. Under a conditional fee agreement, a lawyer receives larger fees in the event of a successful outcome. Meanwhile, litigation funders contract with plaintiffs to sponsor their lawsuits, agreeing to front the costs of the litigation in exchange for a share of the recovery if the plaintiffs prevail. These agreements are not subject to court approval.

5.3.47 In Hong Kong, lawyers are not allowed to charge clients fees depending on the outcome of the proceedings. In other words, contingency fees are banned. Nevertheless, a solicitor may make an agreement in writing with a client as to his or her remuneration, in respect of any contentious business done or to be done by the solicitor for the client, provided that the solicitor shall be remunerated either by a gross sum or by salary, or by other ways, and at either a greater or a less rate than what he or she would otherwise have been entitled to be remunerated.[301] These agreements are not subject to court approval.

[301] Section 58, *Legal Practitioners Ordinance*.

Appendix

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	**Hong Kong (current)**	**United States**	**Australia**	**United Kingdom**
Underlying legislation	Probably a self-contained order of the Rules of the High Court (RHC).	Order 15 rule 12, RHC.	Rule 23, Federal Rules of Civil Procedure (FRCP); United States Code (USC); *Class Action Fairness Act* (*CAFA*).	Part IVA, *Federal Court of Australia Act* (*FCA*).	Part 19 Section III, Civil Procedure Rules (CPR).
Commencement of proceedings					
Certification requirement	Yes.	No.	Yes.	No.	Yes.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Threshold requirements	(a) There are a minimum number of identifiable claimants; (b) the claim has legal merit; (c) there is sufficient commonality of interest and remedy among members of the class; (d) class action is the most appropriate legal vehicle to resolve the issues in dispute; and (e) the representative party should have the standing and ability to represent the class properly and adequately.	(a) Numerous people have the same interest in the proceedings; (b) all group members have a common interest; (c) all group members have a common grievance; (d) the relief is in its nature beneficial to all group members; and (e) the persons to be represented must be clearly identified.	(a) The class is so numerous that joinder of all group members is impracticable; (b) there are questions of law or fact common to the class; (c) the claims or defences of the representative parties are typical of the claims or defences of the class; and (d) the representative parties will fairly and adequately protect the interests of the class.	(a) Seven or more persons have claims against the same person; (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and (c) the claims of all those persons give rise to a substantial common issue of law or fact.	(a) The case involves a number of claims; (b) the claims must give rise to common or related issues of fact or law; (c) the action is consistent with the overriding objective of enabling the court to deal with cases justly; (d) it has the consent of the appropriate official; (e) consolidation of the claims or a representative proceeding would not be more appropriate; and (f) the group has to be defined by the number and nature of claims, and the number of parties involved.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Order of certification	Not specified.	Not applicable.	Certification order must define the class and the class claims, issues or defences, and must appoint class counsel.	Not applicable.	Group litigation order (GLO) must contain directions about the establishment of the group register, specify the GLO issues, and specify the management court.
Case management					
Status of group members	Class members are not parties to the proceeding.	The represented group members are not parties to the action.	The absent class member is a passive party, not physically present but represented before the court.	The group member is not a party to a class action.	Each litigant under GLO is a party to the litigation.
Opt-out or opt-in	Opt-out, but opt-in for parties from outside Hong Kong.	Not applicable.	Opt-out.	Opt-out.	Opt-in.
Delivery of opt-out notice	Not specified.	Not applicable.	Individual notice is preferable for those class members who can be identified through reasonable effort.	Notice is normally given by press advertisement, radio or television broadcast, or by other means.	Not applicable.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Opt-out procedure	Not specified.	Not applicable.	Class members may fill out an opt-out form or submit a written opt-out request by the deadline.	Group members may opt out by written notice given under the Rules of Court before the date which has been fixed by the court.	Not applicable.
Opt-in procedure	Not specified. To assist potential foreign parties to consider whether to join in class action proceedings commenced in Hong Kong, information on those proceedings should be publicised on a website.	Not applicable.	Not applicable.	Not applicable.	People have to choose affirmatively to litigate by entering their names on the group register. Each litigant must issue a claim form providing details of the case which gives rise to at least one of the GLO issues.
Representative party in litigation	Yes.	Yes.	Yes.	Yes.	No.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Whether organizations can commence a proceeding on behalf of their members	Not specified.	Not specified.	Yes, organizations which possess "representational standing" to bring in a suit can bring in a class action on behalf of their members.	Yes, based upon a specific statutory entitlement, some entities with a statutory standing to sue defendants for relief can institute class actions.	Not applicable.
Whether the court can substitute the representative party	Not specified.	Yes, change of the representative party may be made by a court order.	Yes, the court may permit intervention by a new representative or may simply designate that person as a representative.	Yes, on the application by a group member, the court may substitute another group member as the representative party.	Not applicable.
Whether divergent interests among group members are allowed	Yes, subclasses can be formed. In particular, foreign class members may be required to form their own subclass.	No, representative proceeding is not possible if there are divergent interests among group members.	Yes, a class may be divided into subclasses each of which is treated like a class.	Yes, subgroups can be created under such cases.	Yes, each class member's claim is pleaded individually, so that the court can consider individual divergences.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Trial and judgment					
Managing individual issues	Not specified.	It is very rare that separate trials would be ordered for individual issues.	Not specified. Trial of individual issues is at the behest of judicial creativity.	The court may give directions in relation to the determination of individual issues.	Common issues and test claims will normally be tried at the management court while individual issues may be tried at other courts whose locality is convenient for the parties concerned.
Binding effect of the judgment	Class members as defined in the court order would be automatically bound by the litigation, unless they have opted out.	The judgment given in a representative proceeding shall be binding on all the represented persons, but the affected persons may be exempted from such liability on particular grounds.	The judgment in a class action will be binding on all class members of action certified under Rule 23(b)(1) and (b)(2), and all class members of action certified under Rule 23(b)(3) who have not requested exclusion.	Group members are bound by the outcome of the class action unless they have opted out of the proceeding.	The judgment is binding on the parties to all claims that are on the group register at the time the judgment is given unless the court orders otherwise.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Settlement					
Whether settlements are subject to judicial approval	Not specified.	No.	Yes.	Yes.	No.
Requirements for settlement	Not specified.	Not applicable.	Basic principles are fair, reasonable and adequate: (a) settlements cannot constitute a net financial loss to any individual class member, unless the non-monetary benefits to the class member substantially outweigh the monetary loss; and (b) the court may not approve settlements that accord extra monies to class members who are located in closer geographic proximity to the court.	Not specified. The court will normally take into account: (a) the amount offered to each group member; (b) the prospects of success in the proceeding; (c) the likelihood of obtaining judgment for an amount significantly in excess of the settlement offer; (d) the terms of any advice received from counsel and independent expert; (e) the likely duration and cost of the proceeding if continued to judgment; and (f) the attitude of group members to the settlement.	Not applicable.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Procedure	Not specified.	Not applicable.	The parties seeking approval must file a statement identifying any agreement made in connection with the proposal, and all class members should be notified.	Application for approval is made once an agreement has been reached. All group members should be notified before the court will consider the application.	Not applicable.
Assessment and distribution of monetary relief					
Assessment of aggregate damages	Not specified.	Not specified.	Not specified, but aggregate judgments have been widely used in antitrust and securities class actions.	The court may make an award of damages consisting of specified amounts, or in an aggregate amount without specifying amounts awarded in respect of individual group members.	Not specified.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Distribution of monetary relief	Not specified.	Not applicable.	(a) In cases where the names of class members and their entitlements could be assessed on the basis of the defendant's records, the damages awarded may be distributed by the defendant directly to class members. (b) In cases where the defendant does not have the relevant information or resources, the defendant may be required to pay the money into a court fund or other repository.	The court may provide for the constitution and administration of a fund consisting of the money to be distributed such that the costs of administering the fund are to be borne by the fund or by the defendant as the court directs.	Not applicable.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Undistributed or unclaimed fund	Not specified.	Not applicable.	(a) Reversion to the defendant has been approved in some cases. (b) A portion of the value of unclaimed coupons may be distributed to charitable or governmental organizations.	Reversion to the defendant has been statutorily mandated as the first preference.	Not applicable.
Costs and funding					
Costs immunity for group members	Yes, class members enjoy unilateral costs immunity.	Yes, represented parties are not liable for costs. However, the court has jurisdiction to order in anticipation that costs will be borne by all group members.	Yes, absent class members are not liable for costs of litigation in the event of an adverse judgment.	Yes, group members are immune from an adverse costs order.	No, common costs are shared equally among group litigants whose claims are entered on the group register.
Availability of contingency fee agreements	No.	No.	Yes.	No.	No.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Source of funding	(a) Extension of the ordinary legal aid and supplementary legal aid schemes; (b) establishment of a general class actions fund in the long term; (c) enhancement of the Consumer Legal Action Fund to cover class action proceedings in consumer claims; and (d) private litigation funding companies being an option.	There is no special source of funding to facilitate the commencement of representative proceedings. The Consumer Legal Action Fund can assist consumers to bring in a representative action, but no such case has commenced so far.	(a) The "common fund doctrine" shifting the financial burden of class actions to class members, and the lawyers being reimbursed from the pool of compensation recovered from the lawsuit; and (b) contingency fee agreements transferring the financial risk from the class representative to the class attorneys in the event of losing suits.	(a) The representative party applying to the court for costs reimbursement; (b) conditional fee agreements under which the client will only be charged if a successful outcome is achieved; and (c) litigation funding companies paying the litigation costs and accepting the risk of paying the other party's costs if the case loses.	(a) Conditional fee agreements under which the clients have to pay either no costs or reduced costs in a loss; and (b) professional litigation funders sponsoring lawsuits and fronting the costs of the litigation in exchange for a share of the recovery if the suit is successful.

Appendix (cont'd)

Key features of multi-party litigation schemes in the selected places and Hong Kong

	Hong Kong (proposed)	Hong Kong (current)	United States	Australia	United Kingdom
Remuneration mechanism	Not specified.	The solicitor shall be remunerated either by a gross sum or by salary, or by other ways, and at either a greater or a less rate than that at which he or she would otherwise have been entitled to be remunerated.	Under a contingency fee agreement, an attorney is paid nothing if the case is lost, while a percentage of the damages recovered by the claimants would be paid if the case is successful.	(a) Under a conditional uplift fee agreement, a lawyer recovers the normal fee plus a "success uplift" which is usually expressed as a percentage of the normal fee. (b) Under a fee agreement with a litigation funder, the funder receives an agreed percentage of any monies that come to the claimant, while the lawyer hired by the funder receives the normal fee.	(a) Under a conditional fee agreement, a lawyer receives nothing if the case is lost, but larger fee will be paid in the event of a successful outcome. (b) Litigation funders contract with plaintiffs to sponsor their lawsuits, agreeing to front the costs of the litigation in exchange for a share of the recovery if the plaintiffs prevail.
Requirement of court approval for fee agreements	Not specified.	No.	Yes.	No.	No.

References

United States

1. Bassett, D.L. (2006) Constructing class action reality. *Brigham Young University Law Review*, 6, pp.1415-1468.

2. Beisner, J.H. & Borden, C.E. (2006) *On the Road to Litigation Abuse: The Continuing Export of U.S. Class Action and Antitrust Law*. Available from: http://www.instituteforlegalreform.org/get_ilr_doc.php?docId=1061 [Assessed December 2008].

3. Biderman, D.T. & Ballinger, R.S. (2007) Class actions after CAFA: A movement to the federal courts. *The Brief*, 36, 4, pp.52-57.

4. *ClassActionBlawg.com*. (2009) Available from: http://classactionblawg.com/ [Assessed February 2009].

5. *Class Action Fairness Act of 2005*. Available from: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ002.109 [Assessed November 2008].

6. *Class Action World*. (2009) Available from: http://classactionworld.com/ [Assessed February 2009].

7. Cooper, E.H. (2002) Federal class action reform in the United States: Past and future and where next? *Defense Counsel Journal*, 69, 4, pp.432-440.

8. Copland, J.R. (2004) *Class Actions*. Available from: http://www.pointoflaw.com/classactions/overview.php [Assessed December 2008].

9. Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse. (2009) *Securities Class Action Filings – 2008: A Year in Review*. Available from: http://securities.stanford.edu/clearinghouse_research/2008_YIR/20090106_YIR08_Full_Report.pdf [Assessed March 2009].

10. Dickerson, T.A. & Mechmann, B.V. (2000) Consumer class actions and coupon settlements: Are consumers being shortchanged? *Advancing the Consumer Interest*, 12, 2, pp.6-10.

11. Epstein, R.A. (2002) *Class Actions: The Need for a Hard Second Look*. Available from: http://www.manhattan-institute.org/html/cjr_4.htm [Assessed December 2008].

12. *Federal Rules of Civil Procedure*. Available from: http://www.uscourts.gov/rules/CV2008.pdf [Accessed November 2008].

13. Greve, M.S. (2005) *Harm-Less Lawsuits? What's Wrong with Consumer Class Actions*. Available from: http://www.aei.org/docLib/20050404_book814text.pdf [Assessed December 2008].

14. Hawke, F.G. (1998) Class actions: the negative view. *Torts Law Journal*, 7, 6, pp.1-46.

15. Henrichsen, P.A. (1999) *Class Action Suits for Recent Law School Graduates*. Available from: http://www.uiowa.edu/~cyberlaw/elp99/henrichp.html [Assessed February 2009].

16. Institute for Legal Reform. (2008) *Class Action Toolkit*. Available from: http://www.instituteforlegalreform.com/images/stories/documents/pdf/ClassActionToolkit.pdf [Assessed January 2009].

17. *Institute for Legal Reform*. (2009) Available from: http://www.instituteforlegalreform.com/index.php [Assessed January 2009].

18. Karlsgodt, P. (2009) *Securities Class Action Trends in the US and Australia*. Available from: http://classactionblawg.com/2009/01/05/securities-class-action-trends-in-the-us-and-australia/ [Assessed February 2009].

19. L'Heureux, N. (1992) Effective consumer access to justice: Class actions. *Journal of Consumer Policy*, 15, 4, pp.445-462.

20. *Manual for Complex Litigation (Fourth Edition)*. Available from: http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf [Assessed January 2009].

21. Moorhead, R. & Hurst, P. (2008) *Contingency Fees – A Study of their Operation in the United States of America*. A research paper informing the Review of Costs. Available from: http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf [Assessed December 2008].

22. Morabito, V. (2003a) Judicial supervision of individual settlements with class members in Australia, Canada, and the United States. *Texas International Law Journal*, 38, 4, pp.663-727.

23. Morabito, V. (2003b) Standing to sue and multiple defendant class actions in Australia, Canada, and the United States. *Alberta Law Review*, September, pp.295-333.

24. Mulheron, R. (2004) *The Class Action in Common Law Legal Systems: A Comparative Perspective*. Oxford: Hart Publishing.

25. Pengilley, W. (1993) The United States Class Action Airlines settlement: Some possible lessons for class actions and antitrust in Australia? *Competition and Consumer Law Journal*, October, pp.1-26.

26. *Private Securities Litigation Reform Act of 1995*. Available from: http://www.lectlaw.com/files/stf04.htm [Assessed February 2009].

27. Roedder, W. C. (2006) An introduction to the Class Action Fairness Act of 2005. *Federation of Defense and Corporate Counsel Quarterly*, 56, 4, pp.443-463.

28. Rubenstein, W. B. (2005) *Understanding the Class Action Fairness Act of 2005*. Available from: http://www.classactionprofessor.com/cafa-analysis.pdf [Assessed December 2008].

29. *Securities Litigation Uniform Standards Act of 1998*. Available from: http://securities.stanford.edu/research/reports/19981001slusa.html [Assessed February 2009].

30. Seiger, M.B. & Healy, C.W. (2006) Class action reform: Will perception become reality. *Risk Management Magazine*, February, pp.16-21.

31. *Stanford Law School Securities Class Action Clearinghouse*. (2009) Available from: http://securities.stanford.edu/index.html [Assessed March 2009].

32. The Administrative Office of the United States Courts. (2004) *Annual Reports on the Judicial Business of the United States Courts 2004*. Available from: http://www.uscourts.gov/judbus2004/contents.html [Assessed March 2009].

33. The Committee on Capital Markets Regulation. (2006) *Interim Report of the Committee on Capital Markets Regulation*. Available from: http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf [Assessed March 2009].

34. The Federalist Society for Law and Public Policy Studies. (2009) *Class Action Watch*. Available from: http://www.fed-soc.org/publications/id.163/default.asp [Assessed March 2009].

35. *United States Code*. Available from: http://uscode.house.gov/lawrevisioncounsel.shtml [Assessed November 2008].

36. *United States Department of Justice*. (2009) Available from: http://www.usdoj.gov/ [Assessed February 2009].

37. US Chamber Institute for Legal Reform. (2008a) *Securities Class Action Litigation: The Problem, its Impact, and the Path to Reform*. Available from: http://www.instituteforlegalreform.com/get_ilr_doc.php?docId=1213 [Assessed December 2008].

38. US Chamber Institute for Legal Reform. (2008b) *Securities Class Action Litigation Reform (White Paper)*. Available from: http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1071 [Assessed December 2008].

39. *US Courts*. (2009) Available from: http://www.uscourts.gov/ [Assessed March 2009].

40. Vairo, G.M. (2005) *Class Action Fairness Act of 2005*. Newark, NJ: LexisNexis.

Australia

41. *Australian Government Attorney-General's Department*. (2009) Available from: http://www.ag.gov.au/ [Assessed January 2009].

42. Australian Law Reform Commission. (1988) *Grouped Proceedings in the Federal Court*. Available from: http://www.austlii.edu.au/au/other/alrc/publications/reports/46/46.pdf [Assessed January 2009].

43. Australian Law Reform Commission. (1999) *Managing Justice: A Review of the Federal Civil Justice System*. Available from: http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ [Assessed March 2009].

44. *Australian Law Reform Commission*. (2009) Available from: http://www.alrc.gov.au/publications/index.htm [Assessed January 2009].

45. Australian Securities Exchange. (2007) *2006 Australian Share Ownership Study*. Available from: http://www.asx.com.au/about/pdf/shareownership_study_2006.pdf [Assessed February 2009].

46. Bednall, T. (2006) *The Gathering Momentum of Shareholder Class Actions*. Available from: http://www.mallesons.com/publications/2006/Apr/8424923w.htm [Assessed February 2009].

47. Black, A. & Harris, K. (2006) *Corporate Class Actions in Australia*. Available from: http://www.mallesons.com/publications/2006/Jun/8472865W.htm [Assessed February 2009].

48. Cameron, J. (2006) *High Court gives litigation funders the green light: Campbells Cash and Carry Pty Limited v Fostif Pty Limited*. Available from: http://www.mallesons.com/publications/2006/Aug/8585921w.htm [Assessed March 2009].

49. Clark, S. (2000) Learning form Australia's CFA lessons. *The Lawyer*, 31 July 2000.

50. Clark, S.S. (2007) Thinking locally, suing globally: The international frontiers of mass tort litigation in Australia. *Defense Counsel Journal*, 74, 2, pp.139-152.

51. Clark, S.S. & Harris, C. (2001) Class actions down under and how they grew. *Defense Counsel Journal*, 68, 1, pp.115-119.

52. Clark, S.S. & Harris, C. (2008) Class actions in Australia: (Still) a work in progress. *Australian Bar Review*, July, pp.1-96.

53. *ClassActionBlawg.com*. (2009) Available from: http://classactionblawg.com/ [Assessed February 2009].

54. *Class Action Bulletin July 2008*. Available from http://www.mallesons.com/publications/update-combine.cfm?id=1414302 [Assessed February 2009].

55. *Federal Court of Australia Act of 1976*. Available from: http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/ [Assessed November 2008].

56. Ferguson, A. (2009) Shareholder class actions have tripled. *The Australian*, 2 January 2009. Available from: http://www.theaustralian.news.com.au/business/story/0,28124,24862994-643,00.html [Assessed February 2009].

57. Grave, D. & Adams, K. (2005) *Class Actions in Australia*. Sydney: Lawbook Co.

58. Hawke, F. G. (1998) Class actions: the negative view. *Torts Law Journal*, 7, 6, pp.1-46.

59. *High Court Gives Litigation Funders the Green Light: Campbells Cash and Carry Pty Limited v Fostif Pty Limited*. Available from: http://www.mallesons.com/publications/2006/Aug/8585921w.htm [Assessed February 2009].

60. *IMF (Australia) Ltd.* (2009) Available from: http://www.imf.com.au [Assessed February 2009].

61. Karlsgodt, P. (2008) *Climate Change and Class Actions*. Available from: http://classactionblawg.com/2008/09/22/climate-change-and-class-actions/ [Assessed February 2009].

62. Karlsgodt, P. (2009) *Securities Class Action Trends in the US and Australia*. Available from: http://classactionblawg.com/2009/01/05/securities-class-action-trends-in-the-us-and-australia/ [Assessed February 2009].

63. Kavanagh, J. (2009) Investors strike back. *The Sydney Morning Herald*, 4 March 2009. Available from: http://www.smh.com.au/news/business/money/investment/investors-strike-back/2009/03/02/1235842325883.html?page=3 [Assessed March 2009].

64. Law Council of Australia. (2006) *Litigation Funding*. Available from: http://www.quantumlitigation.com.au/files/Law%20Council%20Submissions.pdf [Assessed April 2009].

65. Lynch, P. (1994) Representative actions in the Federal Court of Australia. *Australian Bar Review*, August, pp.1-28.

66. Madafiglio, P. (2007) *Australian Class Action Law*. Available from: http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Newsletters/Previous+Newsletters/A-Australian+class+action+law [Assessed February 2009].

67. Moorhead, R. & Hurst, P. (2008) *Contingency Fees – A Study of their Operation in the United States of America*. A research paper informing the Review of Costs. Available from: http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf [Assessed December 2008].

68. Morabito, V. (2001) Ideological plaintiffs and class actions – An Australian perspective. *The University of British Columbia Law Review*, 34, pp.459-514.

69. Morabito, V. (2003a) Judicial supervision of individual settlements with class members in Australia, Canada, and the United States. *Texas International Law Journal*, 38, 4, pp.663-727.

70. Morabito, V. (2003b) Standing to sue and multiple defendant class actions in Australia, Canada, and the United States. *Alberta Law Review*, September, pp.295-333.

71. Morabito, V. (2004) The Federal Court of Australia's power to terminate properly instituted class actions. *Osgoode Hall Law Journal*, 42, pp.473-513.

72. Morabito, V. (2005) Contingency fee agreements with represented persons in class actions – An undesirable Australian phenomenon. *Common Law World Review*, 34, 3.

73. Morabito, V. (2007) Class actions instituted only for the benefits of the clients of the class representative's solicitors. *The Sydney Law Review*, March, pp.5-41.

74. Mulheron, R. (2004) *The Class Action in Common Law Legal Systems: A Comparative Perspective*. Oxford: Hart Publishing.

75. Murphy, B. & Cameron, C. (2006) Access to justice and the evolution of class action litigation in Australia. *Melbourne University Law Review*, 30, 2, pp.399-440.

76. Pengilley, W. (1993) The United States Class Action Airlines settlement: Some possible lessons for class actions and antitrust in Australia? *Competition and Consumer Law Journal*, October, pp.1-26.

77. Slade, B. & Tang, J. (2005) *Class Actions for Consumers and Investors*. Available from: http://www.piac.asn.au/publications/pubs/Ben%20Slade%20&%20Juliana%20Tang-Class%20Actions%20for%20Consumers%20and%20Investors.pdf [Assessed March 2009].

78. Standing Committee of Attorneys-General. (2006) *Litigation Funding in Australia*. Available from: http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Litigation_Funding_May_2006.doc/$file/Litigation_Funding_May_2006.doc [Assessed April 2009].

79. Standing Committee of Attorneys-General. (2008) *SCAG Summary of Decisions – March 2008*. Available from: http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Summary_of_Decisions_March_08.doc/$file/SCAG_Summary_of_Decisions_March_08.doc [Assessed April 2009].

80. *Standing Committee of Attorneys-General*. (2009) Available from: http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/pages/scag_index [Assessed April 2009].

United Kingdom

81. Beisner, J.H. & Borden, C.E. (2006) *On the Road to Litigation Abuse: The Continuing Export of U.S. Class Action and Antitrust Law*. Available from: http://www.instituteforlegalreform.com/pdfs/beisner.pdf [Assessed December 2008].

82. *CFAs: Society Intervenes in case to Guarantee Flexibility*. Available from: http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=384406 [Assessed April 2009].

83. Civil Justice Council. (2005) *Access to Justice – Funding Options and Proportionate Costs*. Report and Recommendations. Available from: http://www.costsdebate.civiljusticecouncil.gov.uk/updocs/client12/Improved%20Access%20to%20Justice%20pdf.pdf [Assessed January 2009].

84. Civil Justice Council. (2006) *Civil Justice Council Annual Report 2005*. Available from: http://www.civiljusticecouncil.gov.uk/files/civil_justice_council_annual_report_2005_web.pdf.pdf [Assessed February 2009].

85. Civil Justice Council. (2007a) *The Future Funding of Litigation – Alternative Funding Structures*. A Series of Recommendations to the Lord Chancellor to Improve Access to Justice through the Development of Improved Funding Structures. Available from: http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf [Assessed December 2008].

86. Civil Justice Council. (2007b) *Civil Justice Council Annual Report 2006*. Available from: http://www.civiljusticecouncil.gov.uk/files/cjc_annual_report_2006web.pdf [Assessed February 2009].

87. Civil Justice Council. (2008a) *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions*. Final report. Available from: http://www.civiljusticecouncil.gov.uk/files/Improving_Access__to_Justice_through_Collective_Actions.pdf [Assessed February 2009].

88. Civil Justice Council. (2008b) *Civil Justice Council Publishes Final Recommendations to Improve Access to Justice for Consumers and Small Businesses in Collective Claims*. Press notice, 12 December 2008. Available from: http://www.civiljusticecouncil.gov.uk/files/Press_release.pdf [Assessed February 2009].

89. Civil Justice Council. (2008c) *Civil Justice Council Annual Report 2007*. Available from: http://www.civiljusticecouncil.gov.uk/files/cjc-AR2007-web.pdf [Assessed February 2009].

90. *Civil Justice Council*. (2009) Available from: http://www.civiljusticecouncil.gov.uk [Assessed February 2009].

91. Clark, S. (2000) Learning form Australia's CFA lessons. *The Lawyer*, 31 July 2000.

92. *Civil Procedure Rules, Part 19*. Available from: http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm [Assessed December 2008].

93. *ClassActionBlawg.com*. (2009) Available from: http://classactionblawg.com/ [Assessed February 2009].

94. *Conditional Fee Agreements Order 2000*. Available from: http://www.opsi.gov.uk/si/si2000/uksi_20000823_en.pdf [Assessed March 2009].

95. *Conditional Fee Agreements (Revocation) Regulations 2005*. Available from: http://www.opsi.gov.uk/si/em2005/uksiem_20052305_en.pdf [Assessed April 2009].

96. David Greene: 'Class actions allow people access to the courts'. *Times Online*, 1 December 2008. Available from: http://business.timesonline.co.uk/tol/business/law/article5266410.ece [Assessed January 2009].

97. Delaney, J. (2008) Class actions: Collective thinking. *The Lawyer*, 19 May 2008.

98. Dowell, K. (2009) *Do Believe the Hype: Litigation Funders Remain Committed to UK*. Available from: http://www.thelawyer.com/do-believe-the-hype-litigation-funders-remain-committed-to-uk-possibilities/137142.article [Assessed April 2009].

99. Grave, D. & Adams, K. (2005) *Class Actions in Australia*. Sydney: Lawbook Co.

100. *Her Majesty's Court Services*. (2009) Available from: http://www.hmcourts-service.gov.uk [Assessed February 2009].

101. Karlsgodt, P. (2008) *Will UK Damages Ruling Put a Damper on Collective Action Reform*? Available from: http://classactionblawg.com/2008/10/16/will-uk-damages-ruling-put-a-damper-on-collective-action-reform/ [Assessed November 2008].

102. Kean, F. & McLauchlan, R. (2007) *United Kingdom: Litigation Funding: A Growth Industry*. Available from: http://www.mondaq.com/article.asp?articleid=49426 [Assessed April 2009].

103. Kemal-Brooke, A. (2009) *Group litigation in the United Kingdom*. Available from: http://www.securitiesdocket.com/2009/02/05/guest-column-group-litigation-in-the-united-kingdom/ [Assessed February 2009].

104. Litigation Funding – Regulation? *HBMSayers*. 16 May 2008. Available from: http://www.hbmsayers.com/news_events_details.aspx?n_id=126 [Assessed April 2009].

105. Lord Woolf. (1995) *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Available from: http://www.dca.gov.uk/civil/interim/woolf.htm [Assessed April 2009].

106. Lord Woolf. (1996) *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Available from: http://www.dca.gov.uk/civil/final/index.htm [Assessed April 2009].

107. Mildred, M. (2007) Group actions. *The Law of Product Liability*. Second edition. London: LexisNexis Butterworths.

108. *Ministry of Justice*. (2009) Available from: http://www.justice.gov.uk/ [Assessed January 2009].

109. Mulheron, R. (2004) *The Class Action in Common Law Legal Systems: A Comparative Perspective*. Oxford: Hart Publishing.

110. Mulheron, R. (2008a) *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. Available from: http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf [Assessed December 2008].

111. Mulheron, R. (2008b) Reform of collective redress in England and Wales: A perspective of need. *Liability, Risk and Insurance*, 1 May 2008.

112. *Practice Direction – Group Litigation*. Practice Direction 19B. Available from: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part19b.htm [Assessed December 2008].

113. Robins, J (2008) Group Litigation: The Coming of Class Actions? *The Law Gazette*. 9 December 2008. Available from: http://www.lawgazette.co.uk/features/group-litigation-coming-class-actions [Assessed February 2009].

114. Rose, N. (2008a) CJC Makes Class Actions Call. *The Law Gazette*. 3 July 2008. Available from: http://www.lawgazette.co.uk/news/cjc-makes-class-actions-call [Assessed February 2009].

115. Rose, N. (2008b) Class Actions will Make Claims Easier. *The Law Gazette*. 21 February 2008. Available from: http://www.lawgazette.co.uk/news/class-actions-will-make-claims-easier [Assessed February 2009].

116. Rose, N. (2008c) European Commission Rejects Opt-Out Class Actions. *The Law Gazette*. 10 April 2008. Available from: http://www.lawgazette.co.uk/news/european-commission-rejects-opt-out-class-actions [Assessed February 2009].

117. Rose, N. (2008d) Third-party Regulation Move. *The Law Gazette*. 8 May 2008. Available from: http://www.lawgazette.co.uk/news/third-party-regulation-move [Assessed April 2009].

118. Rose, N. (2008e) US-Style Class Actions Recommended for UK. *The Law Gazette*. 7 February 2008. Available from: http://www.lawgazette.co.uk/news/us-style-class-actions-recommended-uk [Assessed February 2009].

119. Smith, V. (2007) Litigation and ADR: Plan of actions. *The Lawyer*, 23 July2007.

120. The Law Society (2008) *Payment by results. Practice Advice Service Booklet*. Available from: http://www.lawsociety.org.uk/secure/file/178168/e:/teamsite-deployed/documents/templatedata/Publications/Practice%20advice%20service%20booklets/Documents/paymentsbyresultsbooklet.pdf [Assessed April 2009].

121. *The Law Society*. (2009) Available from: http://www.lawsociety.org.uk/home.law [Assessed April 2009].

122. Utecht, S. (2008) *US-Style Class Action System Needed*. Available from: http://www.professionalpensions.com/811895 [Assessed February 2009].

Hong Kong

123. Cameron, C. & Kelly, E. (2008) *Principles and Practice of Civil Procedure in Hong Kong*. Second edition. Hong Kong: Sweet & Mexwell Asia.

124. Chief Justice's Working Party on Civil Justice Reform. (2001) *Civil Justice Reform – Interim Report and Consultation Paper*. Available from: http://www.civiljustice.gov.hk/cjr/download.jsp?FN=ir/documents/FullReport.pdf [Assessed December 2008].

125. Chief Justice's Working Party on Civil Justice Reform. (2004) *Civil Justice Reform – Final Report*. Available from: http://www.civiljustice.gov.hk/cjr/download.jsp?FN=fr/documents/cjr_final_report.pdf [Assessed December 2008].

126. *Civil Justice Reform*. (2009) Available from: http://www.civiljustice.gov.hk/ [Assessed January 2009].

127. *Hong Kong Civil Jurisdiction Handbook*. (2008) Hong Kong: Sweet & Mexwell Asia.

128. *Hong Kong Judiciary*. (2009) Available from: http://www.judiciary.gov.hk/en/index/index.htm [Assessed January 2009].

129. *Hong Kong Law Society*. (2009) Available from: http://www.hklawsoc.org.hk/pub_e/default.asp [Assessed February 2009].

130. *Legal Practitioners Ordinance*. Available from: http://www.hklii.org/hk/legis/en/ord/159/ [Assessed February 2009].

131. Legislative Council Secretariat (2002) *Representative Proceedings*. Judiciary's paper on "Implications of the Court of Final Appeal judgement in the cases of Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan on litigation involving a large number of parties" on 25 February 2002. LC Paper No. CB(2)1192/01-02(01).

132. *The Law Reform Commission of Hong Kong*. (2009) Available from: http://www.hkreform.gov.hk/en/index/index.htm [Assessed March 2009].

133. The Law Reform Commission of Hong Kong Class Actions Sub-committee. (2009) *Class Actions*. Consultation Paper. Available from: http://www.hkreform.gov.hk/en/docs/classactions_e.pdf [Assessed November 2009].

134. *The Rules of the High Court, Order 15*. Available from: http://www.hklii.org/hk/legis/reg/4A/s15.html [Assessed January 2009].

135. Wilkinson, M., Booth, C.N. & Cheung, E.T.M. (2005) *The Student Guide to Civil Procedure in Hong Kong*. Second edition. Hong Kong: LexisNexis.