Collective Redress in Europe – Why and How?

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International and
Comparative Law

Published and Distributed by
The British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

British Library Cataloguing in Publication Data
A Catalogue record of this book is available from the British Library

ISBN 978-1-905221-56-1

This publication has been produced with the financial support of the Civil Justice Programme of the European Union. The contents of this publication are the sole responsibility of their authors and can in no way be taken to reflect the views of the European Commission.

Typeset by Cambrian Typesetters
Camberley, Surrey
Printed in Great Britain by Polestar Wheatons Ltd
Cover design by Ian Wileman

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Foreword

*Astrid Stadler**

I. THE BACKGROUND TO THIS BOOK

In 2012, the British Institute of International and Comparative Law (BIICL) was awarded a grant by the European Commission to conduct a study on collective redress mechanisms in different EU Member States. The European Network on Collective Redress which was established as a result involves academics, practitioners, policy-makers, litigation funders and consumers, and it has contributed to cross-national comparisons from many perspectives. This book results from the cooperation in this network, particularly from series of seminars and conferences. When the BIICL project started in 2012, some very interesting collective redress reform projects had already been implemented in national law, such as the Dutch Collective Mass Settlement Act (WCAM 2005) or group litigation proceedings in the Nordic countries, but a considerable number of Member States were waiting for a European harmonized instrument on collective redress. Meanwhile, collective redress has become very fashionable in academic literature and has been a highly topical subject for international conferences. Despite the attention the topic received in academia and among lawyers engaged in mass disputes, the story of collective redress in Europe is a "story of missed opportunities and small steps forward."[1]

After many years of intensive debate, the Commission's Recommendation of 2013[2] was anything but path-breaking. Apart from its main deficiency that it is only non-binding soft law[3] it suffers primarily from two shortcomings:

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[1] V Harsági and CH van Rhee in V Harsági and CH van Rhee (eds) *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia, 2014) XIX.

[2] Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), OJ L 201/60, 26 July 2013.

[3] The Recommendation is based on art 292 TFEU. The Recommendation does not even include an obligation of the Member States to report on their efforts to comply with the Recommendation. Member States must only provide statistical data on the number of proceedings conducted within a specified period (Recommendation points 38–41).

(1) The idea of private enforcement originally adopted from the US class action system has spread from DG Competition's Green and White Papers[4] on competition law in 2005 and 2008 to consumer law in 2008[5] and finally resulted in the all-embracing horizontal approach taken by the Commission's Recommendation. The intention of creating a gapless system of remedies for all violations of European law which includes individuals, representative entities or public bodies as potential group representatives is too ambitious an approach.[6] This book therefore tries to illuminate collective redress from different angles in order to illustrate the peculiarities of competition cases[7], product liability or environmental pollution cases[8].

(2) By contrast to its wide scope of application, the procedural framework provided by the Recommendation seems too cautious. The Commission tried to steer a middle course between a better access to justice and the advantages of bundling many similar claims into a single court action on the one hand and safeguards against a potential misuse on the other, as have often been described in the context of US class actions. The concern to avoid harm to businesses due to abusive litigation had a strong influence on many parts of the Recommendation and it has therefore also been described as "a mix of a 'wish list' or demands of a lobby".[9]

II. SOME OBSERVATIONS ON THE IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATION

A. Mixed Reception in the Member States

Two years after the Recommendation was published there is definitively no wave of collective redress reform sweeping across the European Union (EU). Some Member States will ignore the Commission's proposals more or less completely, others are at best willing to implement instruments of collective redress with a limited scope of application and as a kind of pilot project. The contributions in Part II of this book describe some of the new models developing in Europe and existing prototypes elsewhere (Australia, Israel). In 2014, France and Belgium after long and controversial debates enacted new representative actions which picked only part of the 'common principles'. The

[4] COM (2005) 672 (19 February 2005) and COM (2008) 165 (2 April 2008).

[5] COM (2008) 794 (27 November 2008).

[6] For a similar critical review see M Dawson and E Muir, 'One for All and All for One? The Collective Enforcement of EU Law – Guest Editorial' 41 *Legal Issues of Economic Integration* 3 (2014) 215–224 at 216.

[7] M Clough, 357–384 and M Danov, 337–356.

[8] E Rajnieri and C Poncibò, 295–326 and R Vale e Reis, 385–396.

[9] I Tzankova, 'Case management: the stepchild of mass claim dispute resolution' 19 *Uniform L Rev* (2014) 329–250 at 332.

new French representative action[10] can be brought only by long-standing consumer associations, not by private individuals. Its scope of application is restricted to consumer sales and service contracts, and follow-on damages claims in competition law. Consistent with the Recommendation's default rule in point 21, the French collective instrument is based on an opt-in mechanism. Belgium,[11] by contrast, decided to leave it to the court seized to decide whether an opt-in or opt-out scheme would be more appropriate for the particular proceedings (*système d'option d'inclusion ou d'exclusion*). This rejects the Commission's approach of opt-in proceedings, but it may come under the Recommendation's exception clause in point 21. Like the French counterpart, Belgium group action proceedings can also be instituted only by an 'ideological plaintiff'[12] such as an officially accepted consumer association. The scope of application of the new rules is, however, much broader, as Article XVII.37 of the Belgian *Code de droit economique* refers to the violation of rights provided for in eight books of the Code and another 30 legal provisions and regulations.

The British Ministry of Business, Innovation and Skills (BIS) has also published plans to implement a representative collective action before the Competition Appeal Tribunal (CAT) for follow-on and stand-alone damages actions in competition law.[13] They are critically assessed by Rachael Mulheron in this book.[14] As in Belgium, the mechanism of how to constitute the plaintiff's class can be either opt-in or opt-out, depending on a case-by-case decision of the CAT.[15] The proposal is furthermore in line with the Recommendation regarding a 'preliminary merits test' and an explicit ban of punitive damages and contingency fees, but it absolutely favours conditional fees[16] and after-the-event-insurance thus ignoring the Commission's skepticism of third party funding.

[10] Book 4, title II, Chapter III Code de la consommation: 'action de groupe'. The text is available at http://www.assemblee-nationale.fr/14/ta/ta0295.asp. For details see F Ferrand, 'Collective litigation in France: from distrust to cautious admission' in Harsági and van Rhee (above n 1) 127–152 and R Mulheron in this book 97–116.

[11] L'action en réparation collective, Code de droit économique (titre 2, livre XVII, art XVII.35 – XVII.69), for details see the contribution of JT Nowak in this book, 169–202 and S Voet, 'European Collective Redress: A Status of Quaestionis' 4 *Int J of Procedural Law* (2014) 97.

[12] S Voet, 'Een Belgische vertegenwoordigende collectieve rechtsvordering: vier bouwstenen voor een Belgische class action', 18 *RW* (2012-13) 682, at 689; DOC 53 3300/001, 25.

[13] http://www.biicl.org/files/6310_10_12_2012_urn_13_501_front_and_back_covers_22-jan-13_private_actions_in_competition_law_a_consultation_on_options_for_reform_government_~_response_pdf.

[14] See 97–116.

[15] Government response (above n 13) 31 sub 5.15.

[16] For details on conditional fee arrangement (CFA), C Hodges, in C Hodges and A Stadler (eds.) *Resolving Mass Disputes – ADR and Settlement of Mass claims* (Edward Elgar, 2013) 106 et seq, at 121 et seq.

Even the Dutch Ministry of Justice has plans to further improve the collective redress situation in the Netherlands. At present, representative entities have only limited standing to bring court actions and cannot sue for damages on behalf of absent claimants. In July 2014, the Ministry published a consultation on a draft of collective damages actions (Article 1018b-1018j of the Dutch Civil Procedure Code – a new horizontal instrument which will cover all kinds of mass disputes.[17] The new rules set forth a potential preliminary stage of the WCAM proceedings, but they primarily allow the achievement of a compensation scheme with the help of the judge ('damage scheduling').[18] By contrast to the Recommendation, the primary objective of the new proceedings is not a court decision on individual damages, but either an amicable solution achieved by the parties themselves or a court-suggested compensation scheme. Depending on the way litigation develops, absent claimants can join the settlement either by opt-in or opt-out.

Looking at recent developments at the national level therefore gives the impression that even those Member States which are open-minded to reform are designing new instruments more or less independently of the Recommendation's ideas. However unsurprisingly, one can also put it the other way around: as the common principles laid out in the Recommendation are sometimes vague and allow exceptions to a considerable extent (see for example point 21 on the opt-in and opt-out mechanism) there is enough leeway for Member States to argue that their new instruments are coherent with the Recommendation's principles.[19]

B. Economic Theory of Group Litigation

One of the positive effects which the intensive debate on collective redress has produced is a closer cooperation of legal academics and economists which still cannot be found in many fields of law. Economic analysis of collective redress has a long tradition in the US,[20] but is only gradually being accepted in Europe. Insight from economic analysis and behavioural science has proven very helpful in understanding the dynamics within a group of individuals, the potential risks involved in principal-agent relations or litigation and settlement strategies in collective proceedings. It also highlights problems inherent to a

[17] Consultatieversie Juli 2014, Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (http://www.internetconsultatie.nl/motiedijksma) 7.

[18] Art 1018g Dutch Civil Procedure Code.

[19] Dawson and Muir (above n 6) at 221 describe it as "a blessing rather than a curse" with respect to the level of access to justice in those Member States which already had a extensively developed system of collective redress.

[20] One of the seminal works in this respect is M Olson, *The logic of collective action – public goods and the theory of groups* (Harvard University Press, 1965).

more active role of judges[21] or resulting from the idea that representative entities should be encouraged to become key actors in collective litigation.[22] Therefore the editors of this book also invited authors to describe lessons to be learned from the economic[23] and behavioural science perspective.

Risks identified by economists can often be addressed by lawmakers once they are aware of the problem. The free-rider problem, for example, which appears if (particularly opt-out) group litigation provides a benefit for passive group members without any contribution (then all claimants will probably wait for others to institute group proceedings)[24] can be remedied to some extent by providing rather short periods of limitation for damages claims to put some pressure on the group. With respect to injunctive relief, where the public goods characteristics are evident because everybody benefits from successful litigation, European lawmakers have often tried to avoid free-rider strategies by granting legal standing to representative entities instead of individuals and thus building on public interest litigation and ideological incentives. However, another issue clearly illustrated from the viewpoint of law and economics is that a successful system of collective redress requires sufficient incentives or even some extra benefits for those suing on behalf of a group. Nevertheless, this either remains unheard by lawmakers or is ignored as it may require unpopular political decisions. The German representative action for skimming-off illegally gained profits from businesses violating competition rules[25], for example, failed to work in practice because consumer associations simply have no incentive to take the procedural risk involved in these proceedings. Furthermore the Commission's skepticism to profit-based lead plaintiff organizations[26] or third-party funding of collective litigation and the idea to ban any influence of third-party funders on litigation strategies[27] seems unrealistic. Admittedly it is difficult to find a midway between the US legal culture of 'litigation as a business' with its profit-oriented law firms as key actors in the class action system and the (at least partly)

[21] A Biard, *Judges and Mass Litigation, A behavioral law and economic perspective*, doctoral thesis, Erasmus University Rotterdam (forthcoming 2015); M Faure, 'CADR and settlement of claims – a few economic observations' in Hodges and Stadler (above n 16) 38–60.

[22] RJ Van den Bergh and LT Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' *Erasmus Law Review* (2008) 5–30; RJ Van den Berghand and S Keske, 'Rechtsökonomische Aspekte der Sammelklage' in M Casper, A Janssen, P Pohlmann and R Schulze (eds), *Auf dem Weg zu einer europäischen Sammelklage* (Sellier, 2009) 17 et seq., 35–39.

[23] G Barker and BP Freyens, 5–30 in this book and M Doriat-Durban, S Ferey and S Harnay, 31–44 in this book.

[24] For details see A Szalai, 'Beyond opt-in and opt-out: the law and economics of group litigation' in Harsági and van Rhee (above n 1) 75 et seq. at 77.

[25] Sec. 10 Unfair Competition Act; Sec. 33, 34a Antitrust Act.

[26] Recommendation point 4.

[27] Recommendation point 14–16, 32.

European tradition of non-profit associations[28] which can successfully handle injunctions and small consumer claims, but are probably unable to cope with complex investment disputes, securities or cartel cases. Economic analysis will not solve legal problems, but it plays a very important role in identifying these issues and in pointing out potential options for policy makers.

C. *Settlement Proceedings on the Rise?*

1. Settlements in complex mass disputes

Another observation which can be made is a clear trend towards new settlement mechanisms. Particularly for big cases arising from the global financial crises (like Madoff[29] or Fortis[30]), the securities and product liability cases settled under the Dutch WCAM or mass personal injury cases like the South African silicosis action which recently failed to obtain the High Court's support in arguing for the jurisdiction of English courts,[31] settlement is often the only reasonable option for both parties. However, sometimes it takes at least a court decision on some key issues of the defendant's liability to stimulate his cooperation. Settlement of mass disputes was not a major issue in the Commission's Recommendation,[32] but national policy makers realize the need for non-contentious proceedings and special instruments to support a defendant's or liable party's willingness to get mass claims 'out of the books'. The 2005 Dutch Collective Settlement Act for mass claims (WCAM) was breaking new ground and although its opt-out mechanism and the matter of international jurisdiction cause considerable concern, it has been successfully used in a number of big cases. In July 2013, an important amendment to the WCAM came into force: the act can now be applied to settlements reached if the liable person is declared bankrupt. Another reform of the WCAM followed from the experience that an early

[28] A strong position of non-profit organizations has not only been advocated by the Commission's Recommendation, but also in academic writing: eg R Stürner, 'The role of judges and lawyers in collective actions, equality among parties, conflicts of interest' in *Procesos colectivos-class actions* (XXIII Iberoamerican Procedural Law Conference Buenos Aires, 2012) 67 at 86 et seq.; A Stadler, 'Collective redress litigation - a new challenge for courts in Europe' in A Bruns, C Kern, J Münch, A Piekenbrock, A Stadler and D Tsikrikas (eds.), *Festschrift für Rolf Stürner zum 70. Geburtstag* (Mohr Siebeck, 2013) 1801–1816.

[29] http://jurist.org/paperchase/2011/11/madoff-victims-file-class-action-suit-against-jp-morgan.php.

[30] http://www.investmenteurope.net/regions/benelux/second-investor-group-files-claim-against-fortis/.

[31] http://www.leighday.co.uk/News/2013/July-2013/UK-Court-decision-in-gold-miner%E2%80%99s-silicosis-cases. The UK Court of Appeal heard the case on appeal on 25 March 2014.

[32] Recommendation points 25, 26, Recital 13.

involvement of the court – eg by court hearings already during settlement negotiations – may help to achieve better results, to obtain court approval of the settlement contract more easily and to reduce the number of opt-outs.

In England and Wales, the BIS intends to copy the model of special court proceedings for declaring out-of-court settlements legally binding upon the claimants on whose behalf the settlement has been negotiated by representative associations or individual claimants. Furthermore the trend is confirmed by the French and Belgium group proceedings which both emphasize the need for amicable settlements. The French law provides rules for alternative dispute resolution where a consumer association may negotiate a settlement on behalf of consumers.[33] In Belgium, the new rules on group proceedings do not only include a mandatory mediation phase at the beginning of the litigation,[34] but also offer an instrument very similar to the Dutch WCAM: representative entities which have legal standing may institute proceedings with the sole objective of obtaining court approval for an out-of-court settlement.[35] Even in Germany, the 2012 reform of the Capital Market Test Case Act (*Kapitalanleger-Musterverfahrensgesetz*) alleviated the settlement of securities disputes: the plaintiff of the selected test case may negotiate a settlement for all claimants who have already filed actions. When the court approves the settlement contract, an opt-out procedure will take place in order to declare the settlement binding for all claimants.

2. ADR as a substitute for individual or collective consumer claims?

Nevertheless, while judicial avenues are important they are rather costly in some Member States and at least for typical consumer contract disputes the European legislature strongly favors non-judicial mechanisms such as ADR and ODR as a complementary procedure or even as a substitute for individual court proceedings. Although ADR proceedings might be a necessary option for consumers to enforce small claims if access to courts is burdensome, the approach is rather ambiguous: For many years the European legislature has developed complex and elaborated provisions on consumer contracts and now, finally, consumers are expected to resort to ADR institutions which are not bound by the law and will mostly provide equitable solutions. Once again developments in Europe follow those in the US with delay and without taking seriously objections and criticism already raised there: In the US system the trend to ADR and arbitration has long been criticized for its abandonment of the rule of law and its lack of transparency due to

[33] Art L. 423-15 und 423-16 Code de la consommation.

[34] Art XVII. 38 Code de droit économique.

[35] Art XVII. 36 Code de droit économique; DOC 53 3300/001, 14.

proceedings behind closed doors and the non-publication of decisions.[36] Whereas in complex mass disputes court-assisted settlements are an often welcome or inevitable solution in extraordinary situations, a far-reaching privatization of the judiciary with consumers being regularly steered towards ADR institutions by direct or indirect pressure (eg imposed by cost sanctions) is not acceptable.

There is not only a risk that the ADR Directive's obligation imposed on the Member States to establish a network of ADR institutions covering all areas of consumer related law will lead ministers of finance or ministers of justice into temptation of reducing necessary investments in the state court system. It is also undeniable that the implementation of the ADR Directive may be a (temporary?) alibi for policy makers to completely rely on the ADR mechanism even as a remedy for mass consumer damage claims and to pretend that no further reform of collective actions is necessary.[37] It is therefore necessary to critically analyze the suitability of ADR mechanisms for collective enforcement of claims.[38] It cannot be ruled out that European and national policy makers have done a disservice to consumers and tort victims who are suffering from small or trivial individual damage only: Despite the fact that ADR proceedings might be almost free of cost, claimants will probably not bother to use them by filling in and submitting standard forms in order to obtain a few Euros – and they will also refrain from costly and time-consuming individual court proceedings. Should this happen, efficient proceedings for skimming-off illegally gained profits (either by representative entities or public bodies) must be considered by policy makers in order to provide at least a deterrence against violations resulting in small and dispersed damages (which cannot be compensated effectively anyhow).

C. Issues to be Tackled in the Future

Some of the major challenges involved in collective actions have more or less been circumnavigated in the Commission's Recommendation: one is the cross-border dimension of mass disputes which is dealt with elsewhere in this book[39] and, another, the need for effective case management. The Recommendation

[36] D Luban, 'Settlements and the Erosion of the Public Realm' 83 *Geo L J* (1995) 2619; RC Reuben, M Moffitt, und WD Brazil 'ADR and the Rule of Law' 16 *Dispute Resolution Magazine* (2010) 4 et seq; R Kulms, 'Mediation zwischen effizientem Rechtsschutz und Privatisierung der Justiz' in KJ Hopt and F Steffek (eds), *Mediation, Rechtstatsachen, Rechtsvergleich, Regelungen*, (Mohr Siebeck, 2008) 923 et seq. See also the contributions in J Zekoll, M Bälz and J Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Leiden, 2014).

[37] H Eidenmüller 2 *ZZP* (2015) (forthcoming); J Zekoll, 'Die Bedeutung der ADR-Richtlinie für die Durchsetzung von Verbraucherrechten' 2 *ZZP* (2015) (forthcoming).

[38] M Tulibacka, 399–422.

[39] A Stadler, 235–250 and C Poncibò, 251–272 .

mentions in various contexts the active role of judges without going into details.[40] From various case studies[41] across different legal systems it has become evident that the introduction of some kind of collective proceedings is not sufficient. Even with a certain degree of aggregation, proceedings that involve a large number of claims require considerable judicial case management skills, furthermore smoothly operating IT systems in courts and law firms and last but not least a procedural framework which allows judges a flexible handling of cases in close cooperation with the parties' lawyers (eg in an early case management conference which identifies relevant issues and fixes a realistic time table).[42] The German KapMuG (Capital Market Test Case Act) illustrates clearly how courts can be "stuck in formalities and inflexible civil procedure"[43]: The *Deutsche Telekom* case which started in 2003 and forced the German legislature to enact the KapMuG ('lex Telekom') is still pending. More than ten years later, in December 2014, the German Federal Supreme Court partially granted the appeal on points of law filed by the test case plaintiff and referred the case back to the court of appeal.[44] At present, it is impossible to predict how long the litigation will last as the proceedings are still in the intermediate test case stage and have not reached the final stage when all the individual claims will have to be decided on the basis of a binding test case decision.[45] A first-hand account is provided by Judge Wösthoff in this book.[46]

Depending on tradition and legal culture, the attitude of judges towards a more active role in managing cases and in handling proceedings for scrutinizing and approving proposed settlements are a real challenge for the judiciary. One academic even frankly takes the position that in his country no

[40] Recommendation Recital 21, point 8, 9, 15.

[41] D Hensler, C Hodges and I Tzankova (eds), *Class actions in context: how economics, politics and culture shape collective litigation*, (Edward Elgar, 2014); W van Boom and G Wagner, *Mass Torts in Europe, Cases and Reflections* (Vol 34, European Centre of Tort and Insurance Law Vienna, 2014).

[42] A more detailed analysis is given and similar suggestions are made by Tzankova (above n 9).

[43] Tzankova (above n 9) at 333.

[44] Bundesgerichtshof (BGH) 11 December 2014 (file no. XI ZB 12/12).

[45] For the failure of the KapMuG see also A Halfmeier, 'Litigation without an end: the failure of the German approach to private enforcement of securities law' in Hensler, Hodges and Tzankova (above n 41). A much better example for effective case management is given by the *Buncefield* case in the UK. 2,700 claims based on the explosion of one of the biggest oil storage terminals in the UK were filed by residents, businesses and insurance companies. Within four years, Justice Steel issued a judgment on the liability of Total UK, a 60% owner of the of oil storage terminal, and managed to settle 92 % of the claims subsequently; for details see Tzankova (above n 9). She rightly points out that this case was handled without a formal collective redress mechanism.

[46] See 83–92.

appropriate personal or organizational design for complex litigation exists. Given the fact that even individual litigation was slow and ineffective one could not expect collective litigation devices to be handled more effectively, he concludes.[47] Taking the poor performance of the judiciary as an argument to reject the private enforcement approach altogether (despite the fact that public administration is also inefficient)[48] seems, however, a hardly acceptable capitulation to the 'old structures' in some middle and eastern European Member States.[49]

Mass claim disputes have their own dynamics and party strategies for settlement negotiations differ from normal cases. Courts must be aware that in collective redress proceedings in which absent claimants are represented by a lead plaintiff and do not have the chance of or interest in participating in the negotiation of a settlement, it is necessary to protect them from 'cheap settlements' and principal-agent conflicts. In this context it seems noteworthy that the Amsterdam Court of Appeal which is in charge of the WCAM proceedings until recently accepted all proposed settlements without much hesitation. Only recently, in the DSB case, the court required a number of amendments to be made before it gave its final approval on 4 November 2014.[50] Continental judges can benefit from the experience of their English and US colleagues in aggregate litigation with respect to management skills and the techniques necessary to identify deficiencies and pitfalls in a mass settlement, but it takes a clear specialization of courts with the corresponding rules on jurisdiction and formally embedded training programs for judges.[51] As a supplementary instrument informal manuals on case management following the US example may assist courts in handling complex cases and help to avoid protracted litigation.

III. WHAT NEXT?

The Commission must be prepared to take further action when revisiting the

[47] A Uzelac, 'Why no class actions in Europe? A view from the side of dysfunctional justice systems' in Harsági and van Rhee (above 1) 53–69.

[48] *Ibid*, at 68 (Croatia).

[49] For a more positive attitude with respect to group litigation in Poland see R Kulski, 'Polish perspectives and provisions on group proceedings' in Harsági and van Rhee (above n 1) 225 at 227.

[50] Gerechtshof Amsterdam, 4 November 2014, file no. 200.127.525/01, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2014:4560.

[51] The ELI Statement on collective redress 2014, at 15 also emphasizes the need for formal training programs at the European level. The statement is available at the BIICL website: http://www.collectiveredress.org/collective-redress/. The same is strongly advocated by Tzankova (above n 9).

Recommendation in 2017, but it should also consider its room for manœuvre realistically. Indeed the story of collective redress has been one of small steps forward so far. Different legal culture and institutional infrastructure across Member States cannot easily be overcome by providing 'common principles' which are not clearly extracted from existing regimes in the Member States or 'best practices' examples but based on a political compromise. The idea of private enforcement meets limits if one is not prepared to adopt more or less the US class system and its 'law as a business' approach.[52] Some Member States will always be more apt to follow this route than others. A well-balanced mixture of public and private enforcement[53] will probably be the European future and it seems more likely that this balance can be found at the national level than at the European. The Commission should focus on an adequate legal European framework for cross-border issues (jurisdiction and enforcement of judgments and settlements) which will become of increasing importance as some Member States start to compete for the resolution of mass disputes. It should also establish and operate a platform for the exchange of information on similar and parallel proceedings and offer judicial training programs in order to help the judiciaries to learn from each other.

[52] Stürner (above n 28) at 86.

[53] This approach has been strongly advocated by F Weber, *The law and economics of enforcing European consumer law – a comparative analysis of package travel and misleading advertising* (Ashgate, 2014); furthermore F Cafaggi and HW Micklitz, *New frontiers of consumer protection – the interplay between private and public enforcement* (Intersentia, 2009).

Forum Shopping and Consumer Collective Redress in Action: The Costa Concordia Case

*Cristina Poncibò**

I. INTRODUCTION

On 13 January 2012, the Costa Concordia cruise ship capsized and sank after striking an underwater obstruction off the Isola del Giglio, Tuscany. The captain (Francesco Schettino) is currently under house arrest, facing criminal charges for manslaughter and abandoning ship, because there is now clear evidence that he left the cruise liner before all passengers had been evacuated. The Italian Prosecutor has described captain Schettino's behaviour as 'reckless and inexcusable' in performing a very risky manoeuvre sailing too close to the coast.[1]

The passengers (4,252 people of different nationalities)[2] had bought their tickets either over the internet or through travel agents. Thus, as consumers, they had entered package holiday contracts, ruled by the EU Directive on package travel, package holidays and package tours,[3] having as the object a cruise and related services with the Italian cruise line company, Costa Crociere SpA, which is owned by Carnival in Miami.

Following the accident, one third of the passengers of different nationalities have agreed to the offer arising from a joint conciliation scheme (see Section V), while the others rejected the offer with the aim of pursuing full damage recovery. Among the passengers who rejected the offer, a group filed individual claims in their home jurisdictions and another group joined

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[1] The captain says that it was common practice for the Costa Concordia cruise ship to deviate from its original route and to sail dangerously close to Giglio Island. The so-called 'showboating' was part of Costa's promotional policy.

[2] By nationality, the passengers included 989 Italians, 569 Germans, 462 French, 177 Spanish, 126–129 Americans, 127 Croats, and 108 Russians, 25 Brits, 74 Austrians and 69 Swiss. The remaining 520 passengers were of about thirty different nationalities.

[3] Council Directive (EC) 90/314 on package travel, package holidays and package tours [1990] OJ L158.

the criminal proceedings in Italy against the captain and the members of the crew.[4] Finally, some groups of passengers, including non-US citizens, filed State class actions in the US.

The Costa Concordia disaster raises some fundamental issues about forum shopping and collective redress in cases involving consumer contracts.

II. FORUM SHOPPING

A. Trans-Atlantic Consumer Litigation

Advised by their lawyers, some groups of Costa Concordia passengers decided to sue the parent company of the Italian cruise line in the US, ie they filed State class actions in Florida. Despite the parties agreeing on the Italian jurisdiction as indicated in the tickets, they asserted that they were entitled to bring their lawsuits in the US. This was because the umbrella company, Carnival, and the marketing subsidiary from which their travel agent purchased their tickets, were headquartered in Florida. Curiously, the Italian consumer association Codacons, that represented many Italian passengers, rejected any settlement with the Italian company and launched a campaign to inform Italian and non-Italian passengers to join US class actions. Surprisingly, the association has not filed any action according to the Article 140-bis of the Italian Consumer Code providing for the *azione di classe*, the new Italian collective redress mechanism. It seems clear however that actions have been brought in the US seeking larger compensation and the award of punitive damages.

Traditionally, the US has a forum shopping system with two features that encourage plaintiffs to file claims in US courts, even when those claims involve foreign parties or foreign activity. This is a permissive approach to personal jurisdiction, giving plaintiffs broad court access, and a strong tendency of judges to apply plaintiff-favoring domestic law.[5] In addition, from a plaintiff's perspective, litigating before a US court brings some advantages, which are not provided under European jurisdictions. The contingency fee system makes the courts more readily accessible to a group of consumers with limited financial resources. Such a system is extremely important in financing the litigation in consumer cases. The opt-out system in class actions eliminates the financial risks in bringing claims and favors the litigation of disputes, like consumer small claims, which the consumer

[4] R Carleo, 'Caos Costa e Class Action Italiana: Le ragioni di un mancato avvio' 1 *Rivista di diritto della navigazione* (2013) 35–69.

[5] C A Whytock, 'The Evolving Forum Shopping System' 96 *Cornell LRev* (2011) 481–534.

would not have been brought to court because of the limited amount of individual loss suffered. Moreover, plaintiffs may benefit from liberal discovery rules that either do not exist in European civil law countries, or are much more limited, like disclosure rules in England. In addition, the prospects of a jury awarding high compensatory damages, and even punitive damages, can convince potential plaintiffs, including Costa Concordia's passengers and their lawyers, that US courts are more favorable than those in the EU. All these elements appear to be relevant in explaining the attempts to start litigating the Costa Concordia case before the courts of Florida. In this case, one particular element has been fundamental in driving the litigation: the organization of US attorneys. They are able to organize groups of consumers internationally (ie outside the US) and have in fact been building relationships with local attorneys and a consumer association in Italy to attract more clients to bring claims to the US and increase pressure on defendants.

In reality, the forum shopping system has evolved and no longer encourages plaintiffs to pursue transnational claims in US courts to the extent it supposedly once did. The Costa Concordia affair is an example of this more restrictive approach of US courts.[6]

In 2013, judges in Florida dismissed the first *class action* in *Warrick v. Carnival Corp*.[7] The US District Court for the Southern District of Florida was the first court to decide the issue in relation to the Costa Concordia accident. It held that Massachusetts' residents-plaintiffs had to litigate their claims against the Carnival/Costa defendants in Italy. In analysing the forum non-conveniens issue,[8] the court found that the private and public interest factors heavily favoured trial in Italy. With respect to the private-interest factors, the court stated that the evidence is located 'predominantly in Italy, held by Italians, likely written in Italian, all of which is difficult and costly, and slow to produce here'. The court viewed the public-interest factors as similarly favouring dismissal due to the heavily congested dockets in the Southern District of Florida. In addition, the judges noted the much stronger interest that Italy has in the resolution of the accident

[6] D Fairgrieve and E Lein (eds), *Extraterritoriality and Collective Redress* (Oxford University Press, 2012), Part IV: Extraterritoriality and US Law.

[7] *Warrick v Carnival Corp*, No. 12-61389 (SD Fla, February 4, 2013). See also *Scimone v Carnival Corp*, No. 12-26072-CA02. In this case, the court dismissed the claims of the 35 foreign plaintiffs, but not of the 17 US plaintiffs. See also *Abeid-Saba v Carnival Corp*, No. 12-26076-CA02. In this case, the court dismissed the claims of all 57 plaintiffs, including 5 US residents.

[8] The forum non-conveniens doctrine allows a US Court to dismiss a case over which it has jurisdiction if there is a foreign alternative forum which may hear the case. It enables a US Court to decline to hear a case too remotely connected to it, even if no other court is simultaneously seized.

claims, and the fact that Italy is 'more at home' with the law that will likely govern the action. Finally, the court noted that the presence of two US corporations as defendants did not 'materially change the calculation', because the company that implemented the policies and procedures is Costa Crociere SpA, an Italian entity.

This more restrictive approach of US courts implies that European judges will have to manage a growing number of cross-border collective redress cases.

B. European Forum Shopping

The Green Paper on Collective Redress[9] covers other known regulatory instruments with their legal basis in Article 81 TFEU when dealing with issues relating to jurisdiction and choice of law in consumer collective redress cases.

These are Regulation (EC) 44/2001 on jurisdiction ('Brussels 1 Regulation', now Regulation (EU) 1215/2012)[10] and Regulation (EC) 864/2007 ('Rome II Regulation') on the law applicable to non-contractual obligations, to which Regulation (EC) 593/2008 ('Rome I Regulation')[11] is added with respect to contractual obligations. However, the Green Paper points out that these tools, as well as Regulation (EC) 861/2007 establishing a European procedure for small claims,[12] are not tailored to mass litigation. Thus, they are not equipped to deal with consumer collective redress cases. Most cases before European courts concern the sale of, or services relating to, luxury goods,[13] installment sales,[14] package holiday

[9] Commission's Green Paper on Consumer Collective Redress, Brussels, 27.11.2008, COM (2008) 794 final. See also the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, [2013] OJ L 201, 60–65, at 17.

[10] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012, 1-23. On 12 December 2012, the European Parliament and the Council adopted Regulation (EC) 1215/2012 ('Recast Regulation') which replaces Regulation (EC) 44/2001 ('Brussels I Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and which has applied since 10 January 2015, [2012] OJ L 351, 1–32.

[11] Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, 6–16; Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, 40–49.

[12] Regulation (EC) 861/2007 establishing a European Small Claims Procedure [2007] OJ L 199, 31.7.2007, 1–22.

[13] *Rayner v Davies* [2002] EWCA Civ 1880 (survey to buy a yacht).

[14] Joint Cases C-240/98, 241/98, 242/98, 243/98 and 244/98 *Oceano Grupo Editorial SA v Quintero* [2000] ECR I-4941 (purchase of an encyclopedia by instalments).

contracts,[15] timeshare agreements,[16] and some ordinary sales[17] and services.[18]

These private international law instruments therefore do not address or resolve the difficulties and inefficiencies that consumers have in order to get damages following the behavior of companies that qualify as mass torts.

The Brussels I Recast Regulation regulates, inter alia, the jurisdiction over persons domiciled in the EU.[19] In particular, this provision, conceived for individual actions, expressly contemplates the involvement of more parties, although from the defendants' perspective. Article 8 of the Recast Regulation provides that, in the case of multiple defendants, the plaintiff may bring an action in the court of the forum of any of them.[20] However, the said article does not regulate the reverse case of the plurality of plaintiffs.

The Brussels I (Recast) Regulation allows the consumer to rely on the courts of the Member States where the defendant is domiciled and provides an alternative forum at the place where the consumer is domiciled.[21] Article 18 of the Recast Regulation is based on the presumption that consumers are generally weaker and need protection both regarding jurisdiction and the applicable law. In terms of jurisdiction, a consumer is always entitled to sue or to be sued in the court of his domicile and the effect of a jurisdiction clause is generally restricted. In terms of choice of law, a consumer will not be

[15] *Thomas Cook Tour Operations v Hotel Kaya* [2009] EWHC 720 (QB); *Barton v Golden Sun Holidays* [2007] ILPr 57; *Watson v First Choice Holidays v Flights* [2001] 2 Lloyd's Rep 339.

[16] *Lynch v Halifax Building Society and Royal Bank of Scotland* [1995] CCLR 42.

[17] Landgericht Feldkirch (2R18/08Z) (Austrian buyer purchased a sewing machine on eBay from a German seller by using a pseudonym, stated a delivery address in Germany and payment was made from a German bank account), see S Calabresi-Scholz 'LG Klagenfurt (AT) 12 February 2008 – Brussels I Regulation Articles 5(2), 22(5) – International jurisdiction – Matters relating to maintenance' 1 *European Legal Forum* (2008) 57.

[18] BGH (III ZR 71/08) (a German sued a Greek lawyer regarding services provided in Greece; the lawyer was listed on the websites of the German Embassy in Athens and legal expenses insurers), see S Calabresi-Scholz 'BGH (DE) 17 September 2008 – Brussels I Regulation Article 15(1)(c) – International Jurisdiction – Matters relating to a contract concluded by a consumer' 5 *ELF* (2008) 256; see also OGH 4 Nd 514/97 (language course contract); OGH 9 Nd 509/01 (master education contract).

[19] Italian law No. 218/1995 provides for additional criteria such as residence in Italy, the presence in Italy of a representative authorized to sue and be sued, and other criteria, also referring to the Brussels Convention of 1968 (art 3), then abrogated by Regulation (EC) 44/2001.

[20] Art 8 (1) Regulation (EU) 1215/2012 'allows a person domiciled in a Member State to be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

[21] Art 18 (1) Regulation (EU) 1215/2012: 'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled'.

deprived of the standard of protection provided by the mandatory rules of the law of the consumer's habitual residence, which is the default law applicable in absence of choice (see Section III). It is a common presumption that a consumer is at a disadvantage in litigation versus a company and therefore requires legal protection. Requiring consumers to sue abroad might lead to procedural difficulties and disadvantages which could deprive them of their right of access to justice. However, it is certainly wrong to presume that the protective jurisdiction rules remove all procedural obstacles to cross-border access to justice. Suing at home is more convenient to consumers, but it may still be undesirable considering the small value of the claim. If a consumer does not decide to sue, however, the rules on jurisdiction and choice of law lose all significance.

Thus, the provisions of the said Regulation may facilitate the practice of forum shopping among European jurisdictions especially in consumer cases. This is evident in the Costa Concordia situation. Taking the case examined here as an example: each passenger could have sued the company in the place of the company's domicile, but also in his place of domicile. Accordingly, passengers' domiciles could have justified actions before the courts of some EU Member States, just to limit the discourse to European jurisdictions. This may result in the proliferation of parallel proceedings against the same defendant in several European courts and on behalf of different groups of consumers. In addition, the rules may lead to conflicting judgments in European jurisdictions. European Consumer Law is closely harmonized within the Member States, but divergences remain in the relevant domestic case law.[22]

To overcome such risk, the Commission suggested in its Green Paper that protective jurisdiction should not be used in representative actions. The suggestion is probably right, as protective jurisdiction enables an individual consumer to always sue or be sued in his domicile. Consequently, this benefit is not compatible with the nature of cross-border collective redress, where consumers may come from different Member States. The Green Paper states at point 58: "In cross-border cases the Regulation on jurisdiction would be applicable to any action including an action brought to court by a public authority, if it is exercising private rights (eg an ombudsman suing for consumers). Representative actions would have to be brought to the trader's court, or the court of the place of performance of the contract (Article 5 (1))".

Indeed, collective redress changes the presumed inequality of litigation power between consumers and professionals. Where a large number of consumers bring actions together, or an association or a public authority represents consumers, against one business defendant, the collective strength

[22] JM Smits, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' 18 *ERPL* (2010) 5–14.

of the claimants largely increases the litigation power of the traditional weaker party. This is sufficient reason to abandon the protective jurisdiction in collective redress.

To conclude this section, our point here is that the Brussels I Regime allows consumers to select the jurisdiction in case of litigation. This can lead to a number of actions before the courts of European Member States in the countries of domicile of the consumers involved, and, as in the present case, in the courts of non-European countries. The provisions examined here apply to the Costa Concordia case in the sense that the passengers could have sued the cruise company before the courts of the place where they were domiciled, or before the Italian courts (the Italian cruise liner has its statutory seat in Genoa). By following the Green Paper's suggestion to leave aside the consumer forum in collective redress cases, jurisdiction could be determined by referring to the court of the professional,[23] or the place of performance of the contract.

In addition, specific problems may also arise with respect to the role played by consumer organizations in collective redress in EU Member States and the requirement of homogeneity of consumer rights. This latter point is a common pre-requisite of admissibility for the majority of the collective redress mechanisms adopted in EU Member States.

1. Consumer Contracts

The abovementioned rules contain a discipline for the benefit of the consumer, but they introduce an exception to the normal policy of granting jurisdiction to the courts of the Member State of domicile of the defendant. Due to their exceptional character, their scope is necessarily limited in line with the interpretation of the CJEU.

In interpreting Article 13 of the Brussels Convention,[24] the CJEU had consistently held that the term 'contract' is to be understood as an act that gives rise to reciprocal and interdependent obligations between the two parties.[25] The *Gabriel* case concerned a company that was sending personalized letters to consumers containing a misleading promise to award a prize accompanied by a catalogue of products or a good order. In such cases, the Court stated that jurisdiction should follow the provisions for consumer contracts according to Article 13 of the said Convention. In *Engler*, the CJEU noted that a seller's (misleading) promise to award a prize and the consumer's acceptance of the

[23] Art 63 Regulation (EU)1215/2012 para 1: "For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business".

[24] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

[25] Case C-96/00 *Gabriel* [2002] ECR I-6367, para 39.

prize could create a 'contract between a trader and a consumer' within the meaning of Article 13.[26]

Article 17 of Regulation (EU) 1215/2012 certainly expanded the content of the previous Article 13 of the Brussels Convention.[27] The scope of its application is not limited to consumer contracts in the strict sense (ie contracts concerning the provision of a service or tangible movable property).[28] Package travel contracts are included within such a definition.

When called upon to interpret Article 15 of Regulation (EC) 44/2001, the CJEU, in *Ilsinger*[29] has again shown greater flexibility in interpreting the concept of 'contract' in a case very similar to *Engler*. While stressing the need for the effective conclusion of a contract, in line with the interpretation of Article 13 of the Brussels Convention, the CJEU preliminarily found that the scope of the said provision is no longer limited to those situations where the parties have assumed reciprocal obligations.

Without this limit, there is a contract even when one of the parties, the consumer, is limited to manifesting his acceptance (of a prize) without taking on other legal obligations towards the other party, ie the professional. The latter, however, 'must have clearly expressed their willingness to be bound by that commitment in case of acceptance by the other party, declaring unconditionally willing to pay the premium in question to consumers who have requested it'.[30] In its interpretation of Regulation (EC) 44/2011, the CJEU has thus favoured the extension of consumer protection.

Besides those consumer contracts where the protective rules have been tested in litigation, there are also borderline contracts which generate controversy as to whether they are included in the scope of protection. The European legislator wishes to protect the weaker party, but sometimes it is not clear who the weaker party is. This is especially true in investment contracts[31] and profession-related contracts.[32]

[26] Case C-27/02 *Engler v. Janus Versand GmbH* [2005] ECR I-481.

[27] It confirms the extension of the application of its rules to additional consumer contracts, ie contracts for the sale of goods on installment credit terms; or contracts for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods. The extension aims to align the procedural rules with the substantive provisions of EU directives in the area of consumer protection.

[28] J Hill, *Cross-border Consumer Contracts* (OUP, 2009).

[29] Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961.

[30] *Ibid*, 51.

[31] *Ghandour v Arab Bank (Switzerland)* [2008] ILPr 35 (Athens Court of Appeal held that a borrower, who borrowed very substantial funds from a bank relying upon her own expertise and judgment to invest, was not a consumer); *Standard Bank of London v Apostolakis* [2003] ILPr 29; see also Oberlandesgericht Koblenz, 08.03.2000 – 2 U 1788/99, ILPr 14; Case C-318/93 *Brenner v Dean Witter Reynolds* [1994] ECR I-4275.

[32] Case C-464/01, *Guber v BayWA AG* [2005] ECR I-439. Cf *Prostar management v Tivaddle* [2003] SLT (Sh Ct) 11 (management agreement providing services to a professional footballer).

2. Consumer Associations

The application of the Regulation (EU) 1215/2012 also involves identifying the notion of 'consumer' and 'consumer association'.

The CJEU has pointed out that the Brussels I Regime applies when the applicant is a person who buys goods or services for non-business purposes. He shall enjoy the protection afforded by the Brussels I Regime, because 'he is personally involved as a plaintiff or as a defendant'.[33]

Second, a consumer must conclude the contract, for a purpose, which can be regarded as being outside his trade or profession. The consumer status must therefore be assessed by reference to the role that person plays within a given contract with respect to the nature and purpose of the latter.[34] On this point, the CJEU also made clear in the *Gruber* case that a contract made by an individual to purchase goods or services for personal purposes couldn't be classified as a contract concluded by a consumer, unless professional use is so limited as to have a negligible role in the overall context of the operation.[35] Moreover, it is necessary that the counterparty acted professionally at the time of the conclusion of the contract with the effect of excluding contracts between two consumers from the scope of the protective provisions as in this case no party is weaker than the other.

The question that arises primarily with respect to the wording of Article 18 of Regulation (EU) 1215/2012 ('a consumer') concerns the legal standing of associations and committees of consumers in collective redress cases.

It should also be noted that, with regard to the actions for injunctions, the recitals of the Directive 2009/22/EC,[36] as well as the previous Directive 98/27/EC,[37] state that 'with regard to the jurisdiction, the proposed action does not preclude the application of the rules of private international law and Conventions in force between the Member States...'. The CJEU has also ruled on the application of the criteria laid down by the Brussels Convention for injunctive relief. In the *Henkel* case, the Court assessed whether a consumer association could be qualified as a consumer within the meaning of Article 16, but it denied this possibility.[38] It has to be noted in this context that actions between a public authority and a person governed by private law fall outside the scope of the Brussels regime only in so far as

[33] Case C-96/00 *Gabriel* [2002] ECR I-6367, para. 39.

[34] Case C-269/95 *Benincasa* [1997] ECR I-3788, 3800.

[35] Case C-464/01 *Johann Gruber v BayWa AG* [2005] ECR I-439.

[36] Council Directive 2009/22/EC of June 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110/30.

[37] Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] OJ 166, 51–55.

[38] Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002] ECR I-8111.

the authority is acting in the exercise of public powers. In the case cited, the action was based on the provisions regulating injunctive relief, a procedure where only consumer associations and/or public authorities (and not the single consumer) have standing. In this case, in fact, the associations are acting in their own name as a public authority and their right to obtain an injunction to prevent the use of unfair terms in contracts constitutes a public law power. An organization of that kind takes on the task, in the public interest, of ensuring the protection of the entire group of consumers. For this reason, it has the statutory right to bring an action to obtain an injunction preventing unlawful by-traders, independent of any private law relationship arising out of a contract between a professional and a private individual.

In collective redress cases, the associations (and committees) do not promote action in the collective interests of the consumers, but they act for individual consumers, who have subscribed to an action. They would intervene in the name (and not only on behalf) of victims previously identified or identifiable in any case. For example, Article 140-bis of the Italian Consumer Code, in referring to the homogeneous individual rights of consumers and users, legitimizes each member of the group, also by giving mandate to associations or committees. In doing so, it emphasizes the representation of consumer rights. Proceedings brought by a representative body of consumers based on Article 140-bis of the Consumer Code are therefore not entirely comparable to those already examined by the CJEU in *Henkel*.[39]

III. CHOICE OF LAW

Once jurisdiction has been established, the competent court has to identify the law applicable to the dispute. In this context, it is also appropriate to make some mention of the issues related to the law applicable to contractual obligations under the Rome I Regulation[40] and the existing links with Regulation (EU) 1215/ 2012 in collective redress cases.

With regard to obligations of a contractual nature, the general rule is that the law chosen by the parties governs the contract (Article 3). In the absence of that choice, the applicable law is that of the country with which the contract is most closely connected (Article 4).

[39] Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, [2013] OJ L 201, 60–65, at 17.

[40] Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 6–16.

The Rome I Regulation also provides for special categories of consumer contracts. For this type of contract, Article 6 determines as the applicable law the law of the country of habitual residence of the consumer and that a choice of the applicable law is limited. Further, Article 6(2) Rome I Regulation ostensibly protects consumers by discouraging party agreement on a pre-dispute basis on the law governing a consumer contract. Thus, European private international law contrasts with the absence of private international law restrictions on choice of forum and choice of law in the US, even in consumer contracts.[41]

The prerequisite for the application of the 'discipline of favour' is, again, that the contract is 'a contract concluded by a consumer' within the meaning of Article 6. Similarly to Article 18 of Regulation (EU) 1215/2012, Article 6 of the Rome I Regulation states that the contract is to be concluded by a natural person for a purpose, which can be regarded as being outside his trade, business and professional activity. Thus, it extends to all consumer contracts provided that the professional: pursues his commercial or professional activities in the country where the consumer has his habitual residence; or by any means, directs such activities to that country or to several countries including that country.

In cross-border collective redress cases, the rights of consumers that are homogeneous according to domestic laws may not be so homogeneous, in particular in light of Article 6.[42] Because of this provision, in mass cases involving consumers from different Member States, the court would have to apply the different national laws of residence of the various consumers. If a collective redress regime were open to consumers habitually resident in different Member States, Article 6 Rome I Regulation would directly lead to the result that a separate law should govern each individual claim. The current Rome I Regulation does not provide consumers with viable options to waive the application of the protective applicable law, which surely poses problems, yet to be resolved, for the proper functioning of cross-border collective redress. In the *Costa Concordia* case, the applicable substantive laws would not have significantly diverged in EU Member States because of the high level of harmonization of EU Consumer Law, and in particular the rules on package travel. Nevertheless, divergences may arise in the application of domestic laws by national judges, leading to conflicting judgments.

A solution advanced in the Green Paper on Collective Redress would be to introduce an amendment to the rules, imposing the law of the profes-

[41] R A Brand, 'The Rome I Regulation Rules on Party Autonomy for Choice of Law: A U.S. Perspective' University of Pittsburgh Legal Studies Research Paper Series (2011) No. 2011–29. http://dx.doi.org/10.2139/ssrn.1973162.

[42] Communication 'Towards a European Horizontal Framework for Collective Redress' COM (2013) 401 final, at 3.7.

sional's habitual residence in consumer collective redress cases. Other options are the application of the law of the most affected market, or of the Member State where the representative entity is established.[43]

IV. FORUM AVOIDING

In the Costa Concordia scenario, European private international law rules seem to confirm the jurisdiction of the Italian courts. Thus, a question arises here: is the Italian judicial system for collective redress able to manage the claims of the thousands of victims of the Costa Concordia disaster?

The Costa Concordia case confirms the scant appeal of the Italian jurisdiction. However, how can attempts to avoid this jurisdiction be explained? The litigation environment matters, as well as issues pertaining to substantive law, which, in this case, is quite favourable for victims. In addition, the *azione di classe* has some shortcomings preventing this mechanism from reaching its full potential. This Section points out the fundamental issues behind the choice of a particular forum.

A. Substantive Law

The legal issues at stake are numerous and complex: the liability regime applicable to the claims which will be filed by passengers and third parties, the possibility for ship-owners to invoke limitation of liability (and the regime applying to such limitation), and the consequences of criminal charges against the captain.

It is rather difficult to identify the liability regime applicable to the actions brought by the passengers of Costa Concordia for health damages, and by the relatives of the deceased passengers. Various opinions have been expressed.

First, it can be argued that the claims brought by the passengers are subject to the International Convention on Travel Contracts (CCV)[44] and the EU Package Holiday Directive (90/314/EC),[45] since the casualties occurred during a cruise included in a package offered by the company.

The cruise line company in fact submitted a package to the passengers incorporating Costa's general terms and conditions. The CCV is referred to as a 'residual' regulation in case there is no mandatory domestic or international law applicable to the claim. Nevertheless, the application of the CCV

[43] Green Paper on Consumer Collective Redress (above n 9) 59.

[44] International Convention on Travel Contracts (CCV), Brussels, 23 April 1970.

[45] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.06.1990, 59–64.

and the EU and Italian legislation on package travel contracts is justified although the accident occurred during the sea transit. This was part of a cruise offering a wide range of activities exposing passengers to risks which are only faintly related to carriage by sea. It is important to underline that the CCV provides some limitation to the amount of damages that could be paid to passengers according to the circumstances of the case.[46]

Second, several commentators have considered the matter to be governed by the provisions of the Athens Convention, which established a comprehensive integrated system governing the liability of cruise ship operators for personal injuries and property damage sustained by its passengers. It also contains standards for establishing liability and permissible defenses as well as its own statute of limitations and venue provisions. In particular, the Athens Convention[47] allows the carrier to limit its liability for personal injury or death of passengers.[48]

Finally, it is also possible to allege that Italian law – namely, the Navigation Code – should apply,[49] since the accident occurred on a ship operating under the Italian flag and within Italian territorial waters, and the package tour was agreed with an Italian company. In this case, there would be no limitation of liability for death or injuries, because the Navigation Code does not expressly contain a limit to the amount of damages that can be awarded in favour of a passenger or his relatives in case of death or injury. Interestingly, however, liability for loss of baggage is very limited.

The position reached by Italian Courts over the last two decades as regards compensation for death or serious injuries is in favour of a progressive increase of the amount of compensatory damages, and the sums awarded often exceed the limits applicable under the CCV, or the Athens Protocol.[50]

[46] If the claims were to be brought under the CCV, limitation of liability under art 13 would apply, namely 50,000 Germinal golden francs for cases of personal injury, equal today to around €600,000, whilst limitation for loss or damage to baggage would be slightly less than €24,000.

[47] Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (Athens, 13 December 1974). The adoption of the Athens Convention was primarily motivated by a series of uninsured ferry disasters, but the Convention has had so far limited success and only a few States have ratified it.

[48] According to the 2002 Protocol and/or EU Regulation n. 392/2009, a carrier's liability for death is capped at 400.000 Special Drawing Rights, equal to around €470,000, ie considerably less than the equivalent limitation under the CCV.

[49] Italian Navigation Code, entered into force on 21 April 1942.

[50] Finally, it is worth mentioning that clauses excluding or limiting liability are considered potentially unfair by Italian law, and are subject to specific and strict conditions of validity. Pursuant to art 1341 Codice Civile similar clauses must be referred to in an ad hoc clause at the bottom of the contract or in the general terms and conditions, and must be specifically approved and accepted; moreover, several clauses of this kind are void if contained in contracts with consumers.

In addition, pursuant to Article 7 of the Italian Navigation Code, the law of the ship's flag regulates limitation of liability. The ship was operating under the Italian flag, the owners (Costa Crociere SpA) are an Italian company, the accident took place in Italian territorial waters, and there is little doubt therefore that Italian law would regulate limitation of liability. The system (set out by Article 275 of the Navigation Code) is peculiar, and there are quite a few significant differences between Italian law and the Conventions.

First, limitation under Italian law is afforded only to the operator (*armatore*) whilst the Conventions extend the limitation to other parties involved (eg the manager, charterer and Master).

Secondly, the Italian Navigation Code provides for an 'all inclusive' system, since it extends the limitation to all acts or events occurring during the voyage (including for instance salvage awards, or removal of wreck charges, and liability claims for injured and dead passengers), whilst the Conventions exclude several liabilities from limitation. A major difference exists in respect of the calculation of the limitation fund. Under Italian law, the fund depends on the value of the ship, not on the tonnage. In order to limit liability, the operator of the ship must establish a limitation fund by way of actual payment of a sum to the court.[51] Finally, under Italian law, limitation is excluded in case of fraud or gross negligence of the operator. The recklessness of the captain does, in principle, not prevent the cruise line company from benefiting from limitation, but under Italian law owners are barred from seeking limitation in cases of 'gross negligence' which implies a far less severe degree of negligence.

In light of the above, it seems that Italian law, by permitting compensation beyond the limitation set out by the CCV, is favourable to passengers. So why did their lawyers attempt to pursue claims that are evidently connected with Italy in the US?

This was probably because US courts are more likely to award victims a huge amount of damages, including extra-compensatory damages. Italian private law on the other hand pursues the goal of deterrence through extra-compensatory damages but only to a limited extent and under specific circumstances.[52] For example, in the leading case *Parrott v Fimez SpA*,[53] the Italian courts expressed the view that private lawsuits brought by injured people must only aim at obtaining compensation for loss. Allowing separate

[51] The amount is equal to two-fifths of the sound value of the ship (plus the ship's earnings at the end of the voyage); but if the value of the ship at the time when the limitation is applied for is lower than one fifth of the sound value, the limitation fund corresponds to one fifth.

[52] F Quarta, 'Foreign punitive damages decisions and class actions in Italy', in Fairgrieve and Lein (above n 6) 276.

[53] L Ostoni, 'Translation: Italian rejections of punitive damages in a US judgment', 24 *JL&Com* 24.

awards intended to punish the defendant is against public policy. The Court of Appeal of Venice rendered a judgment confirmed by the Supreme Court, refusing the recognition and enforcement of a judgment of the District Court of Jefferson County, Alabama, in a tort case. In this case, an Italian manufacturer had been ordered to pay $1,000,000 punitive damages, having allegedly caused the death of the plaintiff's son in a road accident, due to a defect in the design of the buckle of the crash helmet he was wearing. The US court did not specify the apportionment of compensatory and punitive damages against the Italian defendants, and the Court of Appeal of Venice concluded that the award was punitive in nature, and therefore contrary to domestic public policy.

The Supreme Court confirmed the ruling, and stressed that the Italian system of civil liability is strictly compensatory, not punitive. Hence, any foreign judgment including punitive damages against Costa Crociere SpA would incur serious problems during enforcement, and fight an uphill battle for the exequatur.

B. The Procedural Gap

Turning to the procedural aspects, the cost of civil litigation in Italy may represent another relevant factor in opting for the Italian jurisdiction: Italian lawyers are not expensive in comparison with those in other European countries. This is because Italian court fees as well as lawyers' fees in civil proceedings are determined according to a statutory framework. Until recently, any other agreement between plaintiff and counsel, in particular any contingency fee or conditional fee arrangement, was plainly illegal.

Moreover, Italian civil procedure does not allow for pre-trial discovery. This is because there is no strict separation of pre-trial and trial phase in Italy, yet much of the preparatory stage of civil litigation is potentially in the hands of the parties. The rules on discovery are generally similar to those of other European civil justice systems.

So why did some passengers and their lawyers, including some Italian citizens, try to escape the Italian jurisdiction with respect to a claim that is deeply connected to Italy?

The fundamental answer comes from the 'procedural gap' of the Italian civil justice system: 'Justice delayed is justice denied' has a meaning in Italian as well as in other languages. Statistics for the Italian civil judiciary, while constantly improving, remain quite unsatisfactory compared to our neighbours.[54] A study by the OECD finds that the average length of a civil suit

[54] E Silvestri, 'Goals of Civil Justice When Nothing Works: The Case of Italy', in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems Ius Gentium: Comparative Perspectives on Law and Justice* (Springer, 2014) Vol. 34, 79–103.

through all its stages is eight years, far higher than elsewhere.[55] Indeed, when a judge of the Court of Appeal of Turin, one of the biggest cities in the country, became president of the main civil court 12 years ago, he found that the oldest case had started about 43 years earlier.[56] By 2009, the Court of Appeal of Turin had cut the average length of a civil case from seven years to three. How has this goal been achieved? This became possible by improving some basic management techniques; one was to impose a 'First in, first out' principle to cases instead of the 'Last in, first out'. Following this example, the government is considering plans to halve Italy's backlog of cases and ensure that all trial stages are completed within twelve months. The government has undertaken measures to give judges more support for ancillary tasks. It is also encouraging the digitization of proceedings and out-of-court settlements.

B. Why the Azione di Classe has not Changed the Picture

Another question arises at this point: has the introduction of the *azione di classe* improved the picture? For some Italian legal scholars, the answer was quite simple before 2010. Before that date, Italy did not allow collective damages actions and the lack of a collective instrument explained the limited attractiveness of Italian Courts with respect to mass litigation. Italy finally adopted collective redress mechanisms from 1 January 2010, by introducing a new Article 140-bis of the Consumer Code (*Codice del Consumo*).[57] The introduction of this action raised many hopes that the level of protection of citizen's rights, or more precisely, consumer rights would increase.

Four years later it is questionable whether these hopes have come true. The reality seems to conflict with the high expectations associated with the introduction of the Italian collective redress mechanism for damages. Indeed, it is very interesting to note that the practice of forum shopping in mass torts to avoid the jurisdiction of Italian courts has continued in spite of the presence of the *azione di classe* in the Italian legal system. The Costa Concordia disaster occurred in 2012, well after the introduction of the *azione di classe*. However, none of the passengers and victims of the cruise have considered bringing such action.

[55] OECD, *What makes civil justice effective?* (OECD, 2013).

[56] The judge of the Turin Court of Appeal is now responsible for the project at the Department of Justice of the Italian government.

[57] Law No. 244/2007 originally introduced the old 140-bis, while law No. 99/2009 introduced the new 140-bis. Publications discussing the old 140-bis are still available, of course, and could confuse readers less experienced with the Italian system.

1. Subjective Limitations

Indeed, the new action is inserted in the Consumer Code as a means to protect the consumer. Consequently, only a consumer may file the new action. Under the Consumer Code, the term 'consumer' refers to any natural person who, in commercial activities covered by this Title, is acting for purposes which are outside their trade, business, craft or profession.

Under the new law, consumers (ie natural persons) with homogenous interests, have the right to file the *azione di classe* against a private corporation in three different cases.

It is important to underline that the plaintiff may give a mandate to a consumer association or committee to sue on his behalf. The law does not require the plaintiff to be a member of the consumer association to which he gives such mandate, and does not set forth provisions about the remuneration of the consumer association.

Because of their role, consumer associations and committees are indicated as the 'representative plaintiffs' of the damaged consumers. Indeed, they are the de facto engine behind the *azione di classe*, while the individual consumer, who is an actual plaintiff, plays no role in the civil proceedings.

This choice of limiting the action to 'consumers' in itself implies a restriction. In the case of the Costa Concordia, however, such action would seem to be applicable in view of the fact that passengers were benefitting from a package travel regime. Of course, this excludes the protection of those who worked on the Costa Concordia ship.

2. Objective Limitations

There are also objective limitations. According to Article 140-bis, paras 2 a, b and c, the action enforces:

a) contractual rights of a number of consumers and users who find themselves in a homogeneous situation in relation to the same company (...);
b) homogeneous end-consumers' rights concerning a given product in relation to its manufacturer, even in the absence of a direct contractual relationship;
c) homogeneous rights to payment of damages due to these consumers and users and deriving from unfair commercial practices or anti-competitive behavior.

Thus, it is clear that cases governed by Article 140-bis would be primarily related to actions based on consumer contracts, damages resulting from a defective product, and actions for damages caused to the same consumers and

users' by anti-competitive behaviour. For example, according to the letter of the law, behaviour (such as that which Captain Schettino is accused of) causing environmental damage is excluded. In addition, Italian scholars are still discussing whether Article 140-bis may also apply in a case of violation of certain rules protecting the financial markets, such as market manipulation or false information, where these do not qualify as unfair commercial practices.

The situation of the cruise passengers could fall under Article 140-bis, paragraph 2 (a), because they all purchased the tickets for the cruise and, after the disaster, they find themselves in a 'homogeneous situation'. The Court has to verify the presence of such a requirement by issuing an admissibility order.[58] Another problem – a fundamental one that will be quantified later – is the damage caused to the individual passenger. This is damage to the person, ranging from the death of a passenger to the mere stress of the rescue, or damage other than to the person, for example damage to personal property. With respect to the quantification of the various damages, the court may issue a judgment on the final amounts due to those who have joined the action, or it shall establish a homogeneous calculation criterion for the payment of these sums. It also grants the parties a period of not more than 90 days to agree on the liquidation of the damages.[59]

3. *Cross-border Cases*

The Italian Parliament has not considered the cross-border dimension of collective redress, the law is silent in this respect. In terms of competence, the *azione di classe* adopts the criterion of the residence of the defendant. Article 140-bis para. 4 of the Consumer Code only mentions judicial competence when the claim is submitted to the court located in the capital of the Region in which the company is based.[60]

[58] In the admissibility order, the court sets out the terms and the most appropriate forms of notices to the public, so that those belonging to the class can join promptly. Public notification is a condition for the claim. By the same order, the court determines the characteristics of the individual rights involved in the action, specifying the criteria according to which the individuals seeking to join are included in the class or must be regarded as excluded from the *azione di classe*.

[59] The minutes of the agreement, signed by the parties and the judge, is immediately enforceable. If the parties have not reached such agreement within 90 days, the judge, upon the request of at least one of the parties, liquidates the damages due to each member of the class. The judgment becomes enforceable 180 days from publication.

[60] The court of Turin has jurisdiction over Valle d'Aosta, the Court of Venice over Trentino-Alto Adige and Friuli-Venezia Giulia, the Court of Rome over Marche, Umbria, Abruzzo and Molise, and the Court of Naples over Basilicata and Calabria.

It emerges that the main question consists in reconciling the application of Regulation (EU) 1215/2012 with the requirement to concentrate the efforts of the group on a small number of judges previously identified (the court located in the capital of the Region in which the company is based). The application of the criteria provided for by Article 18 of the Brussels I Recast Regulation makes it possible to embed the action in an Italian court, but these criteria do not necessarily coincide with those on which Article 140-bis is based. It should be noted, however, that once jurisdiction has been identified under the Brussels I Regime, national procedural rules complement and support the criteria laid down in the Regulation. This is particularly so in cases where the internal rules enhance the concentration of cases in one forum. Thus, the competent court may be located at the place of performance of the contract, or the place of the damaging event, provided of course that such place is the same for all consumers involved in the proceedings.

V. THE JOINT CONCILIATION

Finally, it is important to underline that a large number of passengers have received compensation by adhering to an ad hoc joint conciliation scheme. This solution results from the exercise of 'Italian creativity' in law to overcome gaps of the ordinary justice system.

Consumer associations have played – and still play – an important role in advancing consumer rights in Italy. The *Ministero delle Attività Produttive* set up a Consumer Council (National Council of Consumers and Users, *Consiglio nazionale dei consumatori e degli utenti*) in July 1998. Article 136 of the Italian Consumer Code expressly mentions it and states its functions.[61] The Consumer Council invites representatives from national consumer associations to take part in meetings with representatives of the government and of the industry. There are about eighteen important consumers associations within the county. Among other requirements, the organizations should be founded by a public or certified private deed, they shall be democratically structured, pursue the sole aim of protecting consumers and users, and shall not be profit making. In addition, a list of members shall be kept and updated annually, with an indication of the fees paid directly to the association for statutory purposes. They also have to demonstrate that they are representative in terms of numbers of members and present throughout the country.

The Consumer Council is responsible, among other tasks, for encouraging initiatives designed to improve consumers and users' access to justice in order to settle disputes.

[61] Decree Law 281 of 30 July 1998 – now Consumer Code, Legislative Decree 206/2005.

Based on the above-mentioned legal framework, sixteen of the consumer associations taking part in the Consumer Council promoted a committee of Costa Concordia victims on 12 January 2012. Its aim was to advance the rights of the injured passengers and obtain rapid and satisfactory compensation. Consumer associations contacted the victims of the disaster to obtain their consent to approach the cruise line company with a view to enter out-of-court settlement negotiations between Costa and the passengers. Such out-of-court agreement (protocol) between consumer representatives and the company contains the criteria for compensating the passengers. Indeed, there is no control over the content of the agreement by the courts, nor by the government. The government only supervises private parties during the process of negotiations. The Italian term to denote a form of conciliation is '*conciliazione paritetica*'. The EU Parliament Resolution on alternative dispute resoltion expressly mentions the Italian system, acknowledging that it deserves attention among the various out-of-court settlement procedures. The EU Resolution on alternative dispute resolution in civil matters states that the Italian joint conciliation procedure is a possible best practice model. It is based on "(...) a protocol agreed and signed by the company and the consumer associations, requiring the company to agree in advance to ADR in order to resolve any disputes which arise in the area covered by the protocol".[62]

Thus, the joint conciliation model consists of a voluntary ADR method based on negotiation. It had already been widely applied in sectors such as telephony (where it was tried out initially in 1991 in a pilot project financed by the EC), and postal services (2002).

Joint conciliation may be initiated only after the parties (consumers' associations and businesses) have signed agreements and implementing rules which govern the conduct of the procedure.

With respect to the *Costa Concordia* case, the agreement provides for a compensation package offered to physically uninjured passengers. As to the families of the dead and missing, or hospitalized passengers, separate proposals were to be offered based on their individual circumstances and left to direct negotiations.[63]

The agreement was reached with virtually all the Italian consumer associations and defense organizations, save for one (Codacons), which was preparing class action claims in the US on behalf of passengers and victims. The compensation comprises a payment of €11,000 per person to compensate for all damages (including loss of baggage and property, psychological

[62] European Parliament Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117(INI)), 11.

[63] A group of 32 passengers died and 64 passengers were injured from a total of 4,252 passengers.

distress and loss of enjoyment of the cruise) to be paid within seven days from the acceptance of each passenger. In addition, the agreement provides for the reimbursement of a range of other costs and losses, including reimbursement for the value of the cruise, all air and bus travel costs included in the cruise package, all travel expenses to return home, all medical expenses arising from the event, and all expenses incurred on board during the cruise. Notwithstanding the fact that the joint conciliation has some advantages, it is quite clear that the non-physical damages suffered by the passengers have not been fully compensated in this case, and the gravity of the stress and pain of being involved in a disaster have not been subject to full compensation.

Costa also promised return of all property stored in cabin safes, as far as recoverable, and to grant passengers access to a program for 'psychological assistance'. The offer to uninjured passengers was available for some months only. The uninjured passengers (and consumer associations) agreed not to bring legal actions, including the *azione di classe*, against the company. Because of the joint conciliation about 60% of Italian and non-Italian passengers received compensation based on these terms.[64]

VI. CONCLUSIONS

This case is a starting point from which to observe the practice of forum shopping among European jurisdictions in consumer contract cases.[65]

European private international law provides that a consumer can sue the professional in the courts of the place of his domicile. Taking the Costa Concordia case as an example: each passenger could have sued the company in the city or town of his domicile. Accordingly, passengers' domiciles could have justified actions before the courts of a number of European jurisdictions. Nevertheless, as the Costa Concordia case shows, this benefit for the consumer is not compatible with the nature of cross-border collective redress. Existing rules and lack of any form of coordination risk promoting the proliferation of parallel proceedings in the EU and conflicting judgments. Our analysis confirms that some sort of European coordination is absolutely necessary and urgent to avoid these risks and their negative consequences,

[64] In France, the process has been more complex: the cruise line company had set a deadline of 14 February 2012 (only one month after the event) for the acceptance of the offer, but FENVAC (the French national federation of the victims of catastrophes), which represented a large number of passengers, contested this deadline as too close and unreasonable. FENVAC sought an order from the Court of Nanterre to extend the deadline for the acceptance of the offer; the application was upheld and the Court of Appeal of Versailles following Costa's appeal confirmed the order.

[65] S Tang Zheng, 'Private International Law in Consumer Contracts: A European Perspective' 6 *JPIL* (2010) 225–248.

such as different treatment of European consumers involved in the same disaster depending on the place where they are domiciled.

Moreover, while Italian substantive law is relatively favorable to Costa Concordia's passengers (although it does not provide for punitive damages), the Italian civil justice system suffers from serious procedural shortcomings, so that consumers, including Italian consumers, turned to other jurisdictions despite the fact that the case was obviously connected with Italy. In addition, the introduction of the *azione di classe* has not changed the Italian litigation landscape.[66] Eventually, the compensation of a large number of passengers, who were only physically uninjured, was managed by an ad hoc out-of-court settlement scheme (joint conciliation), with the aim of overcoming the downsides of the judicial system. In so doing, the Italian experience shows the potential of out-of-court settlement mechanisms for cross-border consumer collective redress.

[66] Costa Cruises, which operated the Concordia, initially offered survivors a 30% discount off future cruises, but consumer associations dismissed the first proposal as 'insulting'.

The Israeli Class Action – A Foundation for a European Model?

*Ariel Flavian**

I. INTRODUCTION

A system of collective redress has clear advantages for European consumers, outweighing the problems that may arise from its implementation. The European Union has praised such procedures time and time again, but in 2013, only a very modest recommendation was issued by the European Commission.

Experience from other jurisdictions, such as Israel, shows that the procedure which the Commission outlined in its recent recommendation will not achieve its goals and will leave consumers with no workable redress mechanism. The basic principle of an efficient system of enforcement is that it makes unlawful behaviour inexpedient. The aim is to reach the optimal level of deterrence which will prevent the unlawful business from retaining its illicit gains. Necessary features of a proper redress system should include provisions for the inclusion of all consumers in a class unless they opt out, otherwise the number of plaintiffs would be too small and wrongdoers would not be deprived of their unlawful gains. In addition, financial incentives are necessary for an efficient private action mechanism. The Israeli model illustrates that the combination of an opt-out mechanism with financial incentives may lead to a flood of class actions. It is for this reason that financial incentives should be balanced by safeguards which come into effect at the earliest possible moment, even before an action is submitted to a court. Safeguards play an important role in preventing both frivolous actions and a flood of actions. In Israel, the new legislation brought with it many class actions. The sheer number of class actions has created new challenges for Israeli courts and the legal instrument which was introduced in Israel requires re-thinking.

This article advocates the importance of a coherent European collective redress mechanism. The evolution of the procedure in Europe and the recent

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