

Class actions in Latin America: a report on current laws, legislative proposals and initiatives

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Introduction

There is a clear international trend for the introduction of class action and collective action procedures and for their greater use in courts around the world – Latin America is certainly not being left behind in this regard. In Latin America, the last decade has witnessed increased interest in collective actions among judges, scholars, lawyers and legislators, and class action/collective action⁷ procedures have been enacted into law or are currently being considered or proposed in Argentina, Brazil, Chile, Colombia, Costa Rica, Peru and Mexico. Globally, the litigation landscape has changed dramatically since the mid-1960s, when only the United States and two other countries had class action procedures.⁸ Since then, many countries have embraced some form of collective action rules, and now the number of countries with such mechanisms exceeds 40.

While collective procedures currently in place in Latin American countries generally vary widely, most confer standing to sue to public prosecutors, individuals and private associations, allowing for injunctive and monetary relief. In addition, many Latin American countries are currently considering legislative proposals that seek to introduce collective actions or to modify current procedures. This appears to be the result of the growing emphasis on the protection of individual and consumer rights.

This article will provide an analysis of recently enacted collective action legislation in Argentina, Brazil and Chile, and of legislative proposals currently under consideration in Mexico and Brazil, among

other jurisdictions. The article concludes that, while class action procedures are certainly important tools to protect societal interests, to achieve their ultimate purpose – that is, to provide better access to justice to all the parties involved in the litigation, class action procedures must be balanced and fair to plaintiffs and defendants alike.⁹

Argentina

Prior to 1994, Argentina had no legal provisions on class actions. In 1994, Article 43 of the 1853 Federal Constitution was amended incorporating a provision that recognised protection of collective rights. Article 43 allowed for a summary action ‘*amparo*’ to protect against ‘all forms of discrimination and to protect the environment, competition, users and consumers, as well as *rights of collective incidence*’.¹⁰

Although the text of Article 43 allowed only for ‘*amparo*’ actions, which are actions seeking to protect rights affected by clearly illegal or arbitrary administrative acts, Argentine courts gradually expanded the rule to include other types of actions, including summary and ordinary civil actions.¹¹ As such, collective actions in Argentina are exercisable via ‘*amparo*’, summary ordinary civil actions.

Argentine scholars have defined *rights of collective incidence* as diffuse rights, that is, rights that are indivisible and that belong to an indeterminate number of persons, such as the right to a healthy environment.¹² Some others have distinguished collective rights from diffuse rights explaining that collective rights are those that belong to a collective group whose members are united by a common link,

such as the rights of users of public utilities.¹³

After the constitutional amendment of 1994, no special legislation was enacted for 14 years to implement collective action procedures.¹⁴ Instead, the Supreme Court of Argentina issued interpretative rules which were very restrictive, not allowing for the filing of collective actions seeking monetary relief.¹⁵ Courts, however, applied these interpretative rules differently, and sometimes inconsistently, not being bound by the doctrine of *stare decisis*. For example, while a federal court of appeals followed the Supreme Court's restrictive interpretation holding that associations could not seek monetary damages on behalf of their members,¹⁶ other courts allowed such relief.¹⁷

This scenario changed on 7 April 2008, when an Amendment to the Consumer Protection Act¹⁸ was enacted. The Amendment¹⁹ modified 30 articles of the Consumer Protection Act, incorporating some important changes, both substantive and procedural. However, only a few provisions (§§52–55) specifically addressed collective actions.

A significant change introduced by the Amendment is that it expressly allows for the filing of collective actions seeking monetary relief.²⁰ Although, as discussed above, some Argentine courts had allowed collective actions seeking monetary damages, by expressly allowing for such relief, the Amendment settles the issue of what relief is appropriate in collective actions.

The Amendment expressly grants standing to consumer associations to file collective actions.²¹ While the original text of the Consumer Protection Act gave consumer associations standing to defend consumers' interests when these were affected or threatened,²² it did not specifically grant consumer associations standing to file collective actions. In practice, however, courts allowed them to file collective actions based on the broad language of Article 43 of the Constitution. The Amendment now gives consumer associations express standing. Consumer associations are also entitled to join collective actions as co-plaintiffs. In addition, the Amendment gives standing to file collective actions to consumers, national or local administrative authorities, the Ombudsman and the Public Prosecutor's Office.²³

Consumer associations seeking to represent groups of consumers must meet the following requirements: (i) be incorporated as a legal entity; (ii) not be involved in politics; (iii) be independent from professional or commercial interests; (iv) refrain from receiving contributions from businesses; and (v) refrain from advertising.²⁴

Res judicata effect is given to judgments that are favourable to plaintiffs when raised by other consumers or users who share similar circumstances and who did not opt-out.²⁵ However, the Amendment is silent on whether res judicata effect is to be given to rulings that are favourable to the defendants. This silence

could allow class plaintiffs to argue that they have a right to initiate a new collective or individual action based on the same facts. The lack of balance of such a situation would be obvious. There should be no reason for allowing class members who were adequately represented and who did not opt-out to simply re-file the action if the final decision is unfavourable to them, while providing that defendants would always be bound by the collective action ruling, whatever its result.

The Amendment includes one provision governing settlements.²⁶ It states that in order to settle a collective action, prior notice shall be given to the State Attorney's Office who will issue an opinion on whether consumers' interests have been adequately protected. The settlement must be approved by the judge who shall issue a grounded ruling.²⁷ Class members may opt-out from the settlement.²⁸

As to costs, although the general rule in Argentine litigation is the 'loser pays' rule, and only in exceptional cases where the court considers that the controversy was sufficiently complex to justify the decision, the costs may be borne by each party,²⁹ the Amendment provides that collective action plaintiffs will always be granted free legal aid.³⁰ Such generosity is not shown to defendants who continue to be governed by the 'loser pays' rule.

Although the introduction of some class action provisions in the 2008 Amendment to the Consumer Protection Act may be seen as an initial step towards adopting some uniform legislation on class action procedures in Argentina, it is doubtful that it will have a significant impact in clarifying the existing uncertainties, not only because of the few provisions included but also because, as discussed, it contains some significant omissions. Importantly, pre-admissibility or certification procedures which are necessary in order to guarantee that only meritorious actions are admitted and to prevent waste of judicial resources, are notoriously absent.

Legal scholars and legislators have advocated for the introduction of a uniform law governing class action procedures.³¹ Some proposals to that effect have been introduced in the past to the Argentine Congress, but only one, introduced by Representative Juan Manuel Urtubey, has maintained congressional status.³² The Urtubey proposal follows the United States Federal Rule of Civil Procedure 23 model, providing for a class certification procedure in which the action will be admitted only if: (i) the class is so numerous that joinder of all members is unfeasible; (ii) there are questions of law or fact common to the class; (iii) the claims or defences of the representative parties are typical of the claims or defences of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class.³³ In addition, in determining whether to certify the class, the court must determine (a) that the initiation of separate lawsuits creates the risk of court decisions that are incompatible

or inconsistent for the individual members of the class or for those who are not parties to the action, or that have the effect of limiting or preventing them from protecting their own rights; and (b) that the common issues of law or fact predominate over individual issues.³⁴ Under the Urtubey proposal, parties may appeal the class certification ruling.³⁵

The Urtubey proposal would also require the court to define the class once it decides to certify the action. Class members may opt-out if they do not wish to participate in the action by giving written notice to the court at any time prior to the issuance of the judgment.³⁶ Finally, the Urtubey proposal provides that all class members, except those who did opt-out, will be bound by the judgment.³⁷

Brazil

In the past two decades, Brazil has seen an increase in the number of class actions, especially in the areas of consumer, environmental and tax law. The cases have also grown more aggressive and, in some instances, they have been used as an attempt to create or revise federal regulation. Publications of legal scholars' *'doctrinè'* are also contributing to this trend by discussing additional mechanisms to facilitate the filing of class actions in Brazil. In light of the many proposals on class actions pending for approval before the National Congress, these developments are likely to lead to an increase in collective litigation within the next few years.

In Brazil, a class action differs from an individual lawsuit in the following aspects: (i) the plaintiff is not the party entitled to relief but rather a representative; (ii) the rights pursued in a class action have a collective nature – individual and homogenous rights; and (iii) the decision rendered in a class action affects all parties entitled to relief, provided that it is not unfavourable to the class due to lack of or insufficient evidence.

Influenced by global trends, and especially by the American class action model, Brazilian legislation on class actions has developed significantly in the past 20 years. The enactment of the 1965 Popular Action Law was the first attempt to protect third generation rights in a tangible manner. But it was only with the enactment of Law No 7347 in 1958 and of the Public Civil Action Law, that an authentic class action, aimed at protecting broadly defined collective interests, was created.

The strength of these class actions was further reinforced when third generation rights were given constitutional status in 1988. Then, three years later, the Consumer Defense Code (CDC) introduced new rules for class actions allowing the collective enforcement of diffuse, collective or individual and homogeneous rights – an innovation in the Brazilian legal system.

The collective lawsuits provided for in the CDC, especially those seeking recovery of damages for the

violation of individual and homogeneous rights, are the Brazilian versions of US class actions. There are, however, two main differences between the Brazilian and the American models. First, under the Brazilian model, only some specific entities have standing to sue. Secondly, no certification or pre-admissibility procedures are established making it unnecessary for the court to determine whether the class is a cohesive class, whether the class members are sufficiently numerous to justify class action treatment, whether common issues predominate over individual ones, and whether the class action is a superior mechanism to resolve these issues. As a result, any entity with standing to sue may file a lawsuit and declare itself a representative of the class. This alone is sufficient for the class action to be admitted and processed as such.

In Brazil, the great majority of class actions are filed by the Public Attorney's Office (mostly in relation to environmental and tax issues) and by associations (mostly related to consumer issues). In 2007, Law No 11,448 extended the standing to file class actions to the Public Defender's Office, which will probably contribute to an increase in the number of class actions filed.

At present, many authorised entities exercise their standing to sue by filing class actions involving all sorts of subject matters. For instance, in a class action filed by an association against United International Pictures for the production of the movie *Madagascar*, the plaintiff asserted that although the movie appeared harmless, it could be interpreted as an invitation to teenagers and children to experiment with illegal drugs. The basis for this allegation was one single line by a character in the movie, the zebra, when he said he was sorry for not bringing 'drops' to a rave party. Because in Brazil 'drops' is jargon for the illegal drug ecstasy, plaintiffs claimed this was an invitation to use illegal drugs. The defence argued that although the reference to 'drops' could result in an adult making the connection with drugs, teenagers and children do not know such jargon, and would be unlikely to make the connection. These arguments have yet to be analysed by the court.

While some groups are using class actions to air legitimate grievances, it is alarming that others are trying to use them as a way to change federal regulations. An interesting example is a class action filed by a consumer association against a beer company, requesting that a non-alcoholic beer be removed from the market. The consumer association claimed that although the level of alcohol in the product was within the parameters of regulations applicable to non-alcoholic beverages, the fact that it contained some alcohol, even in a very small amount, would make the label misleading and the product dangerous to consumers. The association obtained an injunction ordering the product to be taken out of the market. This decision is currently stayed by a court order after

the defendant filed a *cautionary* proceeding before the Superior Court of Justice (*Superior Tribunal de Justiça* – STJ).

Likewise, another association filed 16 different class actions against all of the tobacco manufacturers in Brazil seeking to ban the manufacture and commercialisation of cigarettes in the country. Out of the 16 cases filed, 13 have already been dismissed on the grounds that Brazilian law expressly authorises and strongly regulates the manufacture and commercialisation of tobacco in the country.

Another similarly noticeable case was the class action filed by the Public Attorney's Office of the State of Minas Gerais against McDonald's, requesting the inclusion of nutritional information in their products throughout Brazil. Instead of litigating the case, the defendant decided to settle by agreeing to do what the plaintiff requested on a national basis, in order to avoid similar cases. In both the beverage and the fast food cases, it is worth noting that although defendants were in full compliance with regulations issued by the federal authorities, the class action plaintiffs were nonetheless successful.

There is still much work to be done in Brazil. Certainly, the most important criticism of the Brazilian class action system is the absence of rules defining the courts' jurisdiction to decide similar class actions filed in different venues. Currently, similar class actions are filed in different courts leading to contradictory decisions. Despite these issues, national legal scholars continue to claim that more entities should be allowed to file class actions, arguing that this would provide greater protection to third generation rights.

Both of these issues, however, should be analysed together and unless and until the contradictory rulings issue is resolved, standing to file class actions should not be expanded to include more authorised entities. Instead of focusing on allowing for the filing of more class actions, the focus should be on how to devise a system that will generate more qualified results. Avoiding contradictory decisions seems to be a clear necessary first step.

One of the topics that has generated great discussion in connection with the 1958 Public Civil Action Law is the effects of decisions rendered in class actions. While some advocate that decisions rendered in class actions should be effective nationwide regardless of the party filing the lawsuit or the court rendering the decision, others believe that such interpretation would be dangerous and inefficient. In a very recent decision involving a class action filed by a consumer association seeking interest rate adjustments for plaintiffs who had bank accounts with the defendant bank,³⁸ the STJ, contrary to most of its precedents, granted the special appeal filed by the consumer association, holding that a decision rendered by a court in the State of São Paulo should have nationwide effects. Reporting Justice, Nancy Andrihgi, grounded the decision mainly on the

argument that Article 16 of the Public Civil Action Law, which limits the effects of class action decisions to the jurisdiction of the court rendering the decision, does not apply to consumer class actions (the Public Civil Action Law would have subsidiary application, provided it does not conflict with the Consumer Defense Code). Justice Andrihgi explained the conflict with the Consumer Defense Code stating that the Consumer Defense Code does not contain this specific limitation and provides that the effects of a decision rendered in a class action dealing with transindividual or individual and homogenous rights are *erga omnes*. In light of this decision, we may expect a shift in the previous trend of not accepting the effects of a class action decision nationwide.

Another important rule which seems to work as an incentive for the proposal of class actions is the failure to apply the 'loser pays' rule in class actions, provided that the plaintiff does not litigate in bad faith. This leads to plaintiffs not being ordered to pay attorneys' fees as long as they acted with standing and without bad faith. Although attorneys' fees could be substantial in class actions considering that plaintiffs are entitled to ask for collective moral damages, the failure to apply the 'loser pays' rule evenly to both plaintiffs and defendants creates a clearly unbalanced situation.

As a result of criticisms raised against the present model, a group of scholars has developed proposals seeking to promote a Brazilian Code of Collective Actions. As the group involved in the drafting of these proposals (Ada Pellegrini Grinover, Kazuo Watanabe, Antonio Gidi and Aluisio de Castro Mendes) also participated in the promotion of the Ibero-American Model Code of Collective Actions (the Model Code), the Brazilian proposals were clearly inspired by the Model Code.

The proposals currently under consideration revolve around the following ideas: (i) increasing the number of entities who have standing to sue; (ii) creating a special incentive for the entity who successfully files a collective action; and (iii) creating a rule of priority for class actions, allowing them to be processed and adjudged more quickly than other lawsuits. In addition, the proposals incorporate the possibility of passive class actions provided for in the Model Code. One of the proposals expressly allows for the complementary application to passive class actions of all provisions applicable to active class actions provided that these provisions are not conflicting. Another important innovation is a provision stating that class actions dealing with damages of a national extent (*dano nacional*) must be filed in the Federal District by Federal Public Prosecutors. Finally, one of the proposals seeks to establish that the evidence gathered in civil preliminary investigations (*inquérito civil*) preceding the filing of a class action, can only be used in court in the event that the party under investigation has had a chance to discuss the evidence gathered. This

would change the current scenario where prosecutors are not required to give the parties being investigated an opportunity to comment on the evidence gathered in the investigations before deciding to file a class action.

Chile

The Consumer Protection Act of 1997³⁹ did not allow for the filing of collective actions involving violation of consumer rights. This changed in 2004, when the Act was amended, introducing collective actions in Chile.⁴⁰ The Amendment aimed at discouraging massive violations of the law and preventing courts from being overloaded with similar cases that could be dealt with in one single collective action.⁴¹ The Amendment provides that class actions must involve either 'diffuse' or 'collective' interests of consumers. Diffuse interests are defined as those that belong to an indeterminate number of consumers. Collective interests are common rights belonging to an ascertained or ascertainable group of consumers.⁴² The Amendment allows collective action plaintiffs to sue for declaratory, injunctive and monetary relief, as well as to have 'abusive clauses in adhesion contracts annulled'.⁴³

Standing is granted to: (i) The National Consumer Service (SERNAC); (ii) consumer associations; or (iii) a group of at least 50 consumers with the same 'affected rights'. Consumer associations must have been incorporated for at least six months prior to the filing of the suit and must have the necessary authorisation by its shareholders to proceed with the suit.⁴⁴ In addition, they must be an 'organization of persons or legal entities, independent of economic, commercial, or political interests, which has the objective of protecting, informing, educating and representing consumers, and defending consumer rights'.⁴⁵

Collective actions in Chile are summary proceedings⁴⁶ divided into three phases: (1) admissibility or certification; (2) declaratory; and (3) execution or liquidation.

In the admissibility or certification phase the court must determine that: (i) the claim was filed by someone with standing; (ii) it involves collective or widespread interests of consumers; (iii) the action identifies the factual and legal allegations that affect collective interests; and (iv) the potential number of affected parties justifies, economically and procedurally, the institution of a collective action.⁴⁷ These limited admissibility criteria provide a low threshold for class certification. Key features in admissibility procedures such as predominance of common issues over individual ones, superiority of the collective action for the fair and efficient adjudication of the controversy, manageability of the case, typically of the collective claims or defences, and adequacy of representation are not mentioned.

Defendants are granted ten days to oppose certification or admissibility.⁴⁸ If the court denies admissibility, plaintiffs may only re-file as individual actions, except when they can produce new evidence that would have altered the judges' ruling on admissibility.⁴⁹ If the class action is admitted, the court will order defendants to publish at least two notices in a national newspaper.⁵⁰ Consumers have 30 days from the publication date to opt-out from the class. Any judgment resulting from the class action will not apply to consumers who opt-out.⁵¹ In addition, once the notice is published, no other lawsuits may be filed against the defendant based on the same facts. If they are, the court will decree a *litis pendencia*.⁵²

In the declaratory phase, the court will determine whether the defendant is liable in the abstract, detached from any real class member's claim. Evidence is produced and the judge may call to conciliation hearings as he deems appropriate.⁵³ During the declaratory phase, and before a final ruling is issued, the court may divide the class in subclasses. These subclasses are aimed at facilitating calculation of compensation or relief.⁵⁴ The final decision is subject to appeal with staying effects.⁵⁵ Regarding *res judicata*, the law provides that if the ruling is unfavourable to plaintiffs, a new lawsuit may be filed before the same court but only based on new circumstances.⁵⁶ What might constitute new circumstances is not explained, giving judges the ability to decide this point on a case-by-case basis. The statute of limitations is tolled during the collective procedure phase.⁵⁷

The final execution or liquidation phase, '*collective proceedings for damages phase*', has the purpose of awarding damages to consumers who prevailed in the declaratory proceeding. Liability is not reconsidered and the findings of fact and of law made in the declaratory phase ruling constitute 'absolute evidence' in the execution phase. Plaintiffs must only prove that they are members of the class in order to qualify for compensation.⁵⁸ The same collective representative represents the plaintiffs. The action must be filed in the same court which had jurisdiction over the declaratory phase within 90 days of the publication of the final ruling.⁵⁹ Defendants have ten days to object as to specific class members.⁶⁰ The court may order evidence production if it determines that there are substantial, pertinent and disputed facts.⁶¹ Defendants have 30 days in which to pay the award although the court has the power to impose an instalment payment plan when the amount at issue is significant.⁶²

Mexico

The Political Constitution of the United Mexican States of 1917 was the first Constitution of the world to establish social rights, along with its 1919 Weimar equivalent. However, it is now more than 90 years behind in the areas of the so-called new third

generation rights and enforceability mechanisms. The lack of suitable protection methods is particularly noticeable with regard to rights involving the environment, health, users and consumers, cultural personal assets, development, quality of life, information technology freedom and self-determination of the country, among others.

The movement to give access to justice through the protection of diffuse and collective rights or interests led by Mauro Cappelletti during the 1970s soon reached Mexico through a series of conferences delivered at the UNAM Law School in 1990. Mexico is currently at an initial stage in the subject when compared with the rules and jurisprudential evolution of countries such as Argentina, Brazil, Chile, Colombia, Spain and the United States. Certainly, Mexico is in a position to evaluate and analyse the experience gathered in those countries and to carve out an enriched domestic system.

At the constitutional level, there are a few examples of collective actions. For instance, the agricultural constitutional review '*amparo*' in favour of farming cooperative or communal groups; and a miscalled '*popular action*', through which any citizen may lodge a complaint before the House of Representatives of Congress, in case of liability by high-ranking public employees (political trial).

At the legislative level, '*popular claims*' exist already in the areas of environmental, health, consumers' and elder citizens' rights. These are entertained before different administrative agencies and, in very few cases, express authority is granted to begin judicial actions, although in all of them, the agency has an exclusive monopoly to stand before a court to claim a violation of collective rights. Some laws regulate collective or group actions expressly. The Federal Labor Law on Economic Collective Conflicts; the Civil Procedure Code of the States of Morelos, Coahuila and Puebla; and the Consumer Protection Federal Law, which only gives standing to the agency to file actions on behalf of consumers.

It is important to mention that in the 15 years since the Consumer Protection Law was enacted, there have only been two group actions filed by the Consumer Protection Agency before the federal jurisdiction: the *Air Madrid* and the *Lineas Aereas Azteca* cases, both in 2007, with the exception of some isolated judicial precedents in consumer matters.⁶³

At present, the possibility of legislative reform is under study in Mexico. Such reform could take place in several ways: (i) by *transversal*, that is, including environmental, health, consumer, cultural assets, constitutional review processes ('*amparo*'), and other matters; (ii) by introducing specific chapters in the civil procedure codes and in the Federal Commerce Code; or (iii) through the approval of a general collective procedure code. The Ibero-American Model Code for Collective Actions constitutes a guide for such

legislative reforms.⁶⁴

Among the multiple aspects that must be considered in implementing such reform, the following stand out: (a) broad standing to initiate these actions, taking into consideration experience of other countries; (b) adequate group representation; (c) coherent injunction measures; (d) extension of the effects of the final ruling; and (e) indemnification of the harm caused and its extension to the total damages.

Considerations to prevent the abuse of the system are of particular interest. These include: (i) a certification procedure, prior to the initiation of a collective action; (ii) *res judicata* making the final ruling binding on every class member; (iii) opt-out systems that favour legitimate claims based on the numerosity principle; (iv) caps to attorneys' fees and accountability structures before the judicial power to prevent abuse by plaintiffs' lawyers; (v) standing to bring a collective action limited to specific organisations or to a minimum number of individuals in order to prevent political interests from interfering whenever standing is granted exclusively to administrative agencies, in compliance with the adequate representation principle; and (vi) allocation of monetary awards to specific entities instead of allowing monetary awards to go to the pockets of plaintiffs' attorneys.

The atmosphere is ripe for the discussion of a constitutional reform to introduce collective actions as shown by the initiatives filed this year to add a fifth paragraph to Article 17 of the Constitution: '*The laws shall regulate those actions and procedures for a suitable protection of collective rights and interests, as well as measures allowing individuals to organize to defend themselves*'.⁶⁵ The introduction of collective actions is a priority of the Federal Administration, the Congress and the Judiciary, including the states. Not only to guarantee broader access to justice in the terms of Article 17 of the Constitution, but also to reduce human and material resources and associated costs within the judicial machinery; to give coherence to judicial rulings; to grant affordable access to justice, including small claims, and, in particular, to strengthen the democracy through the dynamic participation of the citizenry.

Just as expressed by Cappelletti in those memorable conferences given in Mexico, the great responsibility of the jurist – and in general of the legislators and judges of our times – consists in bringing the law to the civil society, which is a fundamental aspect of any real democracy.

Ibero-American Model Code

The Ibero-American Collective Actions Model Code is a proposal by a committee⁶⁶ of the Latin American Procedural Law Institute. Its adoption is being promoted in several Latin American countries.⁶⁷ According to the Model Code, class actions are to be pursued to safeguard (i) diffuse interests or rights

defined as supra-individual, indivisible rights or interests held by a group, category or class of persons joined by factual circumstances; or (ii) homogeneous individual interests or rights, understood as a set of individual subjective rights of common origin held by the members of a group, category, or class.⁶⁸ The Model Code would allow for class actions seeking compensatory and injunctive relief.⁶⁹

While the Model Code provides that class actions must meet some admissibility requirements, such as to show: (i) the social importance of collective protection; (ii) the predominance of common matters over individual ones; and (iii) the usefulness of the collective action for the protection of homogeneous individual interests or rights,⁷⁰ the Code does not provide for a clear pre-admissibility procedure to determine whether a collective action has merit to proceed as such and whether the class action is the best tool to resolve the controversy and achieve judicial economy.

The Code, however, provides that the judge may determine whether representation is proper at any time, and that it should take into account factors such as the representative's credibility, capacity, prestige and experience, his background in the judicial and extrajudicial protection of rights, his conduct in other class-action proceedings, the coincidence of interests of the class members and the object of the complaint, and, in the case of associations, the length of time during which the association has been incorporated.⁷¹

The Model Code would grant broad standing to pursue class actions to: (i) members of the class; (ii) the Public Prosecutor's Office; (iii) the People's Ombudsman and the Office of the Public Ombudsman; (iv) some public entities; (v) labour unions; (vi) associations that have been legally incorporated for at least one year; and (vii) political parties.⁷² For associations, the Model Code does not require previous authorisation of its shareholders to file the action and the requirement of having been organised previously may be waived by the judge when a clear social interest is at stake.⁷³

After the complaint is filed, the judge is to schedule a preliminary hearing in which settlement discussions are to take place. Any settlement agreement reached between the parties must be approved by the judge. If no settlement is reached, the judge will decide if the proceedings meet the admissibility requirements to continue as a class action, or may separate the petitions into different class action proceedings, if such separation leads to judicial economy or facilitates conduction of the proceedings.⁷⁴ As explained above, no admissibility procedure is envisaged.

The court is then to decide the controverted issues, the evidence to be produced, and to determine the burden of proof applicable to the case and which party must bear it.⁷⁵ According to the Code, the burden of proof belongs to the party having scientific or technical

knowledge, specific information on the facts, or greater ease to prove them.⁷⁶ A controversial proof of causation mechanism provided for by this Model Code is that it allows for statistical or sampling evidence as long as obtained lawfully.⁷⁷ This provision conflicts with existing evidentiary standards in many civil law countries where statistical evidence cannot be used to prove individual causation or damages.

If the court finds the defendant generally liable to the class,⁷⁸ class members have 60 days to seek individual relief. The action may be filed with the court venued at the place where the individual class member resides, and the individual must only prove individual injury, specific causation and the amount of damages.⁷⁹ If individual actions are not filed within 60 days, the Public Prosecutor's Office must file liquidation proceedings on their behalf when the action involves a significant social interest.⁸⁰

As to costs, the Model Code provides that if the defendant is found liable, the court will order the defendant to pay court costs, expert fees and other expenses as well as the fees of the plaintiff's attorneys. However, the same article expressly states that plaintiffs who bring class actions will not be required to advance costs, expert fees or any other expense, nor will they be ordered to pay such costs, fees or expenses, except in the case of proven bad faith.⁸¹ These provisions depart from the traditional loser pays rule adhered to in most civil law countries.

The Code provides that the filing of the class action tolls the statute of limitations for individual or collective actions directly or indirectly related to the dispute.⁸² The judgment will have res judicata effect except when the claim is rejected for lack of evidence, in which case, any party having standing may attempt another action, on identical grounds, using new evidence. In cases involving homogeneous individual interests or rights, if the claim is rejected, the interested parties may file an individual action for compensation.⁸³ On the other hand, if a defendant prevails on the merits, none of the class members are bound by that decision. In cases involving diffuse interests or rights, res judicata will apply to all members of the class.⁸⁴

Finally, the Code provides that an appeal of the final judgment will be granted without a stay of execution unless the grounds are significant and could result in serious, irreparable damage to one of the parties.⁸⁵

Conclusion

The multiplication of class action and collective action mechanisms around the world is only one of the ways in which 'access to justice' is being made increasingly available for a greater proportion of the population. Other purported access to justice initiatives include an erosion of the loser pays rule and prohibitions against contingency fee arrangements and third-party

'litigation funding'. We are also witnessing a relaxation of filing fee requirements for class actions and the increasing availability of punitive or moral damages for plaintiffs. Many or all of these 'enhanced' justice mechanisms have application in the class action arena. But easier access to the courts for would-be class action litigants does not necessarily lead to a greater dispensation of justice. Unfettered access to class action mechanisms may allow unmeritorious claims to go forward which, if unchecked, can lead to litigation abuses. One need only look to the north for an excellent example of such litigation abuses in the area of class actions.

The development of class action proposals, legislation and the enactment of such procedures into law in Latin America continue to march steadily forward. A growing number of countries in Latin America recognise, or are seeking to recognise, some form of collective actions acknowledging that they are important tools for the protection of societal interests. However, to achieve their purpose, they must provide better access to justice to *all* parties involved in the litigation, claimants and defendants alike. Class action procedures must be moulded into fair and workable procedures that are balanced. A review of some of the enacted and pending legislation in Latin America reveals problems such as failing to articulate meaningful class certification criteria, vague and ambiguous provisions, unfair *res judicata* and costs provisions, to mention a few. Thus, whereas the rest of the world, including much of Latin America, is enacting procedures to allow for or expand the availability of class action or collective action procedures, the United States is arguably moving in the opposite direction in the hope of eliminating the abuses that may come with such litigation. Perhaps the United States experience with class actions can provide a useful example for countries in Latin America to draw upon when considering, enacting or amending class action or collective action laws in order to avoid the sorts of abuses that are now being corrected there.

Notes

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- 7 For purposes of this article we use the terms 'collective' and 'class' interchangeably.
- 8 See Luiz Migliora et al, *Class Actions in Brazil and the US, and Global Trends*, 6:8 *LatinLawyer* 38, 39 (September 2007) (hereinafter Migliora).
- 9 The reports that follow are provided by: Shook Hardy & Bacon LLP (Argentina, Chile, and the Ibero-American Model Code); Ríos Ferrer Guillén-Llarena Treviño y Rivera (Mexico); and Veirano Advogados (Brazil).
- 10 See Hector A Mairal, *Collective and Class Actions in Argentina*, at 7, www.law.stanford.edu/display/images/dynamic/events_media/Argentina_National_Report.pdf (hereinafter Mairal).
- 11 *Ibid* at 12.
- 12 *Ibid* at 7.
- 13 *Ibid*.
- 14 *Ibid* at 2.
- 15 *Ibid* at 8.
- 16 *Ibid* at 8 (discussing Federal Court of Appeals for Civil and Commercial Matters, Chamber I, *Union de Usuarios y Consumidores v Edesur*, 2005-A LL 93).
- 17 *Ibid* at 8 (discussing Court of Appeals for Commercial Matters, Chamber C, *Union de Usuarios y Consumidores v Banco de la Provincia de Buenos Aires*, 2006-B LL 375).
- 18 Consumer Protection Act, Pub. Law No 24.240.
- 19 See Pub. Law No 26.361 published in the Official Gazette, CXVI, No 31.378 of 7 April 2008.
- 20 *Ibid* at §54.
- 21 *Ibid* at §55.
- 22 Pub. Law No 24.240 *supra*.
- 23 *Ibid* at §52.
- 24 Pub. Law No 24.240 *supra*, §57.
- 25 See Pub. Law No 26.361 *supra*, §54.
- 26 *Ibid*.
- 27 *Ibid*.
- 28 *Ibid*.
- 29 Mairal, *supra*, at 19.
- 30 See Pub. Law No 26.361 *supra*, §55.
- 31 Mairal *supra*, at 16 (citing Julio C Cueto Rua, *La acción por clase de personas*, 1988-C L.L. 952; Alberto Bianchi, *Las acciones de clase como medio de solución de los problemas de legitimación colectiva a gran escala*, Revista Argentina del Regimen de la Administración Publica, year XX, No 235, pp 13–35 (1998)).
- 32 Proposal by Juan Manuel Urtubey, 33 Trámite Parlamentario, 19 April 2007.
- 33 Urtubey, *supra*, §1.
- 34 *Ibid* at §2.
- 35 *Ibid* at §7.
- 36 *Ibid* at §9.
- 37 *Ibid* at §15.
- 38 Special appeal No 411529-SP.
- 39 Consumer Protection Act. Pub. Law No 19.946.
- 40 Pub. Law No 19.955, published in the Official Gazette on 14 July 2004.
- 41 See Martin Gubbins and Carla Lopez, *Class Actions in Chile* at 4, www.law.stanford.edu/display/images/dynamic/events_media/Chile_National_Report.pdf.
- 42 Pub. Law No 19.955, §50.
- 43 Pub. Law No 19.955, §50.
- 44 *Ibid* at §61 (1) (b).
- 45 *Ibid* at §5.
- 46 *Ibid* at §51.
- 47 *Ibid* at §52.
- 48 *Ibid* at §52.
- 49 *Ibid*.
- 50 *Ibid* at §53.
- 51 *Ibid*.
- 52 *Ibid*.
- 53 *Ibid* at §53B.

54 *Ibid* at §53A.

55 *Ibid* at §53C.

56 *Ibid* at §54.

57 *Ibid*.

58 *Ibid* at §54D.

59 *Ibid* at §54C.

60 *Ibid* at §54E.

61 *Ibid*.

62 *Ibid* at §54F.

63 Fourth Court in Civil Matters of the First Circuit dated April 2008, '*Collective Actions in Favor of Consumers, Legitimacy, Competence and Purpose*'; '*Collective or Diffuse Interests in Jurisdictional Collective or Individual Processes. Inherent Characteristics*'; and '*Collective or Diffuse Interests. Its Characteristics and Actions for its Defense*'.

64 Approved within the XIX Iberoamerican Journeys of Procedural Law (Caracas, 2004).

65 The constitutional reform initiative was simultaneously filed in the Representative and Senate Chambers in 2008.

66 The committee was comprised of law professors from a number of Latin American nations as well as Spain and Portugal. The primary

authors of the model were Brazilian law professors – Professor Ada Pelligrini Grinover and Kazuo Watanabe.

67 Presented at several seminars including the XVIII Iberoamerican Procedural Law Sessions, Montevideo, 16–18 October 2008.

68 Ibero-American Model Code, §1.

69 *Ibid* at §5–8.

70 *Ibid* at §2.

71 *Ibid* at §2, ¶ 2.

72 *Ibid* at §3.

73 *Ibid*.

74 *Ibid* at §11.

75 *Ibid*.

76 *Ibid* at §12.

77 *Ibid* at §12.

78 *Ibid* at §18.

79 *Ibid* at §23.

80 *Ibid* at §13.

81 *Ibid* at §15.

82 *Ibid* at §17.

83 *Ibid* at §33.

84 *Ibid* at §36.

85 *Ibid* at §18.