

# **Emerging Trends in International Litigation: Class Actions, Litigation Funding and Punitive Damages**

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## **Introduction**

If ever there were evidence that the world has become a single, interconnected and interdependent marketplace, it appeared in the front pages of newspapers in the waning months of 2008. First, news spread of melamine-contaminated milk in China and quickly sent shockwaves to boardrooms in the United States and Europe. Secondly, the financial crisis that started in New York began to impact stock exchanges from Tokyo to London. These reports should hardly surprise anyone anymore because in the 21st century, commercial activity is by no means circumscribed to a single nation or region. With the spread of markets and opportunities comes the spread of risk and liability. To stay ahead, companies must not only assure investors and consumers that their offerings meet expectations, but they must ensure that their activities and products do not contravene the many and varied legal provisions applicable in different markets.

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The good and bad news for multinational companies is that more countries are moving toward an American-style approach to litigation by attempting to export not only the good but also the bad features of American litigation. Legislative proposals around the world are purporting to give better access to justice to consumers, including proposals introducing class actions, relaxing the traditional 'loser pays' rule applicable in most civil law jurisdictions, and eliminating prohibitions against contingency fee arrangements and third-party litigation funding. Some countries are also seeking to make punitive damages available even though their legal systems have long rejected them. Companies that understand and stay ahead of these changes will have a competitive advantage in the global market.

This article will highlight recent international developments in areas that may impact product liability litigation, namely, class actions, litigation funding, contingency fees and punitive damages. It will describe current legislation and legislative proposals, and the problems that they bring, as well as related landmark cases from some jurisdictions.

### **The rise of consumerism and the compensation culture**

While in the early phases of the industrial society, politics focused on the rights of producers, the 20th century witnessed the political discovery of the consumer.<sup>1</sup> This shift was foreshadowed by the words of Franklin Roosevelt in 1932: 'I believe we are at the threshold of a fundamental change in our popular economic thought, that in the future, we are going to think less about the producer and more about the consumer.'<sup>2</sup>

Although there are some around the world who blame America for exporting a poisonous brew of consumer-oriented law, empty materialism and heedless waste of resources,<sup>3</sup> such as leftist Hugo Chavez of Venezuela who has declared that American consumerism, marching hand in hand with American militaristic imperialism, threatens the globe,<sup>4</sup> there is a growing movement nevertheless that endorses increased empowerment for consumers and individuals.

Recent evidence suggests that consumerism and consumer rights movements are gaining traction. For example, while consumer-related

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1 James Q Whitman, 'Consumerism versus Producerism: A Study in Comparative Law', *Yale Law Journal*, December 2007 [hereinafter Whitman] (citing Ann Mettler, Editorial, 'Meet the European Consumer', *Wall St J Eur*, 29 January 2007, at 15).

2 *Ibid*, (citing Lawrence B Glickman, 'A Living Wage: American Workers and the Making of Consumer Society' 156 (1997) quoting Franklin Delano Roosevelt).

3 *Ibid*, at 2.

4 Associated Press, 'Consumerism Threatens Globe: Chavez', *Hindu* (Chennai), 28 January 2006, at 18, available at: [www.thehindu.com/2006/01/28/stories/20060128029411400.htm](http://www.thehindu.com/2006/01/28/stories/20060128029411400.htm).

litigation costs are the highest in the United States, other regions seem to be catching up.<sup>5</sup> One survey by Lloyd's of London found that the US tort system costs each US citizen US\$625 a year. That has certainly made products more expensive. States with the highest tort costs experience the lowest standard of living.<sup>6</sup>

Another Lloyd's survey reveals that many business leaders agree that a US-style compensation culture is spreading, especially within Europe. According to the survey, globally, most firms have experienced a lawsuit within the past three years with actions brought by employees and customers being the most frequent. While suits brought against individual directors and officers are less widespread, half of directors feel more exposed than three years ago. Large companies are most likely to be targets for lawsuits, but smaller and fast-growing companies may be more exposed if they lack the infrastructure and experience to respond effectively.<sup>7</sup>

Along the same lines, a 2004 survey in the United Kingdom showed that 'UK businesses are increasingly hampered by the costs of dealing with the UK's burgeoning compensation culture, which in turn is diverting management resources and financial investment away from core business and revenue generating activities.'<sup>8</sup> The survey, conducted by a leading insurance broker and risk management company, found that 75 per cent of those surveyed saw the current growing trend as creating an unsustainable burden on industry, commerce and public services. Among the companies surveyed, 62 per cent expected an overall increase in the cost of claims to their business and 60 per cent felt that the compensation culture was hampering their business by distracting management time. The top three reasons for the growth of the compensation culture were seen as the growth of 'no win no fee' legal services, media advertising of these services, and the reluctance of insurers to defend claims.

According to the Lloyd's survey, boards are allocating increasing resources to litigation issues, which is pushing up the price of products and services and leading many companies to adopt a more cautious business strategy. On average, boards now spend 13 per cent of their time discussing litigation and expect this to increase further over the next three years. There is strong agreement that valuable resources are being spent on legal issues that could

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5 Del Jones, 'Advice from the Top: Training of staff key to avoiding lawsuits', *USA Today*, 14 September 2008, available at: [www.usatoday.com/money/companies/management/2008-09-14-lloyds-lawsuit-advice\\_N.htm?loc=interstitialskip](http://www.usatoday.com/money/companies/management/2008-09-14-lloyds-lawsuit-advice_N.htm?loc=interstitialskip).

6 Survey by Lloyd's of London discussed in 'Advice from the Top: Training of Staff Key to Avoiding Lawsuits', *supra*.

7 Lloyd's, 'Directors in the Dock: Is Business Facing a Liability Crisis?' (May 2008).

8 27 July, 2004 Aon survey available at: [www.aon.com/uk/en/about/Press\\_Office/2707\\_blame.jsp](http://www.aon.com/uk/en/about/Press_Office/2707_blame.jsp).

be deployed elsewhere. Most significantly of all, about one-third of businesses have become more risk averse and less likely to invest in new business opportunities as a direct result of concerns about litigation.<sup>9</sup>

Companies have reacted in different ways to these developments. In the United States, experience has shown that some companies react to large damages awards against one company in an industry by either changing their business practices in an attempt to avoid a similar verdict, or by simply not producing those products any longer.<sup>10</sup> Those companies that choose the former approach face the challenge of maintaining their own identity and core values, making sure that they are able to satisfy the needs and wants of the global market, and at the same time, attempting to reduce their exposure to litigation.

### Emerging trends in the international legal arena

The rise of the compensation culture in the United States was fostered by a civil justice system that adopted several exceptional ‘access to justice’ features such as class actions, primarily on an opt-out basis; contingency-fee financing of litigation; rejection of ‘loser-pays’ rules that make parties responsible for their opponent’s legal fees depending on the outcome of the litigation; extensive reliance on juries as fact finders; costly pre-trial discovery; and the availability of punitive damages in substantial areas of civil litigation, such as torts.<sup>11</sup> The implication drawn is that the foregoing features generate a considerable and undesirable drag in the US economy.<sup>12</sup> In the United States, litigation costs total 2.1 per cent of GDP, four times that of other OECD countries. Four reports issued last year on the competitiveness of US capital markets found that the ability to bring broad securities class actions in the United States was a factor in a foreign company’s decision whether to list or trade in the United States.

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9 Lloyd’s, ‘Directors in the Dock: Is Business Facing a Liability Crisis?’ (May 2008).

10 Gary Rubin, ‘Commentary, Collective Litigation in Europe: Policy Considerations From the U.S. Class Action Experience’, *Legal Backgrounder*, Vol 23, No 1, at 2 (Wash Legal Found, January 18 2008), available at: [www.wlf.org/Publishing/results.asp?View=search&Search=rubin&x=10&y=8](http://www.wlf.org/Publishing/results.asp?View=search&Search=rubin&x=10&y=8) [hereinafter Rubin].

11 See Mark A Behrens, Gregory L Fowler, & Silvia Kim, ‘Global Litigation Trends: Trying to Take the “Good” and Leave Out the “Bad” Aspects of the American Civil Law System’, *Mich St J Int’l L* (forthcoming 2008) [hereinafter Behrens]. See also Richard A Nagareda, ‘Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism’, Working Paper No 08-05, to be published at – *Vand L Rev* – (forthcoming 2009) [hereinafter Nagareda] at 2.

12 *Ibid* (citing Tillinghast Towers-Perrin, 2006 Update on US Tort Cost Trends 3 (2006), [www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort\\_2006\\_FINAL.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf) (estimating cost of US tort system as US\$261 billion in 2005)).

In fact, a 2007 Financial Services Forum study found nine out of every ten companies who delisted from a US exchange in the last four years said the litigation environment played a role in that decision.<sup>13</sup>

Despite these problems, around the world there is growing support for the adoption of litigation practices inspired by the US experience, as evidenced by a recent survey which found that nearly half of all business leaders questioned believed that American-style litigation was increasingly taking hold in Europe.<sup>14</sup> This growing support can certainly be explained by several emerging trends. The promotion of consumers' interests has led to complaints in these jurisdictions that consumers cannot obtain the same redress that consumers in other markets, particularly in the United States, may obtain. In addition, there is increased awareness among consumers of their litigation opportunities as press headlines report on large awards for consumers (while failing to report on more numerous and significant losses), and as American plaintiffs' law firms have expanded their operations around the world and are being imitated by local lawyers.

Some of the litigation practices being discussed worldwide include introduction of collective or class action mechanisms, allowance for litigation funding and contingency fees, and 'supplementing' the traditionally accepted compensatory nature of damages in many jurisdictions by introducing punitive damages.

### **Class actions**

During the latter half of the 20th century, the United States witnessed the launch of national aggregate litigation as a result of the nationalisation of commerce that became so prevalent in the first half of the century.<sup>15</sup> State courts attempted to resolve on a class-wide basis, the claims of persons dispersed throughout the nation.<sup>16</sup> Class counsel would select the state court forum based on its inclination to certify a nationwide class action. The Class Action Fairness Act (CAFA) represented an indirect and partial response in federal and statutory law to this phenomenon.<sup>17</sup>

In the rest of the world, the litigation landscape has changed dramatically since the mid-1960s. Back then, only the United States and a few other countries had class action procedures.<sup>18</sup> Since the 1960s, many countries

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13 Lisa Rickard, 'Class Actions: Should we imitate the United States?', *Le Figaro*, 6 June 2008.

14 See 'Litigious US Ways Strangling Global Growth', *Newsmax.com*, 29 May 2008.

15 See Nagareda, *supra* note 11.

16 *Ibid.*

17 *Ibid.*, at 7.

18 See Behrens, *supra* note 11. See also Luiz Migliora et al, 'Class Actions in Brazil and the US, and Global Trends', 6:8 *LatinLawyer* 38, 39 (September 2007) [hereinafter Migliora].

have embraced some form of collective action rules, and now the number of countries with such mechanisms exceeds 40.<sup>19</sup> There are good reasons to be concerned that such collective action mechanisms, if not accompanied by proper controls, may ultimately prove to be a serious burden on business.<sup>20</sup> The nuances of some of the most significant collective mechanisms by jurisdiction are described below.

## European Union

Most European countries allow some form of aggregate litigation.<sup>21</sup> They mostly consist of representative actions in which consumer organisations are allowed to sue to protect collective interests of consumers.<sup>22</sup> However, most of the models adopted so far allow for class actions with a limited scope and nature. Such mechanisms have not been used extensively, primarily because the consumer organisations that could bring claims have not had enough money to fund the legal costs, or to accept the risks of losing.<sup>23</sup>

However, recent developments in Europe show that the momentum is definitively building to broaden collective action mechanisms. Some European countries in recent years have come to embrace reforms to introduce aggregate litigation.<sup>24</sup> This move has prompted consternation from defence-side practitioners.<sup>25</sup> But these countries have not merely opted to copy US-style class actions.<sup>26</sup> Leaders from the European Union have underscored their disinclination to intentionally import the 'litigation culture' of the United States and spoken of designing distinctively European solutions.<sup>27</sup> EU Competition Commissioner Neelie Kroes, for example, stated: 'I do not want to cut and paste an American-style system here.

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19 Rod Freeman, 'How the Class Action Pendulum Swings in Europe', 47:3 *For the Defense* 67 (March 2005) [hereinafter Freeman].

20 *Ibid.*

21 See Laurel J Harbour & Marc E Shelley, 'The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World', 18:4 *Prac Litigator* 23, 24 (July 2007) [hereinafter Harbour & Shelley].

22 Christopher Hodges, 'Global Actions Project – Summary of European Union Developments', [www.law.stanford.edu/display/images/dynamic/events\\_media/EU\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/EU_Legislation.pdf) [hereinafter Hodges].

23 *Ibid.*

24 See Nagareda, *supra* note 11, at 3.

25 *Ibid.*, (citing John H Beisner & Charles E Borden, 'On the Road to Litigation Abuse: The Continuing Export of US Class Action and Antitrust Law' (October 2006), available at: [www.instituteforlegalreform.com/issues/docload.cfm?docId=1061](http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1061)

26 *Ibid.*, at 5.

27 Nagareda, *supra* note 11, at 5 (citing David Gow, 'Business Chiefs Attack Plan for US-Style Consumer Litigation', *Guardian*, March 19 2007, at 28 (quoting EU Competition Commissioner Nellie Kroes)).

We must avoid excessive levels of litigation.’<sup>28</sup> Similarly EU Consumer Protection Commissioner Meglena Kuneva added: ‘This is not a John Grisham story.’<sup>29</sup> The general trend in Europe seems to be a desire to allow aggregate procedures but without the potential of enabling abuses such as the ones experienced in the United States.<sup>30</sup>

On 19 December 2005, the European Commission issued a Green Paper exploring the conditions for bringing a damages claim for infringement of antitrust law.<sup>31</sup> In the Green Paper, the Commission concluded that there was a failure in certain Member States to provide relief to victims of EC antitrust infringements largely due to various legal and procedural hurdles in the Member States’ rules governing actions for antitrust damages before national courts. These particularities included the very complex factual and economic analysis required, the frequent inaccessibility of crucial evidence in the hands of defendants, and the often unfavourable risk/reward balance for claimants.<sup>32</sup> Competition Commissioner Kroes criticised the US system as having excessive and undesirable consequences, and said that he wished to produce ‘a competition culture and not a litigation culture’ and therefore the Commission was expressly not proposing to introduce class action or contingency fees.<sup>33</sup>

On 13 March 2007, the European Commissioner for Consumer Protection, Meglena Kuneva, included a statement in her Consumer Policy Strategy for 2007-2013 indicating that the Commission would consider ‘action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU antitrust rules.’<sup>34</sup> The Commission was influenced by a 2006 survey that found that 74 per cent of Europeans would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing.<sup>35</sup> In 2008, the European Commission

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28 *Ibid* at 26 (citing Kieron Wood, ‘Judge Raps EU Competition Law Plans’, *Fin Times Sun Bus Post Mag*, March 19, 2006, at 27, available at 2007 WLNR 6533468).

29 See Meglena Kuneva, ‘EU Commissioner for Consumer Protection, Speech on Consumer Strategy 2007-2013’ (13 March 2007), available at: [http://ec.europa.eu/commission\\_barroso/kuneva/speeches/verbatim\\_transcr\\_speech13032007\\_en.pdf](http://ec.europa.eu/commission_barroso/kuneva/speeches/verbatim_transcr_speech13032007_en.pdf).

30 See Nagareda, *supra* note 11, at 6.

31 Harbour & Shelley, *supra* note 21, at 3 (citing ‘Commission of the European Communities, Damages Actions for Breach of EC Antitrust Rules’, Com (2005) 672 (‘2005 Green Paper’, and Ann Rose Southuysen, ‘Belgium: Votes in Favour of Class Actions’, *Ass’n of Corp Counsel* (March 2006)).

32 Com (2008) 165 final, Brussels, 2 April 2008.

33 Hodges, *supra* note 22, at 12 (citing Speech by Commission N Kroes at the Harvard Club, 22 September 2005).

34 Com (2007) 99, 13 March 2007; Harbour & Shelley, *supra* note 21, at 4.

35 Hodges, *supra* note 22.

issued a White Paper<sup>36</sup> concluding that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements because individual consumers, as well as small businesses, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. The Commission recommended a combination of two complementary mechanisms of collective redress: (i) representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable claims; and (ii) opt-in collective actions in which the victims expressly decide to combine their individual claims for harm they suffered into one single action.<sup>37</sup>

More recently, on 27 November 2008, the European Commission's Directorate General on Health and Consumer Affairs (DG SANCO) adopted its Green Paper on Consumer Collective Redress.<sup>38</sup> Based on the view that present civil procedure tools do not adequately provide consumers access to justice mechanisms in all Member States, the Consumer Commission stated that it seeks to ensure that consumers and retailers are as confident shopping across borders as in their own countries. The Paper provides five possible options for the Commission: (i) take no action, and wait for further information on the impact of the measures being debated or adopted presently at the national and EU level; (ii) devise a collective redress network to encourage cooperation among Member States to enable plaintiffs from other Member States to join pending actions that might affect them; (iii) adopt a mixture of nonbinding and (iv) binding policy instruments such as improving ADR mechanisms, extending small claims procedures to mass claims, expanding the Consumer Protection Cooperation Regulation's scope, encouraging improvement of businesses handling complaints, and raising consumer awareness; and (v) create an EU model on judicial collective redress that would ensure adequate redress either through representative actions, group actions, or test cases. In May 2009, DG SANCO released its Consultation Paper, summarising comments submitted during the initial consultation period on its Green Paper. This started a new consultation period that closed in July 2009.

Also recently, in March 2009, the Directorate General for Competition (DG COMP) issued a Draft Directive that followed its 2008 White Paper on Antitrust Damages, which proposed group actions for anti-competitive practices. The White Paper incorporated an opt-out model and the potential for contingencies fees.

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36 Com (2008) 165 final, Brussels, 2 April 2008.

37 *Ibid.*

38 Com (2008) 794 final, 27 November, 2008.



Within the European Union, many individual nations have recently enacted class action laws or are actively considering such legislation at the present time. These countries include Denmark, Italy, France, the Netherlands, Poland and Germany.

#### *Denmark*

Denmark enacted a Class Action law in 2008.<sup>39</sup> This law provides a class certification phase that requires inter alia, common claims, procedural superiority, adequate notice and representation.<sup>40</sup> Class representatives may be individual plaintiffs, public bodies such as the Consumer Ombudsman or private associations.<sup>41</sup> The judge has the discretion to choose whether proceedings will take place in an opt-in or opt-out basis. The law provides that opt-out proceedings are appropriate if the claims are unmarketable.<sup>42</sup> Only public bodies may serve as class representatives in opt-out proceedings.<sup>43</sup> Class members may be required to provide security for opposing parties' costs.<sup>44</sup>

#### *Italy*

Italy has permitted representative actions for injunctive relief since 1998. Consumer organisations registered with the Italian Ministry of Industry are allowed to enjoin acts and conduct that damage the interests of consumers and users.<sup>45</sup>

From the end of 2006 until late 2007, there were 11 separate draft bills presented to Parliament proposing the introduction of class action legislation.<sup>46</sup> The Italian Parliament finally approved a class action proposal in December 2007 as an amendment to the 2008 Financial Act.<sup>47</sup> This law was originally scheduled to go into effect on 29 June 2008, but its effective date has been postponed by the government several times citing the need to improve the text and expand the possible defendants to

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39 See Erik Werlauff, 'Class Actions in Denmark – from 2007', [www.law.stanford.edu/display/images/dynamic/events\\_media/Denmark\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Denmark_Legislation.pdf) (citing Administration of Justice Act, section 254) [hereinafter Werlauf]. See also Harbour & Shelley, *supra* note 21, at 30.

40 See *ibid.*

41 See Werlauf, *supra* note 39, at 3. See also Harbour & Shelley, *supra* note 21, at 30.

42 See Harbour & Shelley, *supra* note 21, at 30. See also Werlauf, *supra* note 39, at 5.

43 See Werlauf, *supra* note 39, at 3.

44 See *ibid.* at 4.

45 See Harbour & Shelley, *supra* note 21, at 8.

46 Harvey Kaplan, William J Crampton & Marc E Shelley, 'Class Action Developments Overseas – Current Law, Strategies and Best Practices in Product Litigation', *Practicing Law Institute* (publication forthcoming 2008) [hereinafter Kaplan] at 14.

47 *Ibid.*

include public entities. The new effective date as of the date of this article is 1 January 2010. The necessary improvements are now being debated at the Italian Congress.

Under the new law, class actions will consist of a two-stage procedure and will apply to standard form contract disputes or as a consequence of tort liability, unfair trade practices or anti-competitive behaviour. In the first stage, the court will determine whether there has been a violation of the law. If the court so finds, a conciliation committee is appointed, comprised of plaintiff and defence counsel to decide the procedures, terms and amounts to be paid in order to compensate class members.<sup>48</sup>

Standing is given to registered consumer associations and associations that are duly representative of the collective rights claimed. The new law provides for an opt-in mechanism whereby individual consumers must declare their intention to join the action before a final decision, or they will be excluded. The new law also provides for a type of certification phase, with very vague certification criteria, during which the court is required to determine if the case may proceed as a representative action.<sup>49</sup>

### *France*

In 2007, the government announced that the adoption of class actions would be a priority. By the close of 2007, several class action proposals were introduced but none was successful.<sup>50</sup>

During 2008, amendments proposing the introduction of class actions into French law were introduced as part of the Economic Modernisation Bill (PLME). All of these were rejected by the Assembly. Thereafter, amendments seeking to introduce class actions in the Decriminalisation of Business Law Bill (PLDPDA) have been pursued on a parallel track. At the time of writing, no official amendment has been introduced.

### *The Netherlands*

The Netherlands recently enacted the first opt-out class action model in Europe. Based on this law, a massive US\$350 million securities claim brought by non-US investors against Royal Dutch Shell PLC was finally settled. The new Dutch law, which permits binding, collective settlements in securities cases, enabled the settlement, and allowed three US plaintiff firms led by Delaware-based Grant & Eisenhofer to pocket US\$47 million in attorneys' fees on top of the settlement amount.<sup>51</sup>

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48 *Ibid.*

49 *Ibid.*

50 *Ibid.*, at 13.

51 *Ibid.*, at 3.

*Poland*

The Polish Ministry of Justice has recently prepared a working draft of class action legislation.<sup>52</sup> The draft provides that a minimum of ten plaintiffs may form a class and seek redress or claim damages for injuries resulting from the same accident or caused by products of the same manufacturer. The court is to inform the public to give an opportunity to other aggrieved parties to join the suit. The group's representative must either be a member of the group or the municipal ombudsman. During the admissibility phase, the court is to determine whether the case should proceed as a class action. The decision on admissibility is subject to an interlocutory appeal. Class members may be required to provide security for costs of up to 20 per cent of their claims' value.<sup>53</sup>

*Germany*

The origins of German class action litigation can be traced to litigation brought by thousands of investors against Deutsche Telekom alleging that the company provided inflated financial information in listing prospectuses in 1999 and 2000.<sup>54</sup> The lawsuit led to an 86 per cent decline in the share price.<sup>55</sup> As a result of this lawsuit, the Capital Markets Model Case Act of 2005 was enacted.<sup>56</sup> This law applies to securities litigation claims allowing model proceedings to be instituted with the filing of an application by a party demonstrating that the start of a model case procedure may be significant for other similar cases.<sup>57</sup> If a minimum of ten similar applications are filed, the trial court refers the model case to the court of appeals to conduct the model case proceedings and render a judgment on the model questions.<sup>58</sup> After the model case is decided by the court of appeals, the trial court decides the individual cases based on the model ruling.<sup>59</sup>

Shareholder suits against Daimler and the European Aeronautics, Space & Defense Company (EADS) have proceeded under the Model Act. The

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52 See Kaplan, *supra* note 46, at 17.

53 See Pawel Pietkiewicz, 'Poland: Proposed Class Action Laws', Law-Now, 23 June 2008, available at: [www.law-now.com/law-now/directory/LawNowPoland.htm](http://www.law-now.com/law-now/directory/LawNowPoland.htm).

54 Dietmar Baetge, 'Class Actions, Group Litigation & Other Forms of Collective Litigation – Germany', at 7, available at: [www.law.stanford.edu/display/images/dynamic/events\\_media/Germany\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf) [hereinafter Baetge]; see also Harbour & Shelley, *supra* note 21.

55 See Rubin, *supra* note 10.

56 See Nagareda, *supra* note 11, at 21.

57 See Baetge, *supra* note 54, at 15.

58 *Ibid.*

59 *Ibid.*, at 13.

Model Act has been criticised for encouraging later coming litigation by allowing potential plaintiffs to 'sit-and-wait' for the results of the model action before deciding to file their own lawsuits.<sup>60</sup> The law is experimental and expires in November 2010 unless extended.<sup>61</sup>

## Australia

Class actions were introduced in Australia in 1992 as part of a package of reforms that was intended by the then Federal Government to increase the level of product liability litigation in Australia.<sup>62</sup> Sixteen years later, Australia has become known as the jurisdiction outside North America where a corporation is more likely to find itself defending a class action.<sup>63</sup> The Australian class action system has been characterised as being more plaintiff friendly than the US system.

The model adopted is similar to US FRCP 23. It allows representative actions on virtually any cause of action.<sup>64</sup> There must at least be seven class members who have claims against the same person or persons arising out of 'the same, similar or related circumstances', and there must be at least one 'substantial common issue of law or fact' among class members.<sup>65</sup> Class members must opt out of the procedure. No certification phase is provided. Instead, defendants have the burden of proof to challenge the propriety of the class form at any stage.<sup>66</sup> In addition, the 'substantial common issue' need not predominate as in the US system.<sup>67</sup>

Class actions have been commenced in Australia against a range of defendants. Product liability claims have been common against Vioxx, Fen-Phen, heart pacemakers, tobacco products and a variety of food products.<sup>68</sup> Many of the early Australian class actions were first initiated in the United States.<sup>69</sup> Notwithstanding, it has been reported that, so far, only one drug or medical device class action, known as *Courtney v Medtel Pty Ltd*, has been tried to verdict.<sup>70</sup> In *Courtney*, the plaintiff claimed that his pacemaker was

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60 *Ibid.*

61 Rubin *supra*, note 10, at 2.

62 S Stuart Clark and Christina Harris, 'Class actions in Australia: (Still) a work in progress', Vol 31, No 1 *Australian Bar Review* 63, at 63-64 (July 2008) [hereinafter Clark & Harris].

63 S Tucker, 'Culture of Class Action Spread Across Australia', *Financial Times* (London), 9 March 2006, p 12.

64 Kaplan, *supra* note 46, at 5.

65 *Ibid* (citing FCA Act § 33C(1)).

66 *Ibid* (citing FCA Act § 33M, 33N); see also Clark & Harris, *supra* note 62 at 67.

67 Clark & Harris, *supra* note 62 at 68.

68 *Ibid*, at 64-65.

69 *Ibid.*

70 *Ibid*, at 69 (discussing *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219).

not of merchantable quality at the time of implantation. Mr Courtney was awarded AU\$9,988 as compensation, and settled the outstanding claims of other class members.<sup>71</sup>

## Asia

Some Asian countries have begun adopting class action procedures in recent years. However, the spread of the class actions has not been as extensive as in the rest of the world.<sup>72</sup>

### *People's Republic of China*

Chinese law has permitted some form of collective redress since 1992.<sup>73</sup> In 1991, the Civil Procedure Law, which reportedly was influenced by the US experience, was enacted.<sup>74</sup> The law provides two categories of class actions. Those where the number of litigants is ascertainable and there are more than ten claimants, and those where the number of litigants is not known at the time of filing.<sup>75</sup> If unknown, the court provides notice to all persons who are similarly affected so that they may register with the court, and the decision is binding on all parties who register and are represented in the claim.<sup>76</sup>

It has been reported that as of 1998, class actions were filed over 'low quality products, consumer fraud, environmental pollution, economic contracts, and local government actions'.<sup>77</sup> In 2006, a class action against Dell made headlines. Consumers had reportedly filed class actions in Xiamen and Shanghai for allegedly fraudulently substituting a different chip in its laptops than as advertised. The plaintiffs sought compensation equal to twice the value of the goods as well as legal fees.<sup>78</sup>

Some academics believe that class actions are unlikely to follow the American example in China.<sup>79</sup> They base their opinion on an All China Lawyers Association (ACLA) 2006 Guiding Opinion, which imposed severe duties on lawyers taking on class actions, because of their perceived threat to social stability. However, in light of the recent food and drug safety issues, the debate over class actions is expected to continue.

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71 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, 260.

72 Kaplan, *supra* note 46, at 22.

73 Articles 53, 54 and 55 of the Procedural Code.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*, (citing Note, 'Class action litigation in China', 111 *Harv L Rev*, 1523 (1998)).

78 *Ibid.*, at 23.

79 *Ibid.*

### *Korea*

Currently, there is no general class action legislation in Korea except for the securities class action bill enacted on 22 December 2003, which applies only to claims related to, for example, insider trading and accounting fraud.

In January 2008, a collective dispute resolution system was introduced for product liability cases. Consumers sharing a common interest and who suffered an injury as a result of a defective product, or a consumer association acting on their behalf, may file an administrative claim before the Korean Consumer Agency in order to resolve the issue via mediation. Furthermore, Korean consumer groups or public interest organisations are permitted under the 2003 amendment to the Consumer Protection Act to file a suit on behalf of consumers for injunctive relief to cease allegedly unlawful company business activities. Although this collective action does not allow damage compensation relief, a court decision or injunction favourable to plaintiffs may lead to successive damage claims brought by individual consumers.<sup>80</sup>

### **Latin America**

The development of legislative proposals seeking to introduce class actions, and the enactment of such procedures into law in Latin America continue to march steadily forward. A growing number of countries in Latin America currently recognise, or are seeking to recognise, some form of collective actions arguing that they are important tools for the protection of social interests. However, a review of some of the recently enacted and pending class action 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, and in general, a tendency to favour claimants over defendants.

In Latin America, the recent trend to adopt class action litigation is best exemplified by the experiences of three countries: Argentina, Brazil and Mexico.

### *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. However, for 14 years after the constitutional amendment, no specific legislation governing

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80 Sang-Ho Han, Kwan-Seok Oh, & Lance B Lee, 'Korea', *Getting the deal through – product liability* (August 2008).

the applicable procedures was enacted.<sup>81</sup> Instead, the Supreme Court of Argentina issued interpretative rules which were very restrictive. For example, the rules did not allow for the filing of collective actions seeking monetary relief.<sup>82</sup> Courts, however, applied these interpretative rules differently, and sometimes, inconsistently, not being bound by the doctrine of *stare decisis*. Thus, 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,<sup>83</sup> other courts allowed suits seeking such relief.<sup>84</sup>

The landscape changed on 7 April 2008, when an Amendment to the Consumer Protection Act<sup>85</sup> was enacted. The Amendment<sup>86</sup> incorporated some important changes, both substantive and procedural into existing law. 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.<sup>87</sup> The Amendment provides for an opt-out procedure, expressly granting standing to consumer associations to file collective actions on behalf of consumers.<sup>88</sup>

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. Legal scholars and legislators have advocated for the introduction of a uniform law governing class action procedures.<sup>89</sup> Some proposals to that effect have been introduced in the past to the Argentine Congress, and two bills are currently pending before Congress.<sup>90</sup>

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81 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](http://www.law.stanford.edu/display/images/dynamic/events_media/Argentina_National_Report.pdf) [hereinafter Mairal].

82 *Ibid*, at 8.

83 *Ibid* (discussing Federal Court of Appeals for Civil and Commercial Matters, Chamber I, *Union de Usuarios y Consumidores v Edesur*, 2005-A L L 93).

84 *Ibid* (discussing Court of Appeals for Commercial Matters, Chamber C, *Union de Usuarios y Consumidores v Banco de la Provincia de Buenos Aires*, 2006-B L L 375).

85 Consumer Protection Act, Pub Law No 24.240.

86 See Pub Law No 26.361 published in the *Official Gazette*, CXVI, No 31.378 of 7 April 2008.

87 *Ibid*, at §54.

88 *Ibid*, at §55.

89 *Supra*, note 81 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)).

90 Bill 2199-D-2009 introduced by Representatives Vilarino, Salum, and Diez; and Bill introduced by Representative Lores on 18 June 2009.

*Brazil*

The Brazilian Public Civil Action Law was enacted in 1985 and the Consumer Defence Code in 1990.<sup>91</sup> These two statutes comprise Brazilian Class Action Law and allow for the filing of class actions by the federal government, state governments, municipal governments, the Public Prosecutor's Office, specific types of public companies, foundations, civil associations and the Public Defender's Office.

The legal requirements for a civil consumer association to file a class action in Brazil are few and flexible and the law does not require a class certification procedure. Two basic phases are provided. Phase I addresses general liability and damages as a whole. Phase II only takes place should the defendant be held liable in Phase I, and it consists in the enforcement of the generic decision by each member of the class. Phase II also includes a broad evidentiary phase, as each member of the class is expected to prove his own specific damages and causal connection. No pre-admissibility or certification of the class is provided for. The action proceeds with an undefined class up to the final trial court ruling. Thus, class defendants are generally unwilling and unable to settle the class action at an early stage of the proceedings because they do not know who are the persons who comprise the class and what is the amount in controversy.<sup>92</sup>

In the past two decades, Brazil has seen increasing numbers of class actions, especially concerning consumer law. The cases have also been getting more aggressive and have even been used to create or revise federal regulation. A boom in collective litigation is expected in Brazil within the next few years.<sup>93</sup>

The Brazilian system has allowed for the filing of controversial class actions seeking to change legislation through judicial action. 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 defendant filed a cautionary proceeding before the Superior Court of Justice.<sup>94</sup>

91 Brazilian Public Civil Action, Law No of 1985; Brazilian Consumer Protection Act, Law No of 1991.

92 *Ibid.*

93 Luiz Migliora, Walter Cofer and Gregory L Fowler, 'Trial and Error: Class Actions in Brazil and the US, and the Global Trends', *LatinLawyer* (Vol 6, Issue 8), September 2007.

94 *Ibid.*



Another similar action sought to ban licit products from the Brazilian market through judicial action. A consumer 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.<sup>95</sup>

Several proposals to change the current system are being discussed in Brazil, ranging in purpose and in their respective progress in the legislative process. A Brazilian Model Code for Collective Actions drafted by the Iberoamerican Procedural Law Institute is being considered by a Ministry of Justice Task Force led by the Secretary of Law Reform at the Ministry of Justice, Mr Rogerio Favretto. Additionally, various bills have been proposed to extend standing to government agents. For example, one such bill proposed to grant standing to file class actions to any member of the Legislative Branch (federal, state and municipal).<sup>96</sup> Another bill would extend standing to associations and labour unions while also broadening the extraterritorial effect of court decisions to extend beyond the territorial jurisdiction of the court.<sup>97</sup>

### *Mexico*

In the 15 years since the Consumer Protection Law was enacted allowing for the filing of class actions by the Consumer Protection Agency, only two such actions have been filed: The *Air Madrid* and the *Lineas Aereas Azteca* cases, both in 2007, with the exception of some isolated judicial precedents in consumer matters.<sup>98</sup> The general perception is that the current collective action mechanisms are very limited because they only allow for the governmental consumer agency to file class actions on behalf of injured consumers. As a result, the Mexican judiciary and legislature have been very interested in adopting new class action rules.<sup>99</sup>

In 2008, a Senate Task Force, charged with drafting a class action bill drafted a proposal that would have given standing to bring class actions to the Consumer Protection Agency, and to consumer associations meeting certain lenient requirements. It would also have allowed for individuals to

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95 Gregory L Fowler, Diego Gandolfo, Eduardo Ferrer Mac-Gregor, Ricardo Rios Ferrer, Rosangela Delgado and Livia Mine, 'Class Actions in Latin America', *Latin American Forum Newsletter*, International Bar Association (Vol 1, No 1), October 2008, at 4 [hereinafter Fowler].

96 House Bill 1403/2007 by Representative Vinicius Carvalho.

97 House Bill 3221/2008 by Representative Cleber Verde.

98 Fowler, *supra* note 95, at 12.

99 *Ibid*, at 6.

bring collective actions in ‘urgent cases.’ The proposal did not include any kind of certification, and allowed for the use of statistical evidence and estimations in determining liability and calculating damages.<sup>100</sup> The Senate Task Force, however, failed to reach consensus and it was disbanded.

In March 2009, the Mexico City Legislature started to work on a bill authored by Mexico City Congressman Xhiu Tenorio. This bill would apply locally in Mexico City. It allows a class action to be brought on behalf of any class of claimants so long as at least one class member resides in Mexico City. In April 2009, the Federal House of Representatives passed a constitutional amendment intended to enable class actions at the federal level. If this amendment is adopted by the Senate and 18 state legislatures, it will become part of the Federal Constitution and preempt local class actions laws, including any bill enacted by Mexico City.

### **Litigation funding and contingency fees**

Contingency fees in US class actions generally range from 30-40 per cent of the award to the class.<sup>101</sup> Contingency fees have been described by United States plaintiffs’ lawyers as the ‘keys to the courthouse’, but opponents have asserted that such fees encourage speculative litigation allowing some plaintiffs’ lawyers to receive a windfall while their clients often receive little by way of compensation.<sup>102</sup> Another criticism raised is that they incentivise attorneys and not would-be parties to commence litigation as illustrated by the indictments of the well-known US plaintiffs’ firm, Milberg Weiss, and several of its partners.<sup>103</sup>

Contingency fee arrangements traditionally have been prohibited in most civil law jurisdictions and where permitted ‘they were used infrequently.’<sup>104</sup> For example, in Europe, traditionally countries have prohibited contingency-fee arrangements. Although the prohibition has softened recently, contingency-fee funding for litigation is still rare outside of the United States.<sup>105</sup>

However, recent trends have developed internationally giving rise to several countries exploring whether contingency fees should be permitted in the context of collective litigation.<sup>106</sup> For instance, England and Wales,<sup>107</sup>

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100 Kaplan, *supra* note 46, at 21.

101 Rubin, *supra* note 10 at 2.

102 Behrens, *supra* note 11 at 15.

103 Rubin, *supra* note 10 at 2.

104 Behrens, *supra* note 11 at 16 (citing Harbour & Shelley, *supra* note 21, at 33).

105 Rubin, *supra* note 10 at 2.

106 *Ibid* (citing Harbour & Shelley, *supra* note 21, at 33).

107 See Harbour & Shelley, *supra* note 21 at 33; Hodges, *supra* note 22, at 27.

Italy,<sup>108</sup> Sweden,<sup>109</sup> Argentina<sup>110</sup> and Brazil to some degree allow for contingency fees.

### *Europe*

In Sweden, attorneys and clients can negotiate 'Risk Agreements' in collective action litigation. Risk Agreements provide for attorneys' fees based on the value of the dispute to the extent the action is successful. The court must approve the Risk Agreement, and will only do so if it is 'reasonable', which in practice means it cannot be a straight percentage of the judgment award.

In Germany, the traditional bar on contingency fee arrangements was repealed by the Federal Supreme Court in March 2007 when it struck the statutory prohibition on constitutional grounds concluding that the ban prevented many citizens from being able to bring claims.<sup>111</sup> The court held that contingency fees must be allowed when a client would not otherwise be able to enforce his rights. The legislature had until June 2008 to enact a new law to govern fee arrangements. Germany is unlikely to adopt the US fee system, but some sort of contingency structure may become permissible.<sup>112</sup>

In November 2008, the United Kingdom's Civil Justice Council issued a report recommending the adoption of US-style contingency fees.<sup>113</sup> The main conclusion of the report was that contingency fees could operate effectively in the England and Wales jurisdiction and that there is no evidence that contingency fees give lawyers an improper motive to settle claims early or that they promote frivolous claims. Other key findings of the report included that contingency fees without cost shifting would provide a cleaner and less complicated model, significantly reducing transactional costs in personal injury cases, and that regulation of contingency fees through caps would be likely to both reduce the level of overcharging and reduce access to justice.

### *Australia*

In the last few years, Australia has loosened its rules against champerty. In 2006, the Australian High Court discarded old rules preventing third parties from funding cases and endorsed the role of funding companies

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108 See Harbour & Shelley, *supra* note 21 at 33.

109 *Ibid.*

110 See Mairal, *supra* note 81.

111 See Harbour & Shelley, *supra* note 21 at 33; Rubin, *supra* note 10 at 5.

112 Rubin, *supra* note 10 at 2.

113 Civil Justice Council, 'Improving Access to Justice: Contingency Fees, A Study of Their Operation in the United States of America; A Research Paper Informing the Review of Costs', November 2008, available at: [www.civiljusticecouncil.gov.uk/publications/publications.htm](http://www.civiljusticecouncil.gov.uk/publications/publications.htm).

in the court process allowing them to support litigation in return for a percent of any judgment.<sup>114</sup> Two publicly-traded litigation funders have been established in Australia – perhaps the first of their kind anywhere in the world. Since mid-2005, ‘all of the securities class actions commenced in Australian courts ... are being funded by commercial litigation funders’.<sup>115</sup>

However, because of the risk of abuse and the growing concern about the proliferation of shareholder class actions, the Standing Committee of Attorneys General (SCAG) and the Council of Chief Justices are considering the extent to which litigation funders should be regulated.<sup>116</sup> Among the options being considered, litigants could be required to disclose to the court that they are being funded by a third party, and to provide a copy of the funding agreement. Courts would also be able to order funders to provide security for the cost of litigation at the beginning of the proceedings.<sup>117</sup> In addition, the Victorian Law Reform Commission (VLRC) is entertaining a number of draft law reform proposals including the creation of a Justice Fund to improve access to courts by providing funding to plaintiffs and plaintiff cases, and rules permitting contingency fees.

#### *Latin America*

In Latin American jurisdictions, as a general rule, the losing party must bear all costs related to the action, whether or not it is so requested by the opposing party. Exceptionally, costs are not imposed on the losing party, for example when the claim is recognised as having been made in good faith.<sup>118</sup> Although ‘loser pays’ is the general rule, the allowance for free legal aid in most countries makes it difficult for the prevailing party to recover costs and attorneys’ fees, and even though such legal aid should be limited to parties who do not have the financial means to face trial, some expansions have been recently made in Argentina allowing, for example, for any consumer association filing a collective action to obtain free legal aid.

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114 ‘Crackdown on class actions’, *Australian Financial Review*, 7 December 2007, available at: [www.afr.com/home/viewer.aspx?ATL://20071207000020052830&title=Crackdown+on+class+actions](http://www.afr.com/home/viewer.aspx?ATL://20071207000020052830&title=Crackdown+on+class+actions).

115 Clark & Harris, *supra* note 62 at 90.

116 ‘Crackdown on class actions’, *supra*, note 114.

117 *Ibid.*

118 Gregory L Fowler (Contributing Editor), ‘Getting the Deal Through: Product Liability in 36 Jurisdictions Worldwide’ (*Law Business Research Ltd*, 2008).

## Punitive damages

The United States Supreme Court has expressed its concern for punitive damages awards that have ‘run wild’, jeopardising fundamental constitutional rights<sup>119</sup> by attempting to provide some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards and procedural limits on when and how punitive damages may be awarded.<sup>120</sup> The Supreme Court’s characterisation of punitive damages is more than justified if we consider that between 1996 and 2001, the annual number of punitive damages awards in excess of US\$100 million doubled in the United States.<sup>121</sup>

Among the many criticisms raised against punitive damages, it has been argued that they provide a ‘windfall recovery’ for plaintiffs;<sup>122</sup> that they are not awarded to compensate for a harm; and that their punitive nature requires additional due process guarantees.<sup>123</sup>

Numerous American states have reacted to abuses by capping punitive damages, raising the burden of proof required to obtain a recovery, and providing defences applicable to certain products, such as pharmaceuticals approved by the United States Food and Drug Administration, to prevent innovation from being chilled and encourage the marketing of socially beneficial products.<sup>124</sup> The United States Supreme Court has also issued recent landmark decisions placing broad constitutional limits on punitive damages awards.<sup>125</sup> In 2007, the US Supreme Court reversed a US\$79.5 million punitive damages award in a smoking and health case involving Philip Morris USA and the widow of a man who allegedly died from a smoking-related disease.<sup>126</sup> The majority determined that an award based in part on a jury’s desire to punish the defendant for harming persons not before the court amounts to a taking of property without due process.

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119 Victor E Schwartz et al, ‘Reining In Punitive Damages “Run Wild”: Proposals For Reform By Courts And Legislatures’, 65 *Brook L Rev* 1003 (2000) [hereinafter Schwartz].

120 *Ibid*, at 1003–04 (citing *BMW of North Am, Inc v Gore*, 517 US 559, 585–86 (1996) and *Honda Motor Co, Ltd v Oberg*, 512 US 415 (1994)).

121 See John Y Gotanda, ‘Punitive Damages: A Comparative Analysis’, 42 *Colum J Transn’l L* 391, 392 (2004) [hereinafter Gotanda].

122 *Ibid* (citing *City of Newport v Fact Concerts, Inc*, 453 US 247, 270 (1981) (Brennan, J dissenting)).

123 *Ibid*, at 1004.

124 Schwartz, *supra* note 119.

125 See *State Farm Mut Auto Ins Co v Campbell*, 538 US 408 (2003); *Phillip Morris USA v Williams*, 127 S Ct 1057 (2007).

126 *Phillip Morris USA v Williams*, 127 S Ct 1057 (2007).

Outside of the United States, punitive damages have been traditionally rejected in most civil law jurisdictions.<sup>127</sup> Still today they are mostly prohibited based on the civil law principle that damages must compensate for harm effectively caused. However, motivated in part in the way the media reports on large punitive damages awards, which always tend to make front pages while a subsequent reduction or reversal is not given the same treatment, recent developments in civil law jurisdictions suggest that their legal systems are becoming more and more receptive towards the idea of introducing punitive damages.

For example, in the European Union, a December 2005 Commission Green Paper has raised the possibility of allowing the doubling of damages in certain antitrust actions.<sup>128</sup> More recently, in March 2007, Commissioner Kuneva issued the Consumer Policy Strategy, proposing collective damages actions 'in line' with the Green Paper for consumer cases.<sup>129</sup> In France, proposed revisions to the Civil Code have been discussed to allow punitive damages in some civil cases.<sup>130</sup>

In Argentina, the recent amendment to Argentina's Consumer Law expressly allowed for the first time punitive damages awards of up to five million pesos (about US\$1.56 million) against providers who fail to comply with legal or contractual obligations. No criteria to determine the degree of reprehensibility of the conduct involved was established.<sup>131</sup>

In Brazil, courts are more frequently using language in their rulings suggesting that they favour punitive and pedagogic nature of moral damages. As part of this trend, several punitive damages proposals have been submitted to Congress. They seek either to introduce punitive damages in the Civil Code or in the Consumer Defence Code.<sup>132</sup>

Although most civil law jurisdictions continue today to be reluctant to recognise a punitive nature for damages, we are certainly witnessing some trend, though tenuous still, towards abandoning this reluctance. How strong this trend becomes, and within what timeframe, will likely play a significant role in the expansion of the compensation culture around the world.

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127 See Adam Liptak, 'Foreign Courts Wary of US Punitive Damages', *NY Times*, 26 March 2008, at A1, available at 2008 WLNR 5738970.

128 See Gotanda, 'Charting Developments', *supra* note 121, at 509.

129 Rubin, *supra* note 58 at 2.

130 See Gotanda, *supra* note 121, at 509.

131 See Pub Law 26.361 amending Consumer Protection Act 24.240, 7 April 2008, Official Bulletin CXVI, No 31.378.

132 House Bills 276/07 and 2497/07 and Senate Bill 413/07.

## **Conclusion**

This article was intended to provide a general overview of international trends and developments in the litigation arena, recognising that as this article was being written, new and significant developments were likely occurring.

Emerging international litigation trends around the world illustrate the way in which countries are attempting to make ‘access to justice’ more available for a greater proportion of the population. Many or all of these ‘enhanced’ justice mechanisms have application in the class action arena but may also affect the way individual cases are litigated. But easier access to the courts for would-be litigants does not necessarily lead to a greater dispensation of justice. Unfettered access to litigation mechanisms may allow unmeritorious claims to go forward which, if unchecked, can lead to litigation abuses. To achieve their purpose, changes must provide better access to justice to all parties involved in the litigation, claimants and defendants alike. Procedures must be molded into fair and workable procedures that are balanced and fair.

A review of some of these emerging litigation trends around the world reveals potential problems for company defendants. The clear conclusion from all of the activity we are witnessing worldwide is that in order to be successful, companies doing business internationally must pay close attention to these developments and engage in the dialogue as legislative proposals are being considered and implemented. Informed and proactive companies are likely to understand and navigate challenges brought by these legislative changes more effectively than companies who take a reactive approach.