Special procedures for managing mass claims outside the US

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Introduction

In the past couple of decades, virtually every industrialized democracy (and some authoritarian regimes as well) has adopted some form of aggregative procedure to dispose of mass civil claims. Some of these procedures facilitate or mandate collecting individually-filed claims, with the goal of resolving key issues common to all claims, usually by selecting a "model (test) case", and applying the court decision in this case on the common issues to all other cases within the aggregate. Recently, many jurisdictions have adopted what many perceive as a more radical departure from traditional civil litigation: representative collective procedures, in which members of the collective (e.g. a class member) or a specially defined entity represent the interests of the collective, seeking an outcome which is binding on all collective members.

The increasing frequency of mass claims and the proliferation of special aggregative procedures almost always create management challenges for private parties, counsel and judges. Judges in common law jurisdictions have responded by assuming more responsibility for organizing litigation and promoting resolution, following in the footsteps (sometimes, quite consciously) of U.S. federal judges deploying Rule 16. In contrast, in many civil law jurisdictions, notwithstanding a formal "inquisitorial" judicial regime that empowers judges, anecdotal information suggests that many judges are reluctant to serve as "case managers." The idea of overseeing privately retained counsel – putting themselves in the place of parties -- is discomforting to many judges. Discovery is constrained not by activist judges but rather by rules that strictly limit counsel's ability to demand evidence from opposing counsel. Judicial intervention in contractual fee agreements is repugnant to many judges. Allocating settlement funds is outside judges' remit; indeed, even reviewing settlements for fairness is a novel notion in many jurisdictions.

Notwithstanding these observations, judicial case management in mass claims seems to be becoming more prevalent. The global ADR movement has legitimized judges playing an active role in facilitating settlements in individual cases. And the requirements of new collective litigation procedures adopted in response to the European Union Representative Action Directive or domestic political pressures are pressing judges in some jurisdictions to play a more activist role. In this respect, as in others, practice in many civil law jurisdictions seems to be gradually converging towards the United States model of civil litigation.

In this essay, I briefly describe the slow movement towards judicial case management that has been generated by mass claims and aggregate procedures, focusing on a set of jurisdictions about which I have some personal knowledge, gleaned primarily from international colleagues. A systematic review of judicial case management worldwide is outside the scope of this paper (and does not appear to have been published by others.)

Australia

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Judicial case management is well-established in Australian federal and state courts, both normatively and by rule.[2] Although influenced heavily by procedural reform efforts in England (e.g. the Woolf reforms),[3] the management practices – including case management conferences, exhortations to use ADR procedures, and concern about "proportionality" are familiar to U.S. practitioners. As in most jurisdictions, however, there are little systematic data on how these rules are implemented by judges and complied with by counsel. A federal class action procedure explicitly modeled after Rule 23 was adopted in Australia in 1992 and damage class actions have been part of the Australian litigation landscape ever since although their absolute number is small. Several Australian states have adopted class action statutes modeled after the federal statute. Most Australian class actions rely on third-party litigation funding, which was pioneered in Australia in response to cost requirements of class litigation. Although the procedure is available for a wide variety of substantive claims, in recent years, most class actions arose out of alleged securities or antitrust law violations.

Through 2017, about 500 class actions had been filed in Australia, about 80 percent in the federal courts. Mass tort class actions accounted for 10 percent of the total.[4] Prof. Peter Cashman (emeritus), a leading Australian class action scholar and practitioner, shared with me that mass tort and other product liability claims are comfortably accommodated in Australia's class action regime, owing in his opinion to the lack of a strict certification procedure and case law similar to *Amchem.*

The federal court of Australia has adopted special case management procedures for class actions,[5] including assigning judges with experience in dealing class actions (a "docket judge"), plus, if deemed necessary, a special "case management judge." The federal court practice note calls for periodic case management hearings. Litigation funding agreements are required to be disclosed initially to the court and subsequently to all parties, subject to rules that provide for claimants' counsel to redact provisions of the funding agreement that would reasonably be understood to convey a tactical advantage if known to the defendant. The federal practice note also sets forth procedures for the management of competing class actions.

<u>Canada</u>

Canadian provinces have long provided for representative collective procedures – i.e. class actions – for mass claims, including mass torts. Quebec and Ontario have the oldest class action procedures, but ultimately other provinces adopted class action procedures as well. To a considerable extent, these procedures mirror Rule 23, but there are important differences – for example, with regard to retention of class counsel and consideration of class counsel fees. Ontario, the commercial center of Canada, has had the most vibrant class action practice, facilitated

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[2] Federal Court of Australia, Case Management Under the National Court Framework, n.d. Available at https://www.fedcourt.gov.au/about/national-court-framework/case-management

[3] Peter Cashman, The Role of Judges in Managing Complex Litigation, 42 Sydney Law Review 141 (2020) [reviewing Anna Olijnyk, The Role of Judges in Managing Complex Litigation: Justice and Efficiency in Mega-Litigation (Hart, 2019).

[4] Australia has been distinguished from other jurisdictions by the availability of empirical data on its class actions, a fact that is entirely attributable to research by Prof. Vince Morabito of Monash University. See e.g., Vince Morabito, The First Twenty-Five Years of Class Actions in Australia, 2017, available on SSRN.

[5] Federal Court of Australia, Class Actions (Representative Proceedings) in the Federal Court, n.d. available at

in part by a relaxed certification standard and a public fund to help pay for up-front costs of initiating class actions, for litigation not supported by third-party litigation investors. Recently, in response to corporate lobbying, the Ontario parliament ratcheted up certification standards. In addition to class actions, Canadian provinces generally provide for joinder and consolidation. Prior to adopting a class action procedure, Alberta added a case management strategy for mass claims to traditional joinder and consolidation that shared many features of the U.S. MDL: a single judge was assigned individual claims arising out of the same facts and law; the judge appointed plaintiff counsel committees to guide the litigation; "test cases" akin to bellwether cases were tried to establish case valuations; however, claims remained formally individual and were represented individually. According to Chiodo,[6] Alberta (and also Manitoba) ultimately abandoned this approach in favor of class action proceedings.

In a recent prisoner rights' case, Ontario and Quebec trial courts jointly adopted an extremely detailed protocol for determining the settlement value of individual claims, including determination of individual issues, after class plaintiffs prevailed and the litigation established an "aggregate damages" fund.[7] Prof. Jasminka Kalajdzic, the leading Canadian class action scholar, shared with me that the court essentially adopted the practices adopted and routinely followed by private settlement administrators in damage class actions. Kalajdzic reports that there are no special case management rules other than the class action proceedings act but that Ontario has adopted specialized case management rules for "commercial litigation."[8]

The European Union

In 2021, UNIDROIT and the European Law Institute published Model European Laws of Civil Procedure, the product of a multi-year research and consultation that earlier engaged also the American Law Institute.[9] Many elements of the model laws will be familiar to U.S. practitioners, including encouraging judicial management of proceedings and settlement (framed as a part of the ADR movement in Europe), and attention to "proportionality" and complex claims. Not surprisingly for a large-scale group effort that had to accommodate diverse stakeholders, including jurists, academicians and practitioners from different European national legal cultures, most of the language in the model rules is nuanced and (at least to my American eyes) mindful of the need not to dictate to either judges or counsel how to manage or litigate civil claims to disposition. Notwithstanding the involvement as an advisor of Prof. Richard Marcus, the Reporter to the U.S. Federal Civil Rules Advisory Committee, the European model rules – which tip the scale at a hefty 300+ pages -- lack the clear didactic tone of U.S. Rule 16, Rule 23, and Rule 26. It is unclear how long it will take for the model rules to make their way into routine management of mass claims: unlike the F.R.C.P. these rules are suggestive rather than authoritative.

Germany

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[6] Suzanne Chiodo, Safety in Numbers or Lost in the Crowd? Litigation of Mass Claims and Access to Justice in Ontario (March 3, 2023). Osgoode Legal Studies Research Paper No. 4377632, Available at SSRN: https://ssrn.com/abstract=4377632

[7] *Brazeau v. Canada, Reddock v. Canada, Gallone v. Canada.*

8 See Part XIII, "Case Management," of the Consolidated Practice Direction Concerning the Commercial List, June 15, 2023, at https://www.ontariocourts.ca/scj/practice/consolidated-commercial-pd/#case Matters eligible for the Commercial List include bankruptcy and insolvency, securities litigation and certain challenges to arbitration.

[9] Advisors to the ELI-UNIDROIT group included American scholars Samuel Isaacharoff, Richard Marcus, Judith Resnik and in its early inception the late Geoffrey Hazard.

In Germany, if multiple cases arising out of the same facts or law are filed within a single court, a judge can join the cases with the consent of the parties. A judge may also informally group cases together, for example, by scheduling joint hearings on evidentiary matters. However, these procedures seem to be used infrequently. Germany has two procedures that permit collective proceedings, which lead to collective management of mass claims: the KapMuG for shareholder lawsuits, and the model consumer claim proceeding (which implements the EU Representative Action Directive).

There is ongoing parliamentary debate about the need for (an) additional proceeding to make mass claim management more efficient and fairer, because of the subject matter jurisdictional limitations of both of these previously adopted procedures and because, in the case of the consumer proceeding, only "qualified entities" rather than individual consumers can bring claims; also both procedures are essentially opt-in. The rule under debate, translated as a "leading decision procedure," would allow an appellate court to rule on common legal questions related to a mass of claims, even if the claims were terminated by settlement before reaching the appellate court. The background for this proposed rule is that in the past defendants have been said to settle claims in order to avoid an adverse precedental decision by the appellate court. By enlarging the opportunity for an appellate court to rule on a contested legal issue, it's claimed that this settlement pressure would diminish.[10]

The Netherlands

In contrast to Germany, Dutch judges seem to be more inclined to take an activist role in managing complex litigation, particularly mass claims. Commentators report that judges promote settlement in commercial disputes, by offering "preliminary opinions" on contested issues at oral hearings and sometimes by participating in settlement conferences.[11]

The Netherlands was a European leader in institutionalizing collective litigation and settlement. However, in its first version the collective litigation statute only permitted injunctive or declaratory relief, so its use was mainly to enable (or not) follow on individual litigation of mass claims or settlement outside the court. The Dutch mass claims settlement act ("WCAM"), adopted almost 20 years ago, was a novel procedure that permitted claimants and defendants to jointly approach the court to make binding a mass claim settlement that they had already reached privately. Unlike the collective litigation statute, the settlement procedure provided monetary remedies and has been used to resolve a number of very large-scale primarily shareholder and other investor disputes. In 2020, in large part in order to increase the attractiveness of this mass claim settlement procedure – which critics argued was hobbled by the lack of court decisions mandating monetary remedies in collective litigation -- the original collective litigation statute was amended to allow for monetary compensation, and in 2022 it was further amended somewhat to satisfy the EU Representative Action Directive for consumer claims.

Perhaps not surprisingly, the new statutory procedures have somewhat destabilized the management of mass claims. Whereas under the old collective settlement regime, the Amsterdam Court of Appeals had

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[10] I am grateful to Prof. Axel Halfmeier of Leuphana University for sharing this information. For German speakers, Prof. Halfmeier recommended Kollektive Rechtserkenntnis oder Revision „light"? Leitentscheidungsverfahren beim Bundesgerichtshof by Prof. Dr. Bettina Rentsch

[11] The commentary I have read focuses on the effectiveness of various judicial practices intended to facilitate settlement, rather than on the due process concerns articulated by Judith Resnik in her seminal article on "managerial judgment." See, e.g. Juriaan de Haan, Civil Court's Settlement Practices in Commercial Cases, Wolters Kluwer, October 16, 2023. [Translated by a language algorithm]

exclusive jurisdiction over mass claim settlements, now parties can file collective claims in any court of first instance, but there is a special working group within the judiciary specializing in mass claims. Commentators suggest that kinks in the procedure are still being worked out. As specified by the EU Directive, and in line with the earlier statute, only "qualified entities" (pre-existing or ad hoc associations), not class members, are permitted to represent the collective. In a couple of recent decisions, the Dutch court found that proposed entities were not properly representative of the collective, and hence could not proceed, surprising practitioners who had been used to courts taking a rather laissez faire attitude on whether a proposed entity had standing to bring the action.[12] What these new stricter standards on representation are seems somewhat unclear, and how to implement any new representation standards in an opt-out regime where ad hoc entities represent the collective is also unclear. A second issue has been whether and how judges should consider the financial capacity of a qualified entity to adequately represent the collective. Third-party litigation financing has long been an accepted aspect of civil litigation in the Netherlands, as in many other European jurisdictions; the recent court decisions rejecting proposed qualified entities also raised questions about what needs to be disclosed to the court regarding financing agreements, creating new uncertainty about whether and how courts will regulate third-party funding.[13]

Latin America

Over the last several decades, national courts in Central and South America have engaged in significant procedural reform, which has moved these regimes from reliance on written submissions to *orality* and on sequential judicial decision-making towards a single "all issues" trial as in the common law tradition. In traditional civil law regimes, judges had little interaction with parties and counsel. With the adoption of oral hearings, judges more actively engage in dispute resolution. The reform movement began in the criminal courts with a set of goals including protection of human rights and increased transparency, but has since moved into civil courts in many jurisdictions. At least a dozen countries in Central and South America have also adopted representative collective litigation procedures for certain categories of civil claims. Together these changes arguably lead to an increased need for judicial case management, but that concept is still novel.

In Brazil, the South American jurisdiction with the longest-established class action procedure, authorization to bring a collective action was originally limited to the Attorney General, and collective actions were limited to consumer protection cases. Now the substantive scope of collective actions is broad and standing to bring such an action is granted to associations and other types of entities as well as government officials (but not apparently to individual class members). Third-party litigation funding is accepted in Brazil and lawyers are permitted to enter into "success fee" contracts akin to contingency fee contracts. Various judicial case management procedures are used in ordinary individual litigation, and judges oversee collective actions, including reviewing settlements. At the same time, since 2015, parties in Brazil (as in some other South American jurisdictions) may contract to use certain procedures (i.e. modifying the general rules) in civil litigation, under what are termed "procedural contracts." These contracts may govern a broad range of procedural aspects, including discovery, cost allocation, and the

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[12] Generally, outside the United States and Canada, representative collective action rules do not require "certification." Instead, courts have used rules on "admissibility" to prohibit such actions from moving forward.

[13] C.J. M. Klaassen, Mass Tort Settlement on the Foot of the WAMCA, AV&S, February 2024. [Translated by a language algorithm] I am grateful to Prof. Ianika Tzankova of Tilburg University (NL) for sharing information about current issues relating to the management of mass claims.

use of alternative dispute resolution procedures. Brazilian law requires judges to uphold these agreements in most instances.[14] I have not yet been able to find out whether and if so, how, parties' rights to enter into such procedural contracts affect collective actions.

In Chile, the national consumer protection agency, SERNAC, is authorized to bring class actions on behalf of consumers; at the same time, private attorneys may represent classes of consumers who claim compensation as a result of a legal violation. Chile does not have a tradition of judicial case management, although in recent years case management has entered into labor courts and family courts but it has not spread to general jurisdiction courts. Perhaps as a result of a passive judge tradition and perhaps because of the presence of a governmental agency (which can intervene in class actions brought by consumers themselves), there does not seem to be significant judicial management of such actions.[15]

[14] Antonio Cabral and Pedro Noguera, Contractualization of Civil Litigation in Brazil: Party Autonomy and Procedural Agreements, Intersentia, n.d. My Chilean colleague, Prof. Claudio Fuentes of Universidad Diego Portales shares that "case management is arriving in Latin American jurisdictions through [such] procedural contracts." He also informs me that these contracts cannot be used in collective litigation in Chile.

[15] Claudio Fuentes, The Emergence of Managerial Judging in Chile's Family and Labor Reformed Courts, International Journal of Procedural Law, *forthcoming.*