

# 1. Introduction

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## I. GENERAL SCOPE OF THE CONTRIBUTIONS

Mass litigation is on the reform agenda across Europe and the legislative landscape has changed impressively in recent years. Many aspects of collective redress litigation, particularly the comparative and international perspective, have been highlighted in various publications recently.<sup>1</sup> Most of them have a focus on the political context such as whether to strengthen private or public enforcement of consumer and/or competition law or on questions raised in the context of contentious litigation, such as how to design procedural instruments effectively, or how to handle cross-border multiparty cases. The focal point of the contributions in this book is a different one. We take as a starting-point the observation that mass claims are a “nuisance” for both parties and courts. Preventing contentious litigation and encouraging parties to settle disputes is particularly important for mass claims. Therefore the contributions are about new ways of settling mass disputes.

Whereas there is vast experience and plenty of case law on settlements

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<sup>1</sup> The number of articles in legal periodicals has become almost uncountable. For books on mass litigation see, for example, Duncan Fairgrieve and Eva Lein, *Extraterritoriality and Collective Redress* (Oxford University Press 2012); *Procesos Colectivos – Class actions, I Conferencia Internacional y XXIII Jornadas Iberoamericanas de Derecho Procesal*, IAPL et al (Buenos Aires 2012); Jenny Steele and Willem van Boom (eds), *Mass Justice – Challenges of Representation and Distribution* (Edward Elgar 2011); Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs and Funding of Civil Litigation – A Comparative Perspective* (Oxford 2010); Fabrizio Cafaggi and Hans-W Micklitz, *New Frontiers of Consumer Protection – The Interplay between Private and Public Enforcement* (Intersentia 2009); Matthias Casper, Nils Janssen, Petra Pohlmann and Reiner Schulze (eds), *Auf dem Weg zu einer europäischen Sammelklage* (Sellier 2009); Rachael Mulheron, *Reform of Collective Redress in England and Wales*, Research Paper, 97 <[www.civijusticecouncil.gov.uk](http://www.civijusticecouncil.gov.uk)>; Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart 2008).

in the classic class action countries like the USA, Canada and Australia, for many courts in Europe mass disputes and settlement approval are a completely new terrain. Notably the US class action system has repeatedly refined its rules, enhanced the court's managerial role and made considerable efforts to minimize the risks typical of class actions.<sup>2</sup> Within Europe, the Dutch Mass Settlement Act of 2005 (*Wet collectieve afwikkeling mas-saschade, WCAM*) is unique and very interesting. It is an excellent example of how courts struggle to find standards and instruments to improve settle-ment proceedings. But people also look for alternatives to court pathways. One of the most significant alternatives that has been identified in the EU is the "new world" of consumer dispute resolution. This has been devel-oping quietly in some Member States for 40 years, but has only recently come into the full glare of the EU policy spotlight. The mechanisms and implications need urgently to be examined.

It is well known that the majority of mass claims in whichever mecha-nism you look at, whether courts or Consumer Alternative Dispute Resolution (CDR), are settled – a need which has confronted people and courts, partly as a result of the cost of litigation. This has long been under-stood in the context of litigation – certainly in common law jurisdictions, although less so traditionally in more efficient civil procedure systems like Germany, but now given increased momentum in Europe through the implementation of the EU Mediation Directive into all Member States' civil procedures.<sup>3</sup> In the new world of CDR, research has recently shown how important settlement through mediation etc. is in that context also, where it applies to the majority of claims in many CDR systems. ADR/ CDR systems and settlements both help to unburden the court system and are arguably the best way of satisfying the parties.

With respect to the US class action system, experience shows that once a mass litigation has got off the ground (e.g. beyond the certification stage) there is a high probability of it being settled before trial.<sup>4</sup> The contributions in this book demonstrate that there is not only a very similar tendency in

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<sup>2</sup> Hannah Buxbaum, *Class Actions, Conflict and Global Economy, Liber ami-corum Rolf Stürner* (Tübingen 2013) vol 2, 1443, 1450, who strongly argues that European legislatures and scholars should be more open-minded and learn from the US class action system instead of rejecting it completely.

<sup>3</sup> Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>4</sup> For Canada, Jasminka Kalajdzic indicates in her contribution (p. 134) a settle-ment rate of 96 per cent in (certified) class actions although approximately one-quarter of all proposed class actions are not certified. There is, however, a diversity of opinions with respect to the blackmailing effect of class action in the US and Canada, Kalajdzic Chapter 6, p. 134.

the other major class action jurisdictions of Australia and Canada, but that one can also see similar issues arising all around the globe. So we are delighted that colleagues from Europe, the USA, Canada, Australia and China have agreed to contribute to this book. Their contributions all point towards an international convergence of the importance of settlements, mediation and ADR. It is a global observation that if court claims, especially mass or collective procedures, present a problem in a jurisdiction, it will start to look at promoting settlement.

We have also decided to include a chapter on the development in China, since it illustrates clearly how the same ideas of ADR and settlement prosper in what is – at first glance – a completely different system. The Chinese legal system has undergone an impressive reform process since the 1990s and we can observe that new regulations have adopted elements from both the 19th-century roots of Chinese civil law in continental Europe<sup>5</sup> and from modern US law. Based on a combination of these elements with traditional and new Chinese approaches a completely new autonomous civil law system is emerging. With respect to mass claims, the PRC Code of Civil Procedure has more or less adopted the US class action idea (Sec. 54<sup>6</sup>), but civil courts are very much afraid to use these instruments and to admit mass claims.<sup>7</sup> As the contribution of Zhang Wusheng explains, courts have found ways to evade the rules on representative proceedings but, owing to the political influence of defendants there is not always an independent exercise of judicial powers. In academic circles, the question whether China should rely on the US class action system is a highly controversial one. Some scholars fear a litigation culture and favour European approaches like reducing the potential of group disputes by a comprehensive social security system, and by redirecting mass claims

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<sup>5</sup> A draft for a Chinese Civil Code prepared in the late Qing Dynasty (1644–1911) closely followed the Roman Pandects and adopted more or less the German Civil Code (enacted in 1900), but the draft never came into force. The first modern Chinese Civil Code to be enacted at least for some years was based on this draft. It was developed from 1929 to 1931 and was also strongly influenced by Japanese, German and Swiss law. However, the laws enacted in the Republic of China were abrogated by the People's Republic of China from 1949.

<sup>6</sup> A recent revision of China's Civil Procedure Code (originally enacted in 1991) came into force on 1 January 2013. The two provisions dealing with mass claims (now Articles 53 and 54, formerly Articles 54 and 55) were already implemented with a first revision in 2007. Because of a new article on “public interest litigation” added by the 2013 reform the number of the articles changed.

<sup>7</sup> Wusheng Zhang, ‘Analysis and Introduction of the US Class Action in China’ (2009) 14 *Zeitschrift für Zivilprozess* 371.

to alternative dispute resolution mechanisms.<sup>8</sup> Last but not least, based on a revival of Confucian ethical values, the government emphasizes the role of courts and authorities (which are formally separated but still not strictly independent of each other) as arbitrators.<sup>9</sup> Court-based mediation has always been a key principle of the Chinese civil justice system, but was pushed aside in favour of adjudication during the 1980s.<sup>10</sup> Since the early 2000s, however, there has been growing pressure on judges to settle disputes<sup>11</sup> and their careers depend very much on their success in settling cases. In China, preventing contentious litigation is particularly important for mass disputes. Since the government fears that allowing mass claims before civil courts might seriously endanger social harmony and stability, it has a strong interest in either mediation<sup>12</sup> or settlements.<sup>13</sup> As a consequence they are also starting to look very closely at ADR systems based on the EU model,<sup>14</sup> and also at how public regulators and criminal courts can be used to deliver restoration and compensation.

Unsurprisingly all these aspects intertwine. CDR and Online Dispute Resolution (ODR) have obvious attractions as the way out of the political dilemma over collective redress at the European level. Since the Commission is not able to come forward with a proposal for a harmonized model of collective redress mechanisms, other than general principles, the focus has shifted to ADR, CDR and mediation. The 2012 resolution of the European Parliament on the Commission's consultation paper emphasized

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<sup>8</sup> Yu Fan, *Group Litigation: About its Problems of System and Practice* (Peking University Press 2005), 428.

<sup>9</sup> Gao Xujun, 'Konfuzianismus und die Rechtsordnung Chinas' in Uwe Kischel and Christian Kirchner (eds), *Ideologie und Weltanschauung im Recht* (Mohr Siebeck 2012) 23, 43.

<sup>10</sup> Fu Hualing and Richard Cullen, 'From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reform in China' in Margaret Woo and Mary E Gallagher, *Chinese Justice – Civil Dispute Resolution in Contemporary China* (Cambridge University Press 2011), 33.

<sup>11</sup> Margaret Woo and Mary E Gallagher, 'Introduction' in Margaret Woo and Mary E Gallagher (supra note 10), 8; Fu Hualing and Richard Cullen (supra note 10), 48–53; Astrid Stadler and Zhang Dahai, 'Kollektiver Rechtsschutz und Klagen im öffentlichen Interesse in China nach der Zivilprozessrechtsreform 2012' (2013) *Recht der Internationalen Wirtschaft* (forthcoming April/May).

<sup>12</sup> Fu Hualing and Richard Cullen (supra note 10), 25.

<sup>13</sup> Yuanshi Bu, 'Gestalten, Schlichten, Richten oder Abweisen, Gegenwärtige Reformströmungen im Lichte der anstehenden Novelle des Zivilprozessrechts in China' (2010) 15 *Zeitschrift für Zivilprozess International* 359.

<sup>14</sup> For a similar tendency in Japan cf Motoko Yoshida, 'Promoting the Use of Mediation: Approach from the Legal and Economic Perspective' (2010) 15 *Zeitschrift für Zivilprozess International* 415.

that ADR and ODR are necessary, but they are an even more attractive option for the business sector if consumers can eventually resort to collective court proceedings.<sup>15</sup> In this respect the Netherlands is a very good example of a “mixed approach”. The Dutch WCAM is quite successful and helps consumers and investors to obtain compensation without burdening the court system with lengthy proceedings, whilst the *Geschillencommissie* system quietly processes many individual and collective claims.

Since litigation cannot be prevented by ADR or mediation in all cases, it becomes extremely important to look at the possibility of mass settlements. If we consider both mechanisms (ADR and settlements) with respect to their effects of unburdening the judicial system from mass claims, it seems necessary to scrutinize the existing experience in the US, Canada and other countries with mass settlements. Although the process of negotiating mass settlements would also be extremely interesting to analyse in detail, the chapters in the first part of the book have a different focus. They will look at the role of courts with respect to settlements and their approval. As courts – for very good reasons – have the obligation to approve mass settlements<sup>16</sup> it is worth taking into account how they cope with that task and how meticulously they look at the merits of the claims.

The second part of the book looks at one of the major alternatives to courts that have emerged onto the European scene for the resolution of consumer disputes, and in which settlement plays an important and intrinsic role. The phenomenon of CDR is clearly a highly significant development, both in its own right and in relation to its impact on pre-existing concepts, structures and practice, i.e. on justice, access to justice, and the need for courts and lawyers. The issues with CDR are summarized further at the end of this chapter. Both parts of the book are preceded by Michael Faure’s chapter providing an observation of CDR and mass settlements from an economic perspective. It analyses risk aversion and rational apathy of consumers, but also points out that utility-maximizing attorneys and judges may jeopardize efficient mass settlements and resolution of consumer claims.

It is significant that the European Commission’s 2013 Recommendation on collective redress puts forward common principles for *both* judicial and

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<sup>15</sup> European Parliament (P7 TA [2012] 0021, 2 February 2012 <[www.europa.eu/parl/europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN](http://www.europa.eu/parl/europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN)>).

<sup>16</sup> For example, Rule 23 (e) (3) Federal Rules of Civil Procedure (FRCP); Sec 33 V Federal Court of Australia Act 1976 (Cth); Art 7:907 Dutch Civil Code.

out-of-court procedures, and applicable equally to each method.<sup>17</sup> It also specifies that “Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute consensually or out-of-court, both at the pre-trial stage and during civil trial”.<sup>18</sup> This policy decision confirms not only the equally importance attached to ADR as to judicial dispute resolution procedures, but also the importance of settlement whichever procedure may be used.

We mentioned above that ADR/CDR/ODR is not the only technique to which governments are turning to resolve disputes. We may see innovation appearing in various forms and, indeed, in various combinations of techniques. In this volume, Stefaan Voet outlines developments in Belgium in the separate but related areas not just of the “piggyback” technique by which individual claimants may become civil parties to criminal proceedings and be awarded compensation for their losses at the end of the criminal process, but also the exciting Belmed CDR portal. Voet notes that the criminal-piggyback technique is available in various European jurisdictions, but it is only when (as in Belgium and the UK) it is mandatory for courts to address “private” compensation that it appears to have been used. The examples cited certainly appear to have been effective, and relatively efficient. The criminal-piggyback approach is similar in function to the approach found in Denmark and the UK where consumer or sectoral regulators have been given powers to facilitate, seek a court order for, or themselves order, companies to pay compensation to those whom they have harmed, as part of standard enforcement activity.<sup>19</sup>

Another important example of effective combining of techniques is the developing relationship between ombudsmen and regulators, exemplified in the UK. A new trend in disputes, or conduct that is illegal or at least questionable, might be picked up by either an ombudsman or a regulator from the data that comes to them. Any issue of legality can then be resolved (by the regulator or the courts) and implemented in resolution of disputes by the ombudsmen or courts, or voluntarily by the sector’s traders, perhaps under the influence or compulsion of regulatory powers.

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<sup>17</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, recital 13 and paras 25–28.

<sup>18</sup> *Ibid* para 25.

<sup>19</sup> See Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart 2008).

## II. SETTLEMENT OF MASS DISPUTES

### 1. Mass Settlements – Two Sides of the Coin

Implementing new instruments of collective redress is a great challenge for legislatures since it requires finding a balance between the efficient administration of the “mass” and the protection of fundamental individual rights. This becomes particularly difficult if the instruments are not only designed to provide a remedy against trivial, albeit widespread (consumer) damages, but also for the enforcement of “regular” damages of consumers or investors. Procedural efficiency will often not allow courts to scrutinize each individual claim, even if the cases are brought together in whatever type of collective instrument. Claimants in mass disputes therefore regularly face the risk that both their procedural rights in participating in the litigation and their claims under substantive law will be curtailed in order to handle the case in due time. Furthermore, in many “big” cases of product or pharmaceutical liability, at least in the USA<sup>20</sup>, defendants face bankruptcy in view of the aggregate amount of damages. As a consequence claimants in mass litigation must often be aware that even in case of a judgment in favour of the class or group they will probably not receive the full amount of damages they could claim from a strict perspective of substantive law. Therefore for a number of good reasons parties to a mass litigation often prefer to settle the dispute. Tort victims, consumers and investors may benefit from a settlement. Even though accepting a reduction of their claims they can expect at least compensation in part, but in the foreseeable future, and without lengthy execution proceedings against the defendant. Settlement also offers the chance of avoiding the risk of being left behind as unsecured insolvency creditors of the defendant company. Individual lawsuits will rarely offer better chances.

Corporate defendants also often prefer settlements to long-lasting court proceedings albeit for slightly different reasons. The usual advantages, such as the avoidance of litigation costs and the uncertainty of the outcome of litigation, apply for them as well. Furthermore, the prospective damage to their company’s image by media coverage of the litigation is very often a strong argument in favour of an early settlement. If the lawsuit is not frivolous they also prefer to meet as many claims as possible at a single blow and on a calculable economic basis in order to remove the liability from their books (sometimes even thus avoiding bankruptcy).

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<sup>20</sup> See for example Linda S Mullenix, *Mass Tort Litigation* (2nd edn West 2008), Ch 2 D, 478 et seq.

The downside of mass settlement is, however, that the class or group members can never be sure that their representative made the most of the situation. Collective settlements involve the risk of collusion and rather “cheap” settlements. The history of the US class action is full of examples of suspicious settlements with the group members left behind with dubious “discount coupons” instead of money damage awards or *cy-près* solutions granting only indirect benefit to the class or consumers in general. In product liability cases, conflicts of interest within the group or class – e.g. those having already suffered damage and the group of future victims – implicate difficult settlement negotiations and require judicious solutions.<sup>21</sup>

## **2. Principals, Agents, Adequate Representation and the Role of Judges in Mass Litigation**

One of the key issues raised in any jurisdiction is: Is not any settlement better than expensive and complex proceedings which have unpredictable results and block judicial capacity? There is certainly no uniform answer to this question. Economists would generally favour settlement as a low-cost solution, but rightly emphasize the importance of the quality of the settlement.<sup>22</sup> From a strictly rule-of-law concept “the idea of a lawsuit is to get a decision from a court about whether the defendant is liable to the plaintiff”.<sup>23</sup> In a traditional two-party litigation, settlements depend on party autonomy and the question of whether a settlement should be preferred over (ongoing) litigation has to be answered by the parties themselves. Mass disputes are different. For the reasons mentioned above, both sides may have strong incentives to settle the case, but the absent group or class members are not involved in the settlement negotiations. Mass settlements are not only difficult and complex for attorneys to negotiate, they also involve a number of principal-agent conflicts and court approval of settlements is an easy way out only at first sight. If we assume that any settlement may not necessarily be a good settlement, what are the standards to be applied by courts? How can courts find out whether a settlement

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<sup>21</sup> For examples see John Coffee, ‘Class Wars: The Dilemma of the Mass Tort Class Action’ (1995) 95 *Columbia L Rev* 1344, 1368.

<sup>22</sup> Michael Faure in this volume, Chapter 2, sub VII.

<sup>23</sup> Richard Marcus in this volume, Chapter 7, p. 154. According to Jasminka Kalajdzic in this volume, Chapter 6, sub IV a, p. 140), in Canada, public policy is said generally to favour the compromise, and courts assume that there is a “strong” presumption that proposed settlements are fair and reasonable – both are facts she finds “troubling”.

proposed by the parties is fair and adequate with respect to the absent group or class member?

Mass settlements must therefore be considered in the broader context of representation and it becomes clear that the traditional role of judges changes in mass litigation.<sup>24</sup> The European Commission's lengthy debate before coming forward with a "coherent approach" on collective redress mechanism in 2013 has a lot to do with these questions. Existing proposals and drafts ran into the opposition of politicians and of the business sector for various reasons. One major argument is that the US class actions model – and anything that looks like it – constitutes a foreign element in the political, social and judicial systems in Europe.<sup>25</sup> Indeed, most European countries have a tradition of public enforcement in many fields of law, particularly in consumer and competition law. They have only gradually become used to the idea that private actions can positively complement current public enforcement or can step in where such enforcement does not exist. However, most private instruments of enforcing mass claims or of collective redress are ultimately based on the rationale that the interests of "the mass" are being represented by a group or class plaintiff, be it a member of the class, a representative body like a non-profit organization, or even a public entity. Collective actions thus do not fit readily into the European "individualistic" civil justice systems, which are almost entirely based on the enforcement of individual claims in two-party litigation.<sup>26</sup> There is a wide consensus today that Europe should not simply copy the US class actions system with all the factors that are responsible for a "litigation culture" or "lawyer-driven" litigation.

Nevertheless, the implementation of any collective redress regime will

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<sup>24</sup> Particularly, if the collective redress mechanism is based on an opt-out system with settlements which purport to bind absent class or group members, Rebecca Money-Kyrle and Christopher Hodges, 'European Collective Action: Towards Coherence?' (2012) 19 *MJ* (4), 477, 495.

<sup>25</sup> For example Alexander Bruns, 'Einheitlicher Kollektiver Rechtsschutz in Europa?' (2012) 4 *Zeitschrift für Zivilprozess* 399–419; Franz Jürgen Säcker, *Die Einordnung der Verbandsklage in das System des Privatrechts* (CH Beck 2006); for a critical assessment of the ineffectiveness of repressive damage awards cf Rolf Stürner, 'Privatautonomie und Wettbewerb unter der Hegemonie angloamerikanischer Rechtskultur' (2010) 210 *Archiv für die civilistische Praxis* 106, 125.

<sup>26</sup> Only representative actions by consumer associations or public interest groups have been established and widely used since the 1970s, but the legal standing given to these groups has often been restricted to suing for injunctive relief; for a comparative overview, see Rolf Stürner, in IAPL et al (eds) *Procesos Colectivos – Class actions, I Conferencia Internacional y XXIII Jornadas Iberoamericanas de Derecho Procesal* (Buenos Aires 2012) 74.

impose greater responsibility on the courts compared with traditional civil proceedings. The 2013 Commission Recommendation on collective redress emphasizes throughout the importance of maintaining traditional approaches towards a balanced mechanism, respecting the rights of claimants and defendants.<sup>27</sup> The detailed proposals comprise a series of safeguards intended to maintain that balance and to guard against abuse, such as maintaining the ‘loser pays’ principle, banning punitive damages, only giving standing to designated representatives who satisfy clearly defined conditions of eligibility, initial verification that cases have merit – and, importantly for this analysis, judicial verification of the legality of collective settlements.

In the US<sup>28</sup> and in the UK<sup>29</sup> the prevailing notion for a long time was that a judge should be an impartial umpire in the proceedings between adversaries, interfering in the parties’ activity only in order to make sure that the lawyers played the game.<sup>30</sup> As a consequence, any active court management does not easily mesh with the traditional role of judges in an adversarial system. Over the years US judges have developed a kind of case management in order to cope with an increasing workload and owing to the growing importance of pretrial discovery which made it more and more necessary for judges to intervene with parties’ disputes over their obligations under discovery rules.<sup>31</sup> While US civil procedure nevertheless generally maintained a more passive role for judges, it was always accepted that class actions required a completely different approach. The need for private enforcement by means of class actions has thus obviously fundamentally changed the role of judges. They certify classes and sub-classes,

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<sup>27</sup> Commission Recommendation (supra note 17).

<sup>28</sup> Cf Judith Resnik, ‘Managerial Judges’ (1982) 96 *Harvard L Rev* 376; for the involvement of magistrate judges see Linda Silberman, ‘Masters and Magistrates’ (1975) 50 *NYU L Rev* 1297; Haimo Schack, *Einführung in das US-amerikanische Zivilprozessrecht* (4th edn, München 2011) para 149.

<sup>29</sup> Neil Andrews, *English Civil Procedure* (Oxford University Press 2003), para 13.12; Neil Andrews, ‘Development in English Civil Procedure: How Far Can the English Courts Reform their Own Procedure?’ (1997) 2 *Zeitschrift für Zivilprozess International* 14.

<sup>30</sup> In the US, this traditional juridical role was partly based on the idea of the drafters of the US Constitution that courts should be independent from the executive. They also wanted to ensure the vesting of substantial adjudicatory power in the people by creating the jury system (US Constitution Amendment VII); Resnik (supra note 28) 381.

<sup>31</sup> Resnik (supra note 28) 378; Collin Wallace, ‘Working Paper – Future of the Judiciary’ (1982) 94 *FRD* 225, 228; John Anthony Jolowicz, ‘The Active Role of the Court in Civil Litigation’, *General Report to the 9th International Congress of Comparative Law* (Teheran 1974), 239.

they appoint lead plaintiffs, they identify “common issues” and issues for individual adjudication, and, finally, they scrutinize and approve settlements. It is particularly the individualistic approach of class actions and the focus on competitiveness and financial incentives for lawyers in the US that requires powerful judges as a strong counterweight.<sup>32</sup> For England and Wales, the implementation of the new Civil Procedure Rules in 1999 led to a paradigm shift.<sup>33</sup> Judges were generally assigned a more active role than before. This trend has been supported and extended as a result of the introduction of costs management under the 2010 Jackson reforms.<sup>34</sup> In particular, the English Group Litigation Order (GLO) system confers significant powers on the court that include the identification of issues to proceed as a test case, the appointment of the lead solicitor, and details to be included in the pleadings.

On the continent, the adversarial system was always less distinct. Common law scholars have often described the different assignment of roles among judges and counsel as “inquisitorial”<sup>35</sup> or as “judicial activism”.<sup>36</sup> Judges have always taken a more active part in handling cases, in the preparation of preliminary hearings and trials and in the taking of evidence.<sup>37</sup> This role model seems to be more suitable for the handling

<sup>32</sup> Stürner (supra note 25), 67, 88 describes this as an “overkill effect”: too much individual freedom produces conflicts that need the “strong man”; for a similar analysis Peter Gottwald, ‘Aktive Richter – Managerial Judges’ in *Law in East and West – Waseda Festschrift*, Institute of Comparative Law, Waseda University (Tokyo 1988), 705, 706.

<sup>33</sup> Neil Andrews, ‘Contracts and English Dispute Resolution’, Nagoya University Comparative Study of Civil Justice, vol 5, 188: “English procedure had previously avoided judicial management . . . English civil procedure has moved from an antagonistic style to a more co-operative ethos”. See also Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (3rd edn, Thomson, Sweet & Maxwell 2011) and Deirdre Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009).

<sup>34</sup> Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) (‘Final Report’) <[http://www.judiciary.gov.uk/about\\_judiciary/cost-review/jan2010/final-report-140110.pdf](http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf)>; the principal implementation is in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>35</sup> Resnik (supra note 28) 380: “Our system was ‘adversarial’ rather than ‘inquisitorial’”; Benjamin Kaplan, Arthur T von Mehren and Rudolf Schaefer, ‘Phases of German Civil Procedure’ (1958) 71 *Harvard L Rev* 1193, 1443.

<sup>36</sup> For a description of the shift in judicial role towards more court management as “judicial activism”, see Donald Horowitz, *The Courts and Social Policy* (Brookings Institution Press 1977).

<sup>37</sup> In the 1970s and 1980s some academics in Germany argued that judges should not act as umpires between plaintiffs and defendants, but as “social engineers” assisting the “weaker party”: Rudolf Wassermann, *Der soziale Zivilprozess*

of mass disputes than the idea of the judge as an umpire. In 1985, John Langbein in comparing US and German civil procedure emphasized the growing manifestations of judicial control in the US multiparty “Big Case” and already observed a convergence of the two systems: “In principle, managerial judging is more compatible with the theory of German procedure than with our own”.<sup>38</sup> However, there seems to be a reverse of the positions now: today the idea of an even more active and protective role for the court in collective proceedings sparks suspicion in Germany and Europe and is deemed to endanger one of the basic pillars of the civil justice system, particularly the impartiality of the judge.

Apart from the rather technical problems of case management, it is the representative character of collective actions that inevitably implies a greater responsibility for judges. Some US courts have even gone so far as to term the judge a fiduciary of the absent class members.<sup>39</sup> It is a main feature of group actions that the group members are not formally parties to the litigation and do not have the right to participate actively in the proceedings. Instead, the group or lead plaintiff acts on their behalf, and this is probably the only way to make mass claims and really big cases manageable. As a consequence, principal-agent problems<sup>40</sup> can occur and there must be a number of safeguards to protect the interests of absent group members. The contributions in the first part of this book will primarily address one: the challenging task for courts of approving mass settlements.

If a group or class action finally results in a proposed settlement of the case, the representative role of the lead plaintiff becomes extremely

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(Luchterhand 1978); Rudolf Wassermann, *Der politische Richter* (Pieper 1982) 56; Theo Rasehorn, Helmut Ostermeyer, Diether Huhn and Fritz Hasse, *Im Namen des Volkes* (Luchterhand 1968) – an approach that did not become generally accepted. Perhaps unsurprisingly, modern Chinese civil justice also assigns the function of social engineers to civil judges, Yuanshi Bu, ‘Gestalten, Schlichten, Richten oder Abweisen – Gegenwärtige Reformströmungen’ (2010) 15 *Zeitschrift für Zivilprozess International* 366, 368.

<sup>38</sup> John Langbein, ‘The German Advantage in Civil Procedure’ (1985) 52 *Univ of Chicago L Rev* 823, 825.

<sup>39</sup> *Reynolds v Beneficial Nat Bank*, 288 F3d 277, 280 (7th Cir 2002); Barbara J Rothstein and Thomas E Willging, *Managing Class Action Litigation, A Pocket Guide for Judges* (Federal Judicial Center 2005), 8. This is indeed in contrast to the traditional juridical role of the adversarial system which was based on the guideline that “disengagement and dispassion supposedly enable judges to decide cases fairly and impartially” (Resnik (supra note 28), 376).

<sup>40</sup> For details of agency issues in enforcing consumer interests, Franziska Weber, *Towards an Optimal Mix of Public and Private Enforcement in Consumer Law* (Rotterdam 2012) 87 et passim. See also Michael Faure in this volume, Chapter 2.

important. Therefore group or class action regulations often require judicial review of the fairness, reasonableness and adequacy of the settlement as a special safeguard for the interests of the group members.<sup>41</sup> For many jurisdictions in Europe, it is a completely new challenge. In the traditional bipolar lawsuit, settlements achieved by the parties are not often subject to judicial review because negotiating an adequate settlement can be left to party autonomy. Collective actions, however, are more vulnerable to collusion, and they require special safeguards to protect the absent group members who do not participate in the settlement process and typically lack the knowledge, resources and motivation to object to a proposed settlement. Therefore judicial review and approval for the settlement is necessary. In some jurisdictions courts are even granted the power to make additional orders, e.g. with respect to the distribution of any money paid under the settlement.<sup>42</sup>

Concern about the potential for conflicts of interest and abuse between agent-intermediaries and principals becomes more acute in jurisdictions when the intermediaries seek levels of remuneration that are either intrinsically substantial and/or significant in proportion to the size of individuals' claims and of the total claim value. Such issues underpin concern over contingency or success fees for lawyers and large fees for the new breed of independent "third party" litigation funders.<sup>43</sup>

### 3. Can Conflicts of Interest be Avoided From the Very Beginning?

Mass settlements may raise the suspicions of judges for various reasons. There might be collusion between the representative of the group and the defendant, resulting in a low settlement amount for the whole group or a much too generous compensation for the group representative and her counsel. The settlement may not treat all group members equally although it should do so, or it may – on the contrary – fail to treat particular groups of the class differently where the facts of the case indicate it would be appropriate to do so. Thus, unfair settlements may result from a conflict of interest between the representative and the represented group, or from conflicts within the group or class. Class action regulations can minimize

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<sup>41</sup> See Rebecca Money-Kyrle and Christopher Hodges (supra note 24), 495: "The issue is thus one of democratic representation as much as of judicial fairness."

<sup>42</sup> Eg Federal Court of Australia Act (Clth) s 33V (2).

<sup>43</sup> Christopher Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (Centre for Socio-Legal Studies, University of Oxford, and Lincoln University Law School 2011) found that commercial funders typically charge 30 per cent or more of the sum recovered, after costs and expenses.

the potential for conflict in several ways. One key issue is the selection of the group representative, which is, however, beyond the scope of this book.<sup>44</sup> Another safeguard operates through certification requirements.<sup>45</sup> Generally a group or class action will only be certified if the plaintiff's claim is typical of the whole class. Thus, in many situations, the interests of the group representative or lead plaintiff and those of the class or group members will not be in conflict. In the US, courts now tend to emphasize scrutiny of the common features and to take into consideration the merits of the plaintiffs' claims before certifying a class – issues that were subject to two US Supreme Court cases in 2012–13.<sup>46</sup> In order to minimize the potential for conflicts within the class courts should be given a broad discretion with respect to the certification and the formation of sub-classes.<sup>47</sup>

The European system offers another chance of avoiding potential conflicts. Non-profit associations and public authorities have traditionally played an important role in representing group or public interests with respect to injunctive and declaratory relief. Consumer associations and private interest groups are bound to their statutory interests, they are often controlled by public institutions and their primary incentive is not to gain profit.<sup>48</sup> If they are granted legal standing to initiate group actions in

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<sup>44</sup> For the various options of how to select a group representative cf Astrid Stadler, 'Collective Redress Litigation – A New Challenge for Courts in Europe' in Alexander Bruns et al (eds) *Liber Amicorum Rolf Stürner* (Tübingen 2013).

<sup>45</sup> For a discussion on safeguards in class actions and the "catch 22" problem that barriers to abuse also operate as barriers to litigation, and may render collective actions toothless, largely by increasing cost and delay to an extent that makes actions unviable, see Rebecca Money-Kyrle and Christopher Hodges, 'Safeguards in Collective Actions' (2012) 19.4 *Maastricht Journal of International and Comparative Law* 477–504.

<sup>46</sup> See Richard Marcus in this volume, Chapter 7, p. 161.

<sup>47</sup> Mass torts, in particular, often raise issues of individual causation and damages which are better adjudicated upon individually. In these circumstances, a group or class action should be certified only to try certain common issues (not whole cases) at a preliminary stage, and cases might proceed through individual proceedings at a later stage. In the US, there are examples of judges certifying a class action notwithstanding that the class was likely to be decertified at a later stage of the proceedings for adjudication of individual issues; see, for example, the certification of the asbestos class action (*Jenkins v Raymark Indus*, 19 FRD 269, 282, [ED Tex 1985], affirmed 782 F2d 468 [5th Cir 1986]) and the certification of the nationwide class action "Agent Orange". For details see Peter H Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Bellknap Press 1986); Myriam Gilles, 'Opting Out of Liability: The Forthcoming, Near Total Demise of the Modern Class Action' (2005) 104 *Michigan L Rev* 373, 383.

<sup>48</sup> Stürner (supra note 26) 74, 88.

appropriate cases, they will not be a member of the class themselves and there can be a presumption of adequate representation.<sup>49</sup> The same is true for public authorities acting as representatives in group or class actions.<sup>50</sup> Thus, principal-agent issues become less important and even information asymmetries can be mitigated because consumer associations or authorities will regularly be better informed than individual consumers.<sup>51</sup>

Admittedly, an active role of these institutions in collective redress litigation will raise other controversial issues, particularly with respect to adequate financial resources and accountability. Legal standing should be given only to those institutions showing credibility and a strong commitment to acting in the collective interest of their members or consumers.<sup>52</sup> They will need a democratic structure or should probably be controlled in the same way as public agencies.<sup>53</sup> In implementing the EC Injunctive Directive some Member States have already defined criteria for the legal standing of representative organizations, but these are definitely issues that require further deliberation. Furthermore Michael Faure in his contribution<sup>54</sup> expresses worries that if consumer organizations have a monopoly there might be a divergence of interests between the organization and the consumer. Competition between several associations may avoid that problem. In any case, one has to concede that not all types of mass damages are suitable for class representation by associations and non-profit organizations.

The importance that European justice systems attach to avoiding conflicts of interest can be seen from the inclusion in the European

<sup>49</sup> Of course in some cases one may have doubts about the goals of these organizations, Richard Marcus (in this volume) Chapter 7, p. 163.

<sup>50</sup> Group litigation regulations in Sweden (Sec 5 and 6 Group Litigation Act 2003), Denmark (§ 254c Administration of Justice Act), and Norway (Sec 35-3 Dispute Act) give legal standing to private associations and public bodies like the consumer ombudsman; in Finland (§ 4 Class Action Act 444/2007) and Poland (Art 4 8 [2] Group Litigation Act) only ombudsmen have the right to bring group actions (in Poland in addition to individual members of the group). Consumer organizations also have legal standing for group actions, for example in Bulgaria (Ch 3 Civil Procedure Code), Italy (Art 140 *bis* Consumer Code), and Portugal (Art 17 7 Law 24/96).

<sup>51</sup> Franziska Weber (supra note 40) 150 et seq.; for restrictions on legal standing see also Rebecca Money-Kyrle and Christopher Hodges (supra note 24), 487–9.

<sup>52</sup> Roger Van den Bergh and Louis Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1 *Erasmus L Rev* 5, 28.

<sup>53</sup> Franziska Weber (supra note 40), 153; Christopher Hodges, *Collectivism: Evaluating the Effectiveness of Public and Private Models for Regulating Consumer Protection*, 207, 217.

<sup>54</sup> In this volume, Chapter 2, V 2.

Commission's 2013 Recommendation on collective redress of a power for courts to stay proceedings where funding is provided by a third party if there is a conflict of interest between the third party and the claimant party and its members.<sup>55</sup>

#### 4. "Opt-out" as a Safeguard Against Unfair Settlements?

Group or class members may have the right to opt out of the proposed settlement and thus escape its binding effect. In the US, the 2003 reform of class actions rules provides the court with the discretion to grant the chance for a second opt-out once a settlement has been reached (Rule 23 [e] [3] Federal Rules of Civil Procedure (FRCP)). The Dutch WCAM proceedings are based on the court approval for an out-of-court settlement of mass torts and provide an opt-out mechanism for those tort victims who do not want to participate in the settlement. This is a very strong weapon against unfair settlements if at least three conditions are met: the claimants must receive adequate notice of the settlement terms; they must be in a position to assess the pros and cons of the settlement; and they must have real alternatives to enforce their claims. With respect to the first requirement, class or group proceedings involving a large number of unidentified victims present a particular challenge in terms of submitting the settlement to their attention.<sup>56</sup> In the Netherlands, the Amsterdam court's efforts to inform the tort victims who will be bound by the approved settlement (often residing in countries all over the world) seem to be guided by US class actions practice.<sup>57</sup> The court's instructions with respect to the notification of the injured parties became more precise step by step and case by case.<sup>58</sup> Nevertheless, its notification practice raises concern and might turn out to be an obstacle to the Europe-wide recognition of the court's decisions under the Brussels I Regulation.<sup>59</sup> In big international cases, even the

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<sup>55</sup> Commission Recommendation (supra note 17), para 15(a).

<sup>56</sup> For the form of notice used in Australia cf Michael Legg (this volume), Chapter 8, p. 179–181.

<sup>57</sup> Art 1013 (5) Dutch Code of Civil Procedure (CPC). For a general discussion on the effects of the opt-out mechanism, see Christopher Hodges (supra note 1), 118–30; Astrid Stadler, 'Group Actions as a Remedy to Enforce Consumer Interests' in Fabrizio Cafaggi and Hans-W Micklitz (supra note 1), 305, 317.

<sup>58</sup> For a detailed analysis of the notification practice, see H el ene van Lith, *The Dutch Collective Settlements Act and Private International Law: Aspects van Internationaal Privaatrecht in de WCAM* (Maklu 2011), Chapter 3.3; Karen Jelsma and Manon Cordewener, 'The Settlement of Mass Claims, A Hot Topic in The Netherlands' (2011) *Intl L Q* 13, 17.

<sup>59</sup> Xandra Kramer, in this volume, Chapter 3 sub V, p. 82 et seq.

most careful and vigilant attempts to reach all group members by public announcements apparently accept that not all of them will definitely receive the information. The Dutch Parliament has recently enacted legislation improving the WCAM proceedings.<sup>60</sup> In Australia, adequate notice is even more important than in other class action systems since a final settlement requires a “closed class” and therefore the action converts into an opt-in proceeding requiring affirmative steps by those class members who want to benefit from the settlement.<sup>61</sup>

When implementing group or class actions to enforce trivial damages, one should bear in mind that group members will have no incentive to opt-out and will tend to accept any settlement since individual litigation is not an option. Defendants may thus get off lightly unless courts intervene. But also with respect to “regular” damages court approval plays an important role because it sends a signal that the settlement is fair and adequate and thus influences the decision of group members to accept it. In the US, the “second opt-out” (Rule 23 [e] [4] FRCP) is a controversial provision. In practice, defendants reserve the right to withdraw from the settlement if more than a certain number of claimants opt-out<sup>62</sup> – a solution provided by law now in the German Capital Market Model Case Act (s 17 [1]). One may also be concerned about evidence from the Netherlands and UK of the arrival on the scene of independent claims’ intermediaries who seek to attract class members to opt-out of settlements with the lure of gaining higher damages. Classic economic analysis might support such activity if it results in higher recoveries, but there is some evidence that the result may not be achieved for the enticed claimants whereas significant fees may be gained by the enticers.<sup>63</sup>

## 5. Criteria and Standards to be Applied in Evaluating Proposed Settlements

Regulations on the judicial review of proposed settlements are sometimes very vague and do not provide detailed criteria to be applied by the courts. In the US, Rule 23 (e) FRCP requires only that the settlement be “fair,

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<sup>60</sup> Ianika Tzankova and Deborah Hensler, in this volume, Chapter 4, sub IV, p. 98 et seq. The amendments came into force on 1 July 2013.

<sup>61</sup> Those class members who do not come forward are not only excluded from the settlement, they also face the risk that their claims are extinguished unless the court excludes them from the class, for details Michael Legg in this volume, Chapter 8.

<sup>62</sup> Richard Marcus in this volume, Chapter 7, p. 157.

<sup>63</sup> For details see Christopher Hodges in this volume, Chapter 5.

reasonable and adequate”.<sup>64</sup> The Dutch WCAM is a little bit more specific.<sup>65</sup> In reviewing settlements courts must often assess the adequacy of attorney’s fees, the administration and distribution of funds, and last but not least the recovery of class members. In this last respect judicial review can be understood to require comparison of the relief granted in the settlement to what group or class members might have obtained by a court judgment. Nevertheless, the review has to take into account that “compromise is the essence of a settlement”<sup>66</sup>. In practice, it will always be a question of how meticulously courts will and can consider the alternatives to the proposed settlement without litigating the merits of the case.<sup>67</sup> There seems to be a widespread consensus that courts should not ignore the legal situation of the group or class member completely, and that they must resist the temptation to rubber-stamp proposed settlements solely in order to bring the litigation to an end. From an economic perspective, based on empirical studies on judges’ incentives, Michael Faure also doubts whether judges will fulfill the sometimes high expectations in their monitoring tasks.<sup>68</sup> In the US, legal scholars emphasize that a summary assessment based on the facts and evidence presented so far is necessary, but also sufficient. This will always leave a broad range of acceptable settlements. Courts in the US<sup>69</sup> and in Australia have also developed catalogues listing criteria to be applied (the “nine-factor test”<sup>70</sup>) when looking over class action

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<sup>64</sup> The provisions in Australia (Michael Legg in this volume, Chapter 8, p. 177) do not provide any criteria for approving settlements.

<sup>65</sup> Court approval may be refused if “the amount of the compensation is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage” (Article 907 III lit b Dutch Civil Code). Approval may also be denied if “the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded”. The Swedish Group Litigation Act 2003 s 26 provides that, a settlement shall be confirmed by the court “provided that it is not discriminatory against particular members of the group or in another way manifestly unfair”.

<sup>66</sup> *Milstein v Werner*, 57 FRD 515, 524-525 (SDNY 1972).

<sup>67</sup> Timothy E Eble (1999) *Federal Class Action Practice Manual*, Chapter 9, § 49 <[www.classactionlitigation.com/fcapmanual/chapter9.html](http://www.classactionlitigation.com/fcapmanual/chapter9.html)>; Janet Walker, ‘Class Action Settlement Approval; Res Judicata; Claims Administration and Cy-Près Awards’, in IAPL et al (eds) *Procesos Colectivos – Class actions, I Conferencia Internacional y XXIII Jornadas Iberoamericanas de Derecho Procesal* (Buenos Aires 2012) 535, 538; Christopher Hodges (supra note 1) 120.

<sup>68</sup> Michael Faure in this volume, Chapter 2 p. 59.

<sup>69</sup> David F Herr, *Manual for Complex Litigation*, Federal Judicial Center (4th edn, West 2008), 22.923.

<sup>70</sup> Michael Legg in this volume, Chapter 8, p. 188; Practice Note CM 17 2010 based on Part IVA of the Federal Court of Australia Act 1976. In Canada, courts

settlements. They are meant to alleviate the tightrope walk between accepting the negotiated compromise in the light of the complexity and risks of further litigation, on the one side, and taking into consideration the legal position of the parties, on the other side.

Whereas all the jurisdictions we are considering seem to give courts a broad (and necessary) discretion when approving settlements, there are few legal provisions which are explicitly restrictive on the court's standards of approval. In Germany, for example, a recent reform of the only instrument of collective redress, the Capital Market Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*, CMMCA), generated such a new standard of court approval. The proceedings under this law, which was enacted in 2005 as a reaction to the big Deutsche Telekom securities litigation, are not exactly like a group action. They are closer to the English Group Litigation Order, however with a very limited scope of application which is restricted to securities cases. Once investors who have suffered damages due to false or misleading capital market information have sued the defendant(s), the CMMCA offers the chance of having factual and legal issues that are common to all claims decided by the Court of Appeals with a legally binding effect for all claimants. The Court of Appeals selects a test case for that purpose and all other pending cases are suspended and will be resumed once the Court of Appeals has decided on all issues selected for the test case before it. Different from traditional group actions, the test case plaintiff is not deemed to be a representative of the other claimants. These are allowed to participate in the test case proceedings as "interested parties". In practice, however, it turns out that the vast majority of them do not interfere. The original version of the CMMCA allowed a settlement of all disputes during the test case proceedings only if all claimants of the suspended proceedings would consent to it explicitly. Section 18, which became effective in November 2012, now gives the test case plaintiff a mandate to negotiate a settlement for all claimants. A proposed settlement will become legally binding on all "interested parties" based on an opt-out mechanism if less than 70 per cent of them opt-out. The settlement requires the approval of the Court of Appeals and its decision will be based on the situation of the test case proceedings. The court will not take into consideration the merits of each claim. Given that the Court of Appeals is not familiar with the details of the other pending actions and has only very limited information with respect to these cases this seems logical. The issues listed for the test case proceedings will regularly not include all the

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have developed more or less the same factors, see Jasminka Kalajdzic in this volume, Chapter 6 sub IV, p. 138 et seq.

conditions of entitlement of the individual claims.<sup>71</sup> But how can the Court of Appeals decide whether the settlement is fair and adequate if it is not getting the full picture of the cases? The legislature obviously believed that the parties to the test case will not allow unmeritorious claims to benefit from the settlement. Maybe the rights of “interested parties” to comment on the settlement and to opt-out are sufficient safeguards against unfair settlement terms. The rationale behind the new regulation is simple (but probably also wrong): As the Court of Appeals does not even possess the complete files of the individual lawsuits there was a deep concern that it would be too time-consuming and too complex to take the merits of all claims into consideration. Once again, the legislature faced the challenge of balancing the public interest in bringing mass litigation to an end without overloading the courts against the protection of the “interested parties” who are not able to overlook the situation and fairness of the settlement. The reform of the German CMMCA is another piece of evidence that even parliaments tend to prefer a quick settlement of mass disputes and to reduce judicial control to a minimum.<sup>72</sup>

## 6. Settlements in International Mass Disputes

The court’s task becomes even more complicated if the case involves an international dimension. The Dutch settlement cases provide excellent examples, and are explained below by Ianika Tzankova and Deborah Hensler, and also by Xandra Kramer. Since its coming into force in 2005 the WCAM has attracted big international cases, particularly securities cases where non-US shareholders were excluded from US class actions.

The *Royal Shell* and *Converium* collective settlements approved by the Amsterdam Court<sup>73</sup> involved thousands of shareholders domiciled in different countries all over the world. Without a settlement of such cases, the courts would have faced complex conflict-of-laws problems and might

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<sup>71</sup> Thus, even if the test case plaintiff wins the test case with respect to all issues listed, some of the other claimants may still lose their case despite the binding effect of the test case decision, if they cannot successfully prove other elements of their alleged claims.

<sup>72</sup> For the particular situation of the German test case proceedings it would have been a much better solution to ask at least the courts of first instance trying the individual cases to comment on the settlement. Since they are familiar with the details of each claim they are in a much better position to estimate whether each plaintiff could win his or her case, and hence should be allowed to benefit from the settlement.

<sup>73</sup> Court of Appeal Amsterdam 29 May 2009, *LJN*: BI5744 (Shell); Court of Appeal Amsterdam 17 January 2012, *LJN*: BV1026 (Converium).

have had to apply a multiplicity of substantive laws to the claims of the group members. Is a settlement a good chance to release the court from the conflict-of-laws problem? In both cases the Amsterdam Court approved the settlement without even mentioning the conflict-of-laws question. Given that national liability rules and tort law can differ considerably this approach appears to be taking the easy way out.<sup>74</sup> Without a settlement these differences have to be taken into account, for example by forming sub-classes or sub-groups.<sup>75</sup> Given a limited settlement amount to be distributed among the group or class members, including unmeritorious claims in the settlement contract is done at the expense of those injured persons with sound claims, and cannot be accepted as an adequate representation of the interests of the whole group.<sup>76</sup> Ignoring the conflict-of-laws issue completely with respect to the approval of a settlement thus seems difficult to accept.<sup>77</sup> Even if the settlement agreement includes a choice-of-law clause, this clause itself must be subject to a reasonableness test. Therefore a comparative analysis of the treatment of the group members which includes weighing the merits of their claims is necessary and often recommended.<sup>78</sup> Otherwise group members may take benefit from a settlement even though they are not entitled to compensation under the applicable law.

In its *Converium* decision of January 2012,<sup>79</sup> the Amsterdam Court simply relied on one main argument for assuming the reasonableness of the compensation awarded to the non-US-exchange purchasers excluded

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<sup>74</sup> Liability rules may differ considerably, for example, with respect to statutes of limitation, the allocation of the burden of proof, the requirements of default or contributory negligence, and the entitlement to compensation for pain and suffering in case of bereavement of the next of kin.

<sup>75</sup> Many group or class action regulations allow for the formation of sub-groups in order to cope with differences within the group of class members: Rule 23 (c) (4) FRCP; Section 20 Swedish Group Litigation Act 2003; § 14 Finnish Class Action Act 444/2007; Section 35-10 Norwegian Dispute Act; Article 6 Polish Group Litigation Act 2009.

<sup>76</sup> For the approval of (domestic) class action settlements in Canada Jasminka Kalajdzic reports that the settlement need not “be reasonable vis-à-vis particular class members” (Chapter 6 sub IV). However, arguably a preferential treatment of only one or even a small number of class members is always at the expense of the others.

<sup>77</sup> Rob Polak and V Hermans, ‘International Class Action Settlements in the Netherlands after the Morrison and Ahold Decisions’ (2011) *Class & Group Actions* <[www.iclg.co.uk](http://www.iclg.co.uk)>, 33.

<sup>78</sup> David F Herr, *Manual for Complex Litigation*, Federal Judicial Center (4th edn, West 2008), 21.62 with respect to Rule 23 (e) (1) (C) FRCP.

<sup>79</sup> Court of Appeal Amsterdam 17 January 2012, *LJN*: BV1026

from the US class action. As none of them had made any attempt to sue the defendant for damages outside the US<sup>80</sup> the court concluded that they obviously faced real obstacles to pursuing their claims and were in a worse position than the US-exchange purchasers. As a consequence, the much lower settlement amount in the settlement in Europe was deemed to be appropriate. It seems rather questionable whether this is an acceptable application of the reasonableness test. Certainly, the apathy of the aggrieved parties can be taken into account, but it may have many reasons. Particularly with respect to on-going settlement negotiations, group members may have refrained from filing a lawsuit. Should this argument be used to avoid considering whether some group members should be treated differently from others with respect to the potential strength of their claims? Some academics rightly point out that the Amsterdam Court should test the “reasonableness” by considering foreign laws.<sup>81</sup> This will not always require a very detailed comparison, but fundamental differences in substantive laws should indeed be reflected in the terms of the settlement. Admittedly, this approach will add some complexity to the process of negotiating a settlement in international cases, and to the effort of the courts reviewing the settlement. However, if we are serious about accepting only reasonably balanced settlements, coping with that task will be inevitable.

## **7. How Can Courts Obtain the Necessary Information to Evaluate the Position of the Group Members?**

The adversarial nature of the litigation is lost once the parties have successfully negotiated a settlement, and it is up to the court to detect flaws or abuses. Therefore courts must anticipate a number of recurring potential abuses, and compensate for the lack of significant opposition to the settlement. According to the contributions in this book, almost everywhere courts are obliged to give notice of the settlement to the class members and grant the chance of submitting objections to the proposed settlement.<sup>82</sup> In the US and Canada, a fairness hearing must be held,<sup>83</sup> in other jurisdictions

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<sup>80</sup> Court of Appeal Amsterdam 17 January 2012, *LJN*: BV1026, sub 6.4.2.

<sup>81</sup> Rob Polak and V Hermans (supra note 77), 33.

<sup>82</sup> USA: Rule 23 (e) (5) FRCP and Securities Act s 27 (a) (5), Securities Exchange Act s 21 D (a) (5); Federal Court of Australia Act (Clth) Australia s 33 X; in Canada notice of the proposed settlement to the class member is not always mandatory, but common practice, see Jasminka Kalajdzic in this volume, Chapter 6, sub 3.

<sup>83</sup> Rule 23 (e) (2) FRCP; Article 1013 (5), (6) Dutch CPC. See for example Ontario’s Class Proceedings Act, 1992, SO 1992, c.6, s. 29.

it is at least common practice to do so.<sup>84</sup> One should not be too optimistic, however, that a large number of group members will object to the proposed settlement. Inertia of class members may indicate consent or acquiescence, but sometimes they are simply not in a position to judge the fairness of the settlement and are not inclined to seek expensive legal advice in order to detect collusion or misuse. Silence on behalf of the class members probably weighs differently from case to case depending – inter alia – on their qualifications<sup>85</sup> and the stake class members have in the action.<sup>86</sup> The main responsibility often lies with the court. Those who do come forward and raise objections – at least in the US – often have in mind only to retain the right to appeal approval of the settlement over their objections, thus delaying the whole proceedings and getting leverage to extract concessions for their own benefit.<sup>87</sup> Therefore the argument that a neutral “guardian” should be appointed to represent the interests of the group members during the negotiation and approval process carries some weight.<sup>88</sup>

Some national rules also allow the consulting of experts, particularly with respect to the economic aspects of settlements (e.g. coupon settlements).<sup>89</sup> Other instruments include giving notice of the settlement terms to public institutions, state officials or associations who might comment on or object to the settlement based on their knowledge of the dispute.<sup>90</sup> Provisions like Rule 23 (e) (3) FRCP require that the parties reveal

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<sup>84</sup> For Australia see Michael Legg in this volume, Chapter 8, p. 182. See also Antonio Gidi, ‘The Class Action Code: A Model for Civil Law Countries’, (2005) 23 *Arizona J. of Internat. & Comp. L.* 37, 45 (Art 14.6).

<sup>85</sup> Business owners or institutional investors are regularly in a better position to assess the benefits of a settlement than are consumers or small investors, but they may prefer the anonymity as an absent class member for various reasons to having a prominent role in a public fairness hearing.

<sup>86</sup> Michael Legg in this volume, Chapter 8, p. 187 et seq.

<sup>87</sup> Richard Marcus in this volume, Chapter 7, p. 156.

<sup>88</sup> Michael Legg in this volume, Chapter 8, p. 197, 198; Eduard Brunet, ‘Class Action Objectors: Extortionist Free Riders or Fairness Guarantors’ (2003) *The University of Chicago Legal Forum* 403; Sylvia Lazos, ‘Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations’ (1985) 84 *Michigan L Rev* 308.

<sup>89</sup> Cf for the Netherlands Article 1016 CPC; for US class actions David F Herr, *Manual for Complex Litigation* (4th ed. West Publishing 2008), 22.925 and 28 USC § 1712 (d) as amended by the Class Action Fairness Act 2005; for the situation in Israel see Magen Amichai and Segal Peretz, ‘National Report Israel, Globalization of Class Actions’, 2007, <<http://www.law.stanford.edu/calender/details/1066/>> (2007), 37–8; Class Action Law Israel (2006), Sec 19; for general observations see Rebecca Money-Kyrle and Christopher Hodges (supra note 24), 496.

<sup>90</sup> US: 28 USC § 1715; Sec 25 of the Israeli Group Action Law 2006.

any agreements made in connection with the proposed the settlement. In Australia, the plaintiff's counsel must also submit to the court a statement explaining the settlement terms and why the plaintiff's side decided to accept the settlement in view of the further prospects of the litigation.<sup>91</sup> As a matter of course this kind of statement is privileged and must not be revealed to the defendant, but it might help the court understand the settlement terms.

From the contributions in this book it becomes clear that the established class actions systems in the US, Canada and Australia provide the courts generously with instruments for getting as much information as possible in order to decide upon the adequacy and fairness of a proposed settlement. European jurisdictions seem to be more reluctant to give judges "inquisitorial" powers which might be in conflict with the traditional party autonomy in civil proceedings. The feeling that courts should not interfere with settlements negotiated by the parties still prevails over understanding the risks of representation in mass litigation and the disadvantages of mass settlements.

### III. THE NEW WORLD OF CDR

#### 1. Explaining CDR

Consumer Alternative Dispute Resolution (CDR) is the resolution of disputes that arise out of trading between consumers and traders (C2B disputes).<sup>92</sup> Such disputes can, of course, be raised directly between them, and/or through lawyers through court processes, and/or in other ways, such as by public regulators. However, the CDR group of systems that has emerged is specifically designed to handle C2B claims. CDR can now be seen to exist in its own distinct universe and operates independently of the courts (and lawyers). CDR systems are designed to process individual claims, but almost all of them can inherently also process multiple similar disputes. Thus, CDR is a means of providing collective redress.<sup>93</sup> CDR systems exist in parallel with courts and sometimes compete with them.

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<sup>91</sup> Michael Legg in this volume, Chapter 8, p. 186.

<sup>92</sup> What follows draws heavily on the findings of an ongoing research project on CDR, much of which is published in Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart 2012).

<sup>93</sup> Discussions on "collective redress" frequently overlook the fact that the mechanism that speakers have in mind is a court-based mechanism of a "collective action", on the incorrect assumption that that is the only option. In fact, "collective redress" is the functional objective, and a "collective action" is only one option, alongside others such as CDR and regulatory mechanisms.

Most CDR schemes operate on the basis of “traditional” settlement techniques, namely mediation/conciliation and (subsequently) a decision, whether technically binding or not, reached through a quasi-judicial procedure akin to, or formally involving, arbitration. Historically, many CDR systems adopted an arbitration model, involving three or one arbitrators, to whom the parties could agree to submit a dispute, and who would make a determination on the legal merits, which would be either binding between them or not. More recent CDR schemes have evolved away from the quasi-adversarial model of arbitration to a more inquisitorial model involving expert ombudsmen, or their case-handling staff. Some CDR schemes have emerged as intrinsic parts of new regulatory systems, notably under EU sectoral legislation for major market sectors like financial services, communications, energy and utilities. Others have arisen as part of self-regulatory arrangements based on codes of business practice in specific sectors, such as for travel companies or motor vehicles.

CDR has long been familiar in the Nordic states, the Netherlands (*Geschillencommissie* and KiFiD), and the UK, all of which have good systems, even if they could all be improved further. In those countries, CDR has grown over 40 years and occupies a distinct and increasingly well-used place in the landscape. In Sweden, for example, virtually *no* consumer sues a trader in court, except where the decision of the CDR body (the ARN or a sectoral ADR body) is not implemented by the trader. This post-CDR legal enforcement stage is necessary because CDR decisions in Sweden are not legally binding on traders, and compliance is voluntary, but compliance is generally high and is significantly enhanced by an effective “name and shame” procedure and culture. CDR decisions in some other countries are legally binding (for example where a dispute is agreed to be submitted to binding arbitration, or where a CDR scheme is made binding on the trader by statute, such as the UK’s Financial Ombudsman Service (FOS)). The Netherlands’ *Geschillencommissie* CDR system has gone one better, and guarantees payment by the traders’ association, although the current challenge there is how to ensure coverage for traders who are not members of trade associations.

Naomi Creutzfeldt examines the multiple origins of CDR schemes in Chapter 10 of this volume identifying a series of different origins, forces and developments that have collectively contributed to the growth of CDR. One influence may be the failure of court-based civil procedure systems to deliver accessibility to justice for C2B disputes, and the development of ADR techniques within civil procedure systems, but there are additional external forces such as cultural aspects that favour resolution of problems through collaborative rather than adversarial means, the impact of increasing regulation of the EU market and the importance of consumers

in that market, the advent of new technology for both selling and dispute resolution (and the integration of these two modes), the impact of choice for consumers and especially businesses in relation to pathways for dispute resolution, and the ability of CDR systems to resolve mass problems better – and more cheaply – than court-based systems.

Even the most efficient court systems can be overtaken by swifter, cheaper and more user-friendly alternative solutions. The development of DR has been significantly encouraged by being included – almost unnoticed by many people – in EU legislation that has created and harmonized regulatory systems for many major sectors. A decade ago, EU regulatory legislation *encouraged* firms to use ADR, but from around 2005 regulatory legislation *required* them to have it. Requirements for CADR systems have been established by EU Recommendations as long ago as 1998<sup>94</sup> and 2001.<sup>95</sup>

These points are taken up by Iris Benöhr, who focuses on the important financial services sector. She shows the close links between CDR and regulation (and therefore between ombudsmen and regulators) and that the legal regimes and organizations of both are undergoing significant development. Focusing on the insurance sector, she demonstrates that sophisticated ombudsmen schemes have existed for some years in Germany, France and the UK. Although their structures differ, which would make either voluntary or imposed harmonization challenging, they use the same techniques in practice, namely a conciliation stage followed by a decision stage. One major difference lies in whether (and how) the decision is legally binding. But the insurance sector does see the need for CDR decisions to be accepted by its undertakings in the vast majority of individual cases, if general confidence in the CDR system is to be maintained. It is striking that in all three of the countries studied, the original stimulus for the creation of a national CDR scheme lay with the business sector, even if (especially in the UK) the CDR arrangements were later put into legislation as part of a wider construction of the regulatory system. This shows that there are sectors where business can see the advantages of having CDR schemes and of making them work. Crucial elements in achieving this are providing sufficient resources, and independent governance and transparency.

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<sup>94</sup> Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>

<sup>95</sup> Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC), available at [http://ec.europa.eu/consumers/redress/out\\_of\\_court/adr/acce\\_just12\\_en.pdf](http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf)

CDR is shortly to take a major further step of integration within the European dispute resolution architecture as a result of its formalization and expansion under the EU's new regime, set out in 2011 proposals<sup>96</sup> that were passed in early 2013, and will be in force in 2015.<sup>97</sup>

A specific manifestation of ADR has developed to support online trading. Julia Hörnle examines online dispute resolution (ODR), which has become firmly embedded in online trading, and is set to be enhanced by the EU ODR Regulation (establishing a Belmed-like portal at EU level) and by an UNCITRAL agreement. Having effective support for ODR in place is regarded as being essential for the development of digital and cross-border trading. The whole process, from filing to adjudication, can be done without paper documents or physical meetings. ODR can be extremely swift and cheap. It also offers an exciting vision of spreading access to justice to millions of people in less developed countries, if handled carefully. A great deal of ODR already exists – it is a basic requirement for major online traders, such as eBay, Amazon and Paypal. eBay's ODR platform handles over 60 million e-commerce disputes annually: most of them very simple types, such as non-delivery, or delivery of a damaged or wrong item. ODR is considered to be essential in supporting trade: When Paypal introduced its ODR facility, buyers' claims decreased by 50 per cent and seller losses under chargebacks fell by 20 per cent.

## 2. CDR and Settlement

A major feature of CDR systems that is of interest to this book is the fact that almost all CDR systems are designed to facilitate settlement of disputes. They do this not only as an inherent part of their function and procedure, but also as a preliminary stage in the process *before* ending in a stage in which a decision on the merits is reached by an independent third party. Indeed, most CDR schemes involve a succession of distinct stages: first, discussion of the dispute directly between consumer and trader (and this is often a mandatory first stage); secondly, assessment of the issue by

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<sup>96</sup> See Communication by the European Commission on "Alternative Dispute Resolution for consumer disputes in the Single Market", COM(2011) 791/2.

<sup>97</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165/63, 18.6.2013, and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165/1, 18.6.2012.

the independent third party (triage), in which one or other party might be quickly advised to drop or settle the case immediately; third, a more detailed stage of mediation or conciliation between the parties, seeking to achieve mutual agreement between them; and only finally a stage where the third party (or a fresh third party) makes a determination on the legal merits of the dispute, which may or may not be legally binding between the parties.

Research has shown that in many CDR schemes, the incidence of cases that are resolved at these various stages equates to a broadly based pyramid. In other words, most cases are resolved, or ‘fall out’ of the process, at the initial more informal stages, and only a small percentage reach the final determination stage.

Societies clearly benefit from the availability of quick and cheap dispute resolution processes for a major body of disputes that are typically small in value and relatively straightforward in relation to their facts and applicable law. Claims handled by CDR schemes are typically about relatively minor problems and small amounts of money,<sup>98</sup> although some financial services or insurance disputes can be larger (the UK Financial Ombudsman Scheme (FOS) has raised its upper limit to £150,000).

CDR schemes can also be designed – as many are – to process mass disputes far more quickly and more efficiently than a private collective action. In this context, mass claims can simply be lodged with the CDR body, who will process them. It is often the CDR body that first recognizes that a “mass problem” is arising, and that there is a need for a consistent approach towards multiple similar cases. The UK FOS applies various

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<sup>98</sup> Data found in the Oxford study for 2010 included:

- In France, many cases handled by the FFSA *médiateur* were around €100, and some as low as €5. The average award of the national energy *médiateur* was €373, the average amount in dispute in the cases of the *médiateur* of EDF was €1,120 (with 23 per cent of cases over €2,000).
- In Germany, 86 per cent of claims made to the Insurance Ombudsman involved under €5,000, and over 90 per cent were under €10,000. A normal claim made to the transport ombudsman (Söp) is between €10 and €200.
- In the Netherlands, the average claim value for *Geschillencommissie* cases varies between sectors, from €206 for taxis and an average of €5,980 for housing guarantees. In 2009, 9 per cent of the *Geschillencommissie* claims were less than €250, there was no claim involving a value of more than €10,000, and the largest segment of claims (24 per cent) were for €1,001–2,000.
- The average value of an award in the arbitration system in Spain was €366.
- The average amount claimed in cases before the UK’s Ombudsman Service: Communications was £587 and the average award was £198.

techniques to ensure that “collective issues” are resolved in a consistent manner, either by itself selecting test cases or by referring issues to the regulatory authority or to the courts for decisions on the law, after which it can apply the rules to all similar cases that it receives. The process of issue identification and test or representative cases is similar to how many courts would manage a collective action, so the CDR process is unsurprising in managerial terms. However, the CDR bodies do not operate under “class action rules” of procedure, so appear to have greater flexibility in selecting a procedure that would fit the particular circumstances. Perhaps an issue is raised here of uncertainty over whether “due process rights” are threatened: this is an area that would repay further empirical research before theorists reach for their book of principles.

### 3. Issues with CDR and ODR

CDR and ODR systems dispose of individuals’ legal rights. Hence, it is important that CDR bodies satisfy requirements of democratic accountability and other principles of justice, which also apply to courts. As noted above, the EU promulgated criteria for ADR over a decade ago: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC)<sup>99</sup> and Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).<sup>100</sup> These two sets of criteria are not absolutely identical, but neither are they particularly intrinsically inconsistent. The 1998 criteria are:

- I. Independence: guaranteeing the impartiality of the decision-making body.
- II. Transparency: appropriate measures must be taken, including:
- III. Adversarial: allowing all the parties to present their viewpoint and to hear the arguments and facts put forward by the other party, and any experts’ statements.
- IV. Effectiveness.
- V. Legality.

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<sup>99</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>

<sup>100</sup> Available at [http://ec.europa.eu/consumers/redress/out\\_of\\_court/adr/acce\\_just12\\_en.pdf](http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf)

- VI. Liberty: The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.
- VII. Representation: the procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

The 2001 criteria are:

- A. Impartiality.
- B. Transparency.
- C. Effectiveness.
- D. Fairness.

The 2013 EU legislation has not introduced new criteria, but has introduced the above criteria into law to form essential quality requirements for the various diverse forms of CDR that exist across Member States at national level and are beginning to be established at pan-EU level. Particularly important issues can be predicted to give rise to ongoing debate as the relevance of CDR systems gains wider recognition. In particular, debates are likely to focus on the relevance of:

- whether the constitutional/justice/due process requirements are, or can be, satisfied by CDR systems, and
- whether individual CDR schemes satisfy the requirements of independence and impartiality, and to what extent problems can be satisfactorily overcome through governance and transparency.

In Western democracies, courts have been valued on the basis of their adherence to principles of justice, due process and fair procedures. But orderly and fair procedures have been allowed to escape the scrutiny of what process evaluators call KPIs – Key Performance Indicators – especially cost and duration. The most important development that has taken place in dispute resolution in the first decade of the 21st century is that individuals and consumers with disputes, who have hitherto had few options other than the traditional court pathways for channelling their disputes, have been presented with new options and have voted silently with their feet by using the new pathways and not using the court options. The simple attractions of these new pathways are speed, low cost, and perhaps above all their user-friendliness. In other words, users of small claim dispute resolution procedures have made their choices based on the KPIs. User power has not only introduced KPIs as criteria for assessment

of dispute resolution procedures, now that it has some real options, it has even elevated KPIs over the traditional legal standards as being the most important criteria in selection among the options.

This is an application of the simple principles of competition: the availability of pathways have traditionally been controlled by suppliers, and have been monopolized and restricted, with rent-gaining behaviour. The introduction of more options has introduced competition, and users have turned their backs on the traditional court processes in favour of new pathways and providers. As a result, CDR systems have become mainstream dispute resolution pathways.

The key point is that CDRs are not only faster and cheaper than courts, but, above all, they are usually (more) *user-friendly*. Busy people cannot afford the time to deal with lawyers and courts. People have become used to the speed of modern communications and do not want to have to put up with slow dispute resolution systems. Many CDR and ODR systems have the huge practical advantage that all people have to do is send simple online details of a complaint and the responsibility for dealing with it becomes the responsibility of the ombudsman or other CDR body, acting impartially but in effect as the consumer's friend. In many cases, consumers just want advice and a second opinion: if they are told by a reliable expert third party that they have no cause for complaint, they will trust that opinion if it is made by a respected body. One feature that will increase respect will be where the intermediary has no financial incentive to institute further proceedings – here an ombudsman is *unlike* a lawyer.

People who might choose litigation have voted with their feet, and have deserted courts, or are deserting them. In addition, CDRs are capturing C2B claims that people would never bring in courts. As a single illustrative example, one can see this from UK data. County Court claims in England and Wales for *all* non-family cases have fallen from 2 million in 2008 to 1.5 million in 2011 (of which only 163,905 were defended and allocated to a track). In contrast, contacts to the UK FOS have risen over the past decade from nothing to 1.2 million in 2011 (which that year turned into 264,375 cases for determination). These figures show not only a growth in the dispute resolution function of CDR schemes compared with courts but also a growth in consumers seeking advice or triage from CDR bodies compared with lawyers or other sources.

CDR schemes can weed out unmeritorious claims at an early stage, and support claims that would otherwise not be brought. Four out of five contacts received by the UK FOS do not turn into complaints. Many of these are requests for information, or for an independent opinion of whether there may be anything to complain about. Thus, many CDR schemes provide a valuable information service. The importance of

reliable, independent information pre-sale can be illustrated in Sweden, where there is a strong national network of information bodies. It is difficult to prove this empirically, but I suspect that the number of disputes that arise in Sweden (around 11,000 annually in the ARN) is low compared with many other similar non-Nordic countries, and this is attributable to good pre-sale and post-sale sources of advice. It is also notable that good CDR schemes have high levels of public trust. A survey found that 70 per cent of people asked said they had faith in the UK FOS.<sup>101</sup>

Two points can be observed here. First, consumers may be accepting a certain lowering of standards in terms of essential requirements, provided the standards achieve a certain minimum level, as opposed to the highest level, which should be demonstrated by courts. Undoubtedly, some CDR systems achieve the same level of accuracy, fairness, independence, and so on as can many courts. But who would guarantee that every court decision absolutely achieves all of these standards? Secondly, consumers accept less than the highest level of protection because they value high performance of the KPIs more than they value achievement of the highest level of the legal principles.

There are two consequences of this situation. First, a debate is needed about what minimum level of essential requirements and KPIs are acceptable, and what the balance between them should be. Secondly, there need to be effective mechanisms to ensure that *all* dispute resolution providers achieve the required standards. In some countries, it has traditionally been very rare for judges to be accused of bias. Control or response mechanisms have therefore been almost non-existent. Even in countries where confidence in the judiciary is low, control or response mechanisms have been difficult to devise or apply. It is fundamentally important that high standards are achieved by courts, and seen to be maintained. But in the world of CDR and similar mechanisms, regulatory systems must be imposed from the start on CDR providers and they must be effective. If they are not effective, confidence in these pathways will evaporate and the pathways will collapse. Lawyers might welcome that, but state courts would not be able to cope, and there would be a major risk of collapse in civil society.<sup>102</sup>

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<sup>101</sup> *Annual Review of Consumer Complaints about Insurance, Credit, Banking, Savings, Investments. Financial Year 2011–2012* (Financial Ombudsman Service, 2012). The survey also found 76 per cent supporting the local Trading Standards Authorities.

<sup>102</sup> These issues are explored further in the following chapters of this book.

#### 4. Overcoming Funding and Costs Barriers

Many CDR systems offer the considerable attraction to governments that they are financed largely or wholly by the private sector, saving public funds. In civil procedure systems, by contrast, litigants usually pay their own costs but courts are usually heavily subsidized by the state.<sup>103</sup> The picture on who funds CDR systems is not uniform, but may well be evolving as a result of the global financial crisis towards more privatized funding. In some states, major business sectors have seen commercial advantages in funding specialist CDR schemes covering their sector (note the points here in Benöhr's analysis of the insurance sector). Intelligent governments will be able to maximize such advantages so as to entice more sectors to fund sectoral CDR schemes. Or governments may simply impose a funding requirement by law. The issue of funding is inter-linked with the issue of whether decisions by a CDR body should be binding on traders (or on consumers). But there may remain a need in some or all states for public funding of a residual CDR body to handle cases that do not fall under privately funded arrangements. The picture across Europe is far from uniform and has some way to evolve. But the development of 'privatized justice' highlights the importance of ensuring that CDR bodies satisfy the constitutional criteria of independence, impartiality, and so on, referred to above.

#### 5. CDR as Part of the Regulatory System

CDR systems also offer the invaluable benefit that they can deliver cheap and effective regulatory data, and hence make a substantial contribution to having behavioural impact and to maintaining and raising standards of business practice in the marketplace. The source of this benefit lies in the ability of CDR bodies to record *every* contact in their IT systems, and then aggregate them all so as to see a complete picture of what is going on in the marketplace. Even if a contact is merely an inquiry rather than a complaint, and even if a complaint is rejected as being unfounded, the fact that it has been made can be recorded, and every single contact, when aggregated, contributes to a complete picture of what is happening in the market.

Holistic quality systems that operate on the basis of post-marketing data have spread across many regulatory systems. For example, the effectiveness

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<sup>103</sup> Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs and Funding of Civil Litigation – A Comparative Perspective* (Oxford 2010).

of the EU regulatory system for identifying unsuspectedly unsafe medicines rests on the pharmacovigilance system, into which all adverse drug reaction<sup>104</sup> reports are entered and scrutinized for unexpected signals. Similar post-marketing vigilance systems have been introduced in many other sectors – medical devices, general product safety, etc. These systems all depend on capturing as many adverse event reports as possible, in a single database, and then looking for trends and signals. The information is then re-cycled to firms, regulators, the market and purchasers. That is what private enforcement based ultimately on courts cannot do, but one based on CDR systems can do – and already does.

A fundamental feature of such post-marketing vigilance systems is that the data should not just be collected but should be fed back – to the traders involved but also to customers, market commentators and regulators. Leading CDR schemes, such as the FOS and the telecoms regulator OFCOM, now publish statistics on the number and type of claims received, naming the firms involved. The results have been striking. The introduction of such public transparency revealed that almost all of the then 200,000 complaints against financial institutions in 2010 were only against the four large retail banks. For the first time, consumer complaints, consumer complaint systems, and the activities revealed that gave rise to such complaints, became items for scrutiny by the main Boards of the banks. Customers reacted: trading behaviour improved.

#### IV. GENERAL CONCLUSIONS

A culture of settlement is spreading across Europe, from the introduction of mediation in the courts to the development of new CDR systems that are built on facilitating settlement in most disputes,<sup>105</sup> and the inclusion of restorative justice into the duties of some public enforcement bodies. Does the spread of a culture of settlement signify a philosophical desire or trend in some societies for less confrontation? If so, is this a feature of particular societies (and legal systems) and not others? What are the reasons for such a trend, what prerequisites must exist for the culture of settlement to flourish, and what consequential changes occur or are necessary in legal systems? Does a settlement culture in fact signify a deep philosophical

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<sup>104</sup> Confusingly, the acronym is also ADR!

<sup>105</sup> Pablo Cortés, 'A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?' (2012) 32.1 *Civil Justice Quarterly* 42.

state within a civil society, or does it merely manifest a desire for greater speed and efficiency in dispute resolution? To what extent may increased computerization by courts “claw back” disputes from CDR?

This book raises a whole series of questions. It is a challenge, at this stage, for legal scientists to provide answers, since the underlying changes seem to be both cultural and market-led, and the direction and speed of change largely now depend on political decisions. These are our thoughts about the future, at least on the important questions that arise and that call for political debate and decision.

We are already seeing the development of new forms and architectures within European legal systems, as CDR systems grow with their own architectures and courts wither. It will be important to debate what criteria are necessary for all or any dispute resolution pathway to satisfy. To what extent, if at all, should we accept exceptions to general principles? How can we ensure that ombudsmen and regulators satisfy the essential constitutional requirements that we demand from courts, such as independence, integrity, openness and fairness.

A series of key challenges exist for the developing CDR system: In Europe, governments will have to address the requirements for implementation of the ADR/ODR legislation. Will they adopt minimal implementation or be more imaginative? Will the CDR and ODR systems, and wider ADR systems, develop further? The main issues that need to be addressed are: funding, what is binding on whom, and extending to full coverage. Will the courts and lawyers see the development of CDR and regulatory oversight of redress as a challenge? If so, how will they respond? Will they be capable of responding by improving their performance criteria by reducing cost, improving speed, and providing effective outcomes? Or has the combined voice of business and consumers in fact already made clear their choice in favour of new forms of dispute resolution that are more responsive?

One fundamentally important question is whether CADR or courts should decide the law. A number of commentators regard it as unconstitutional and/or unacceptable that law is declared or clarified anywhere other than by judges in courts. One objection raised relates to whether a phenomenon of “disappearing judgments” (akin to the phenomenon of “disappearing trials” in USA and elsewhere) will lead to perpetuation of uncertainty because rules are not clarified (which may be highly undesirable in unclear or controversial situations such as commercial or civil rights law), or may lead to a collapse in respect for the rule of law itself if courts are not seen to apply law reasonably regularly. Some responses to those points are made. First, arbitration is extensively used, especially in commercial disputes, and that takes much “business” away from courts

in a non-transparent fashion. Secondly, law can be clarified by means other than courts, such as by regulators, codes or guidance, and by parliaments and increased use of law commission reviews and restatement-type approaches. Thirdly, Hodges et al have suggested that consumer ADR bodies should not decide points of law, but they should be able to refer them to courts and regulators as necessary for decision, so that the results can then be applied by the CDR body. It may well be that these arguments and counter-arguments will not be resolved soon, and so are likely to continue as sources of irritation and even hostility.

The contributions in this book tackle thorny issues. In China, the omnipresent political trend to court-based mediation and settlement strongly nourishes the suspicion that not all settlements are based on the free will of the parties. While this can mostly be ascribed to the lack of judicial independence in China, in Western countries the constraints of litigation costs may have more subtle effects on the parties but often lead to similar results. The UK provides an excellent but alarming example of where settlements have already become a standard practice in individual civil litigation – irrespective of the even greater pressure to settle mass disputes which clog courts for years and require considerable creativity to find new ways of funding. Although any tendency to accept ADR, mediation and settlement as *standard instruments* to handle civil disputes comes into conflict with the idea of the rule of law and the pivotal role of courts in a constitutional state, with respect to mass disputes there is obviously no way out of this dilemma once the the regulatory systems have failed to prevent infringements.

Thus a task for the future will be to find at least a balance between *ex ante* and *ex post* control by both public and private actors. We must create a legal architecture in Europe which offers several ways and options in order to address diverse situations.<sup>106</sup> Although negotiations and settlements save on many social costs and must therefore be an important part of the system, they cannot be the only pillar. Self-regulation, ADR and CDR systems offer an excellent chance of filtering out a number of disputes, but they are not suited for cases which involve complicated fact-finding and highly controversial legal issues. For the latter category of cases, public authorities, special arrangements, or court-based private actions are necessary to assist in the enforcement of damages claims.<sup>107</sup> For many mass dis-

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<sup>106</sup> In any case, in order to evaluate existing models further empirical research will be necessary, Rebecca Money-Kyrle and Christopher Hodges (*supra* note 24), 504.

<sup>107</sup> For a three-pillar system see Christopher Hodges in Jenny Steele and Willem van Boom (*supra* note 1), 101–7; see also Christopher Hodges (*supra* note 1), 235 *et seq.*

puts a settlement will be the best solution. However, the lesson to be learnt from the settlement part of the book is that we need independent judges acting with responsibility. If settlements are seen to be unfair or collusive, it will quickly undermine trust in the judicial system. Some contributors report that courts rely on a rather strong presumption that the proposed settlements are fair and they can list only a few cases where a proposed settlement was rejected.<sup>108</sup> Does that indicate that “utility-maximizing judges”<sup>109</sup> fail to apply standards for approval strictly or does this provide evidence that settlements apart from some outliers are very often indeed “fair and reasonable”? Being aware of the incentives for lawyers and judges monitoring settlements is only a first step in developing an efficient system of mass justice, albeit a very important one. We suggest that robust mechanisms are needed to ensure that settlements are fair. Judges cannot be expected to have the tools or experience to evaluate an arrangement that is being put forward by all, or the principal, parties. Merely including a right for some to object will not be enough. Some independent scrutiny, or mechanism for a “devil’s advocate” challenge, will be required.

We will not only have to watch the developments described in this book closely, it will also be necessary to compare the results of self-regulation and mass settlements with the efficiency of public enforcement proceedings in order to establish a well-balanced system.

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<sup>108</sup> See Jasminka Kalajdzic, in this volume, Chapter 6, p. 141.

<sup>109</sup> Michael Faure, in this volume, Chapter 2, p. 58.