Index

‘absent parties’ 6
ADESF litigation see under Brazil
administrative schemes, public and
private 4, 5
‘compensation matrix’, adopting 5
adverse cost risks see costs/adverse cost
risks
agency issues in class/group litigation
27, 36–40, 167
agency problems 39–40, 131–2,
145–6
adverse implications from
divergence of interests 145–6,
212
attorney-initiated class actions,
mitigation mechanisms absent
in 146
client monitoring, mitigation of
agency problems by 146
early settlement 146, 212
inherent nature of 393–7
insufficient investment in litigating
146, 212
individuals in cases, importance of 39
standing, models of
ad hoc approved or certified
non-profit entities 38–40
entrepreneurial lawyer 37, 39
governmental agencies 37, 38,
39–40
long-standing non-profit
associations/designated
entities 32, 37–8, 39–40
see also Reichart Industries/Shemesh
litigation under Israel
alternatives to class actions 4–5
ad hoc management strategies 4–5
administrative schemes, public and
private 4, 5
distinguishing from class actions 5, 6
group litigation procedures 4, 5–6
informal ad hoc strategies 6
Aristocrat litigation see under Australia
Atlas litigation see under Canada
Australia 13–14
Aristocrat litigation 139–40, 190,
198–202
background 198–9
‘closed’ class, restricting to 162,
200–202
commercial litigation funder 139,
191, 199–200, 202–3
control of the litigation 204
facts of 140
interlocutory litigation 200
lead plaintiff, appointment of 200,
202
opt-out process 200–201
settlement after trial 139, 190, 199,
202, 206
Australian Law Reform Commission
162, 202
civil litigation/compensation,
deterrent value of 271
class actions 160–64
‘access to justice’, and 190, 196–7,
204–7
advantages of 205
‘closed’ or limited classes 161–4,
202–202, 398
common fund approach 163–4
entrepreneurial lawyers 160–61,
191–2
expense of 205
free riders, discouraging 201, 398
institutional investors, role of 193
introduction of 160, 189
opt-in approach 398
opt-out approach 162, 196–7, 200–201, 398
private contract approach to funding 160
robust class action regime 189
commercial litigation funders 139, 147, 398
access to justice, and 204–7
adverse costs orders, and 190, 398
conflict of interests 209
degree of control in litigation 148, 203–4
dominant role of 189
funded class actions commonplace 189
funder philosophies 202–4
future of 209–10
growth in 190
IMF as change agent 202–3
IMF as financial service license holder 208–9
institutional investors, building relationships with 202
legislation, controlling 207–8
licensing of funders 208–9
negative impact of 205–6
pro bono work 206
regulation of 148, 207–9
role contested 147
securities class actions 207
conditional fees 205
contingency fees prohibited 139, 190
access to justice, and 205
cost-shifting rule applying 139
Multiplex litigation 139, 190, 191–8
access to justice issues 196–7
attorneys and private funders 145
background/overview 191–4
class lawyers, challenge to conduct of 198
‘closed’ class 161–2, 163
commercial litigation funder 139, 191, 192, 201
cost of the litigation 204
costs 139
entrepreneurial lawyering 191–2
facts of 139, 191–2
funding arrangements, challenges to 194–7
institutional investors unwilling to be lead plaintiff 193
judicial regulatory role 148
lead plaintiff, finding 143, 155, 192–3
regulation of commercial litigation funding: satellite litigation 194–8
settlement of 139, 190, 194, 197–8, 202, 206
trans-substantive class actions 7
barratry, doctrine of 145
Belgium 13–14
class actions exclusively for consumer protection 7
Lernout & Hauspie (L&H) litigation 299–318
associations, role of 308–9
background 261–2, 299–301
civil claimants 268–9, 306–7
civil claimants, representation by associations and 307–9
co-mingling of public and private processes 268–9, 401
corporate defendants not liable 262, 274, 304
criminal investigation/trial 261–2, 268, 274, 302–3, 304–5
defendants, role of 310–12
fraud, finding of 304
funding and financing 313
judicial management: before trial 313–14
judicial management: during trial 314–16
‘language development companies’ and L&H 303–4
lessons from 317–18
multiple courts, involvement of 265
other defendants, findings against 304–5
outcome 303–5
piggybacking civil claimants 268–9, 306–7
plaintiffs, government as 264, 266
procedural options for mass claims 307–8
public prosecutor 264, 312–13, 318
revenue, nature of 303
rise and downfall of L&H 301–2
US class actions 316–17
no class action procedure 17
standing 318
BP Deepwater Horizon litigation see under United States
Brazil 13–14
ADESF litigation 24, 51–67
ADESF founded to bring 24, 29, 35, 52–3, 57
collective litigation challenging
power structures 401, 402
compensatory/moral damages
order reversed on appeal 24
coordinating political/public
relations activity 29–30
defendants, well-funded and
well-organized nature of 30
expert evidence 62–3
facts of 24
first round for ADESF 62–4
global movement by advocacy
organizations, as example of
29–30
impact of litigation 66–7
individuals v. multi-national
corporations, as example of
29–30
informal network assisting/sharing
costs 29, 35, 59–60, 62
litigation strategy, defendants’
60–62
media coverage 24, 35, 36, 52, 63, 67
nature of claim 24, 29, 57–8
other consumer associations
joining 65
outcome unsuccessful for plaintiffs
24, 30, 36, 38
reversal of fortunes for ADESF/
appeal 64–6
standing/ad hoc approved entity
model 38, 58, 62
structural measures against
tobacco products following 38
anti-tobacco campaigning
advantages of litigation 67
litigation, surge in 52, 54, 56, 58–9
mass media campaigns 67
multi-pronged strategies against
big tobacco 66–7
political lobbying 58, 59
pressure on government agencies/
regulatory action 66–7
public awareness 58, 59, 67
big tobacco and their litigation
strategy in Brazil 60–62
individual treatment of cases 61
no settlement strategy 61–2, 67
resources of large companies
60–61
standing rules, effect of 62
class action procedure
erga omnes effect of liability 56, 363
opt-out approach 363
Consumer Defense Code (1990)
55–6, 398
burden of proof 60
costs 60
diffuse and collective rights 55–6
erga omnes effect of decisions 56, 363
individual-homogenous rights 56
procedural benefits granted to
consumer associations 60, 62
standing 58, 62
economic importance of tobacco
industry 52
landscape of consumer collective
litigation 55–7
Consumer Defense Code (1990)
55–6
popular actions in public interest
55
tobacco control policies 52–3
Buncefield mass disaster litigation see under United Kingdom
Canada 13–14
Atlas litigation 140, 237–40
agency problems/conflicts of interest 397
attorneys sharing carriage of action 145, 239
contingency fees 146, 159, 232, 240, 246–9, 397
entrepreneurial litigation 244
facts of 140, 237–8
public funding 140, 159
representative plaintiff, recruiting 155, 158, 237–9, 241
settlement of 140, 239–40
strike out application 239
civil litigation/compensation, deterrent value of 271
class actions
access to justice objectives 232, 244, 253–4
adoption of 157
adverse costs, risk of 233
behavior change as goal of 271
certification 233, 242, 251
class attorneys 159
clear sailing provision 246
collective litigation challenging power structures 401, 402
commencement of 233
common fund approach 160
contingency fees 139, 157, 159, 234, 240–41, 244–50, 254
contingency fees, approving 244–46
cost-shifting 157–8
costs 250–53
discontinuing 233–4
entrepreneurial lawyers/litigation 232–3, 240–44
fees of class attorneys 233, 234
free rider problem, eliminating 398
incentive payments to class representatives 154
indemnities against adverse costs 153, 251, 252
multipliers 232, 254
private/commercial litigation funders 147–50, 159, 233, 252–3
public funders 149, 150, 159, 233, 252, 398
representative plaintiffs 157–8, 233, 241–4
settlement 233–4
trans-substantive class actions 7
commercial litigation funders 147, 150, 159, 233
group of control in litigation 148
emergence of 252–3
regulation of 148–9, 253
entrepreneurial litigation 240–44
absent client phenomenon 243–4
certification test, requirements of 242
court’s control with lawyers 243
court’s approach to representative recruitment 242–3
monitor, little incentive to 243
representative plaintiffs, active recruitment of 241–3
seeking viable class actions 241
Hislop litigation 140–41, 234–7, 404
agency problems/conflicts of interest 397
appeal 235
attorney and class members 145
contingency fees 240, 248–50, 397
costs 141
entrepreneurial litigation 244
facts of 140–41, 234–5
fees to class counsel, issues with 141, 235–7
representative plaintiff, recruiting 158, 241
litigation, cost of 232
class action procedure 363–4
erga omnes effect of liability 363
opt-out approach 363
provisions preventing flood of private litigation 363
SERNAC’s broad gatekeeping powers 363–4
La Polar litigation 263, 370–79

Class actions in context
Index

SERNAC’s involvement 366–7, 368
Civil Action, A (film) 29
civil law jurisdictions 6
class actions 3
  standing in class actions 7
civil litigation, deterrent value of 271, 321
claims funds 45–9
  9/11 Victim Compensation Fund 35, 45–6, 48, 396
Black Lung Program 46
corporate social responsibility, and 46
cultural injury, assuaging 47–9
  nature of claim fund 45
private claims funds 46
public claims funds 45–6
quasi-private claims funds 46
types of 45
class actions
  alternatives to see alternatives to class actions
certifying claim fit for 6
claims not formally before court/‘absent parties’ 6
class members’ interests represented by one/few 6
costs see costs/adverse cost risks; economic enablers
damages value, effect of 9
due process, class members’ right to 6
economic enablers see economic enablers
effect of 6
entrepreneurial lawyers see entrepreneurial lawyers
global spread of 4

SERNAC
  broad gatekeeping powers 363–4
class actions role 263, 363–4
effective control over private litigation 364
extractive power over private enforcement 364
ousting private lawyers 267
standing 267

VTR litigation 263, 364–70
admissibility of class complaint 367–8
assessment of SERNAC’s behavior 379–82
class complaint, commencement of 365–6
compensation 273
defendant’s compensation strategy 368, 369–70
facts of 263
individuals switching between public and private roles 266
origins 364–5

agency problems 395
assessment of SERNAC’s behavior 379–82
class action by SERNAC 371, 372, 373–4
class counsel’s strategy 373–5
collective mediation 270, 370–71, 372
compensation 273, 275
facts of 263, 270, 370, 371–2
criminal prosecution indicting executives 264
entrepreneurial attorney as class counsel, appointment of 270
fraud 371–2
intersection of public and private processes 270
media coverage, effect of 390
prosecution of public class action 270
rescue of company, attempted 372–3
settlement 270, 275, 375–6
settlement, SERNAC’s involvement 376–9
SERNAC
  broad gatekeeping powers 363–4
class actions role 263, 363–4
effective control over private litigation 364
economic enablers see economic enablers
damages value, effect of 9
due process, class members’ right to 6
economic enablers see economic enablers
effect of 6
entrepreneurial lawyers see entrepreneurial lawyers
global spread of 4

Deborah R. Hensler, Christopher Hodges and Ianika Tzankova - 9781783470440
Downloaded from Elgar Online at 03/11/2019 01:44:00PM via free access
individual collective interests, protecting 6
informal combination of rules 171
legal financing shaping collective litigation 397–9
see also economic enablers
mass claims, dealing with 6
meaning of 3
names for 3
notification to potential class members 6
obstacles to 170–71
‘opt-in’jurisdictions 8
outcome of suit binding class members 8
pleading standards, effect of 9
private dispute resolution/courts not equipped to deal with 4
protecting individual collective/‘diffuse’interests 6
public funders see public funders
relief granted, nature of 8
representative plaintiffs see representative plaintiffs
small numbers of 9
standing see standing
trans-substantive class actions 7
class actions, controversies around 9–11
absence of empirical data 10
aggregation, impact of 10, 272
conflict of interest problems 1, 129, 131
qualitative evidence, lack of 11
qualitative empirical gap, filling 11–18
representative litigation, issues around 11
rules and practices, controversy over 9–10
class actions in context 387–409
future scholarship 406–8
lessons for policy-makers 388–406
agency problems, inherent nature of 393–7
collective litigation challenging power structures 401–2
collective litigation procedures, differences in 388–9
globalization of law shaping mass litigation 404–5
legal financing shaping collective litigation 397–9
litigation and regulation symbiotically related 399–401
mass claims incentivising legal adaptation 391–3
mass claims, no one size fits all response to 405–6
mass media setting stage for mass claims 389–91
process outcomes turning on personalities as well as law 403–4
collective litigation culture of see culture of collective litigation: comparative analysis
global landscape of 3–9
legal financing shaping 397–9 see also economic enablers
potential future paths for see potential future paths for managing collective redress
public dimension of see public dimension of private collective litigation see also class actions
commercial funders 146–9
‘access to justice’ value of 149
budgets 150
consumer protection 148
degree of control in litigation 148, 150
factors creating gaps in class action financing 147
increased presence as class action enablers 146–7
limiting exposure to adverse costs 150
purpose 149
regulation of 148–9
see also under individual countries
common law jurisdictions
class actions 3
standing in class actions 7, 37
Index

compensation

deterrent effect of 271–2
compensation function of adverse costs 154
'compensation matrix' in administrative schemes 5

conflicts of interest
class actions 1, 129, 131, 167, 182–3
commercial funders, and 209
incentive payments, and 156
Special Purpose Vehicles 131
contingency fees 9, 151–2, 154, 240–41
conflict of interest, and 182–3, 249
compensating lawyers for costs and risk of losing 152
effects of ensuring entrepreneurial lawyers as primary enablers 154
incentive, as 241
fees payable from common fund 151, 152
nature of 241
non-contingent fees 151, 152
setting contingent fees
input based/lodestar fees 151, 152
output based fees 151, 152
costs/adverse cost risks 9
cost shifting 152–5
compensation function of adverse costs, importance of 154
complicating search for representative plaintiff 154–5
contingency fees, and 154–5
debate about utility of maintaining rule in class actions 154
deterrent effect of 8, 153, 233, 252
funding mechanisms, creation of 153
increasing incentive payments to class representatives 153
indemnities against adverse costs 153, 251, 252
'loser pays' rule 8
purpose of 152–3
representative plaintiff bearing adverse costs risk 8
private or public funding to mitigate adverse cost risk 8

legal aid 9
legal expenses insurance 9
speculative/contingent fees 9
third party litigation financiers 9
see also economic enablers
see also under individual countries
courts
burden on 45
due process requirements 6, 42
judicial case management see judicial case management
media, and 43–5
judiciary refraining from involvement with 44
role in adjudication of mass claim disputes 42–3
UK/England
Costs Judges 325
cost management powers 325
informal ad hoc strategies 6
judicial case management 17, 325–6, 339, 389
media, and 44–5
US
judicial case management 17, 43
media, and 44
role of judge increasingly active 44–5
websites, publication of cases on 44
crisis management in law 40–42
large corporations managing media 40–41
law firms developing crisis management practices 41–2
lawyers with previous government experience 41
preventative work with clients 42
cultural injury, claims funds assuaging 47–9
cultural power relationships and collective litigation 27
individual plaintiffs v. big corporations 29–30
Brazilian tobacco litigation 29–30
empowering individuals 29
popular culture representations 29
individuals/regulated industries v. public regulators/State 30–32
individuals and the State 30–31
regulated company and regulator 31
State/regulator and insurance industry/policyholders 31–2
long-standing associations v. ad hoc drivers of collective litigation 32
culture of collective litigation: comparative analysis 23–49
culture of collective litigation 27–40
agency issues see agency issues in class and group litigation
cultural power relationships see cultural power relationships and collective litigation
media, role of see media, role of meaning of culture 17, 23
overview of case studies 24–7
potential future paths see potential future paths for managing collective redress

Deutsche Telekom litigation see under Germany
Deepwater Horizon litigation see under United States
discrimination/sexual orientation litigation see under Canada

economic enablers 137–67
Australia 160–64
‘closed’ or limited classes 161–4
commercial litigation funders 161
entrepreneurial lawyers 160–61
Canada 157–9
class attorneys 159
public and private funders 159
representative plaintiffs 157–8
commercial funders 146–9
‘access to justice’ value of 149
budgets 150
consumer protection 148
degree of control in litigation 148, 150
factors creating gaps in class action financing 147

increased presence as class action enablers 146–7
limiting exposure to adverse costs 150
purpose 149
regulation of 148–9
economic viability of collective litigation scheme 137
entrepreneurial lawyers 144–6
agency issues 145–6
aggregation essential for rendering claims marketable 144, 272
aversion to lawyer-initiated litigation 145
class attorney as mix of public and private 144
mitigating agency problems 146
reluctance to entrust public cause to private hands 146
institutional variables affecting selection of enabling agent 151–5
attorney contingency fees 151–2
cost-shifting 152–5
Israel 164–7
class attorneys 166
public funding 166–7
representative plaintiffs 165
legal financing shaping collective litigation 397–9
mapping the framework 155–67
Australia 160–64
Canada 157–9
Israel 164–7
United States 155–7
overview of case studies 137–42
public funders 149–51
budgets 150
commercial litigation funders, and 149–50
constrained by enabling statutes and regulations 150
no input into litigation 150
pro bono work by lawyers 150–51
public interest, considering 149–50
purpose 149
state facilitating class actions by 149
representative plaintiffs 142–4
aggregating claims, advantages of 142, 272
class members’ information, importance of 142–3
class members with high stakes as lead plaintiff 143
class representative, role of 142–3
free riding issues 142
incentive issues 142
meaningful representation, means of achieving 143–4
non-profit organization as lead plaintiff 143
scrutiny of class attorney/certification requirements 143–4
United States 155–7
class attorneys 156–7
representative plaintiffs 156
third party funders 157
economic, legal and cultural changes 4
‘legal transplants’ 4
increased frequency of mass claims as reason for 4, 6
sources of mass injury and environmental damage 4
England see United Kingdom/England
entrepreneurial lawyers 144–6, 240–44
absent client phenomenon 243–4
agency issues 145–6
aggregation essential for rendering claims marketable 144
aversion to lawyer-initiated litigation 145
class attorney as mix of public and private 144
control of litigation with lawyers 243
mitigating agency problems 146
monitor, little incentive to 243
negative and positive connotations 191
reluctance to entrust public cause to private hands 146
representative plaintiffs, active recruitment of 241–3
seeking viable class actions 241
environmental cases
oil pollution see BP Deepwater Horizon litigation under United States
water pollution see MTBE litigation under United States
Erin Brockovich (film) 29
European Union Recommendation on Collective Redress 3
agency issues 132
standing 37
Feinberg, Kenneth 26, 49
claims administration work 26, 49
106, 113
9/11 Victim Compensation Fund 35, 48, 106, 112
BP Deepwater Horizon claim fund 26, 35, 48, 94, 403
administration of fund 106–8
building trust in town hall meetings 108–9
challenges 106
compensation for Feinberg from BP 110–11
neutrality/independence, concerns about 46, 110–11, 396
free riding 142
discouraging 201, 398
fairness and equality of proceedings, and 89–90
funding class actions see economic enablers
Germany 13, 15
Deutsche Telekom litigation 279–97, 389
background 260–61, 279–80
court not capable of dealing with numbers of claims 282–4
economic context 281–2
entities with public and private dimensions 266–7
facts of 260–61
intersection of public and private processes 269
legal context 280
legal expenses insurance funding
261, 283
media coverage, effect of 390
model case proceedings/KapMuG
265, 279, 284–7, 293–4, 388
multiple courts, involvement of
265–6
public prosecutors initiating
proceedings 264, 400–401
US proceedings, relation to 261,
285–6
Deutsche Telekom litigation before
higher courts 286–93
first decision 290–91
individual cases to model
procedure 286–7
model procedure before Appellate
Court 288–90
plaintiffs win before Federal Court
of Justice 291–3
Deutsche Telekom litigation, legacy
of 293–7
mass litigation on political agenda
293–4
plaintiffs’ bar, accelerated creation
of 280, 294–6
shareholders’ culture in Germany,
frustration regarding 296–7
social relevance of litigation,
change in perception of 280
fees/costs
adverse costs under loser pays
principle 280, 282
contingency fees prohibited 282
high court and attorney fees 282
group/collective litigation 6
association suits 280
investor claims 17
no collective litigation instrument
280
no discovery in civil procedure 280
legal expenses insurance 283
mass claims incentivising legal
adaptation 392
group litigation procedures 4, 5–6
decisions on common issues applied
to all claims 5–6
final decision on merits of individual
claim 6
Gulf Coast Claims Facility see under
United States
Hislop litigation see under Canada
indivisible collective/diffuse interests
6–7
declaratory/injunctive relief sought 6
indivisible interest of specific group
or public at large 6
informal ad hoc strategies 6
‘case management’, as 6
insurance company, collapse of see Vie
d’Or litigation under Netherlands
Israel 13, 15
class actions 213–15
adoption of 213
basic features of 213
class attorney fee 224
class attorneys 166, 224
class certification 165
commercial litigation funders 147
common fund approach 160
contingency fees 139, 213
general class action statute 7
incentive payments to class
representatives 154, 165
indemnities against adverse costs
not permitted 153
introduction of 164
new Class Action Law 214, 224
opt-out provision 213, 214
procedure not trans-substantive 7
public funders 149, 150, 166–7
rarely proceeding to trial and
judgment 215, 221
representative plaintiffs 165, 213
securities litigation, requirements
for 214
substance-specific class action
procedures 214
substantive laws, incorporated into
213–14
Reichart Industries/Shemesh
litigation 139–40, 212–31, 404
agency problems 146, 394
appeals (2002–1012) 223–4, 228
background 212–13, 215–16
class attorney fee 224–7
class attorneys, concerns about 218
class attorney’s relentless litigation strategy 212–13, 228, 229–30
class certification 218–19
class representative, challenge to 217–18
damages, method of calculation of 227–8, 229
distribution to the class 227–8, 229
epilogue 228–31
facts of 139–40, 215–16, 221
fraudulent scheme, exposure of 221–2
lead attorney 218
litigation, 2002 resumption of 221–3
prolonged litigation, effect of 140, 229
settlement 140, 212–13, 218–21, 227
settlements (1997–2002) 218–21
start of litigation 216–18
trial and judgment 215
unprecedented issues, addressing 214
judicial case management 42–3
UK 17, 325–6, 389
Buncefield, in 320–21, 331, 338–9, 388–9
GLO, and 339, 389
US 17, 43
labor/union litigation see under Taiwan
lawyers, entrepreneurial see under entrepreneurial lawyers
legal financing see economic enablers
Lernout & Hauspie litigation see under Belgium
maintenance and champerty 145, 148
media 27–8, 32–6, 51, 389–91
courts, and 43–5
courts communicating with media 44–5
cultural injury, facilitating wide sharing of 47
drawbacks of media engagement with litigation 33
large corporations, and public relations departments 40–41
mass media affecting development of mass litigation
disseminating notices and information 33
enabling public to follow pending litigation 33
investigation of possible misconduct 32
lawyers’ media strategy, effect of 33
public outreach efforts, facilitating 33
publicizing potential claims/expandin scale of litigation 32–3
mass media coverage of cases effects of 34–6
shaping defendants’s strategic decisions/conduct 33–4
reputational damage 272
misrepresentation litigation see under Australia; Canada; Israel
Multiplex litigation see under Australia
Netherlands, the 13, 15, 17
business and political culture on mass disputes, influence of 132–4
dual role of State 133
political interference with resolution of mass disputes 133
state’s policy on consumer protection inconsistent 132
Claim Code, establishment of 131
collective actions
collective settlement procedure, extension of 7
declaratory and injunctive relief 122
introduction of 122
reliance on State interference 133
resources, need for 129
Special Purpose Vehicles 122, 128–32
standing 122, 131
types of organizations bringing actions 122
courts/judges, media and 44–5
Royal Dutch/Shell Transport
  litigation 138, 178–81, 398–9
  see also under United States
Special Purpose Vehicles, role and functioning of 122, 128–32
accountability and legitimacy issues 131–2
advantages of 129
agency issues 131–2
civil society reliance on State supervisory/enforcement powers 128–9
competing Special Purpose Vehicles 129–30, 131
conflicts of interest 131
group interests to be sufficiently guaranteed 131
issues raised by 129–32
need for resources 129
new market in legal services, as 130
remuneration of Board members 130–31
trans-substantive class actions 7
Vie d’Or litigation 26–7, 117–33, 403–4
ad hoc association required 32
agency problems 395
Association of Insurers 119–21, 125, 127, 132
background 26, 117–18, 122–3
bankruptcy of Vie d’Or, causes of 120, 130
bankruptcy of Vie d’Or, effect of 117–18
costs 123, 127–8
cultural connectedness, claimants as community and 47
Index

BP CEO, meeting 35, 48, 105
creation of claims fund 26, 35, 44, 46,
48, 94, 104–6, 403
endorsement of 108
oil pollution claims see under United
States
‘opt-in’ jurisdictions 8
‘opt-in’ jurisdictions 8

potential future paths for managing
collective redress 40–49
case management and interacting
with media 42–5
courts and media 43–5
judicial case management 42–3
crisis management see crisis
management in law
culture and claims funds see claims
funds
private attorneys 132, 144–6, 399
public dimension of private collective
litigation 259–77
accountability, compensation and
behaviour change 271–6
compensation, deterrent effect of
271–2
redress 271, 273–4
regulatory enforcement 274–6
remedial options 271–2
many roles of public actors 264–8
criminal prosecutors, role of 264–5
entities with public and private
dimensions 266–7
funding of litigation, government
roles in 267
government institutions at
cross-purposes 265
individuals switching between
public and private roles 266
multiple courts, involvement of
265
plaintiffs and defendants,
government as 264, 266
prospective regulatory roles of
government institutions
264–5
public sector entities, roles of 264
mixed nature of process 268–70
co-mingling of public and private
processes 268–70
mass injuries evoking special
public responses 268
public decision-making shaping
private litigation 268
overview of case studies 260–63
public and private enforcement
connected nature of 259–60
public funders 149–51
budgets 150
commercial litigation funders, and
149–50
constrained by enabling statutes and
regulations 150
no input into litigation 150
pro bono work by lawyers 150–51
public interest, considering 149–50
purpose 149
state facilitating class actions by 149
see also under individual countries

qualitative empirical gap, filling 11–18
‘case study’ method 11–12
common interview protocol 12–13
cultural factors, importance of 17
legal financing rules, importance of
17
public legal actors, importance of 18

Reichart Industries/Shemesh litigation
see under Israel
representative plaintiffs 142–4
adverse costs risk, bearing 8
aggregating claims, advantages of
142, 272
class members’ information,
importance of 142–3
class members with high stakes as
lead plaintiff 143
class representative, role of 142–3
free riding issues 142
incentive issues 142
meaningful representation, means of
achieving 143–4
non-profit organization as lead
plaintiff 143
Class actions in context

scrutiny of class attorney/certification requirements 143–4
see also under individual countries
Royal Dutch/Shell Transport litigation see under United States
securities/shareholder litigation see under Canada; Germany; Israel; Taiwan; United States
sexual orientation/discrimination litigation see under Canada
Shemesh/Reichart Industries litigation see under Israel
standing 7, 8
agency issues, and see agency issues in class and group litigation
civil law jurisdictions 7
common law jurisdictions 7, 37
European Union Recommendation on Collective Redress 37
models of
ad hoc approved or certified non-profit entities 38–40
entrepreneurial lawyer 37, 39
governmental agencies 37, 38, 39–40
long-standing non-profit associations/designated entities 32, 37–8, 39–40
public officials 267
see also under individual countries
Taiwan 13, 15
Civil Procedure Code 70
class actions 71, 90–91
lack of consumer association resources, effect of 90–91
representative suits 70
compensation on lawsuits for public interest associations, ban on 71, 90, 91
Consumer Protection Act (1994)
class actions 70–71
scarcity of class actions under 90
labour class/small claim action 25, 72–8
appeal 76–7
background 72–3
collective litigation challenging power structures 401–2
defences 75–6
dispute and underlying battle 73–4
equal treatment, demands for 72–3
facts of case 30–31
funding/legal aid 74–5, 78, 90
individuals v. State, as example of 30–31
long term battle between labor union/government 25, 90
nature of claim 25, 30, 74–6
outcome successful for plaintiffs 31
representation 74–5
small-claims class action procedure used 30
standing 37–8
unique context of litigation 90
Union leaders fired after litigation 25, 31, 38, 78
victory, backfire after 77–8
new type of class action, victims associations as 91
public interest associations, costs of class actions and 90
securities class action originating in IPO 25, 79–90
background 79–80
class action, SFIPC’s decision to initiate 82–4
costs 88, 89–90
defendants’ position and strategy 85
facts of 25, 79–80
fairness and equality of proceedings/free riding 89–90
filing two separate class actions 84–5, 86–7
institutional investor’s lawsuit 80–81, 89
KYEC’s IPO 79
litigation process and outcome 86–8
media attention propelling litigation 36
nature of claim 31
new style of class action, as 89
<table>
<thead>
<tr>
<th>Outcome</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>three separate processes with different goals</td>
<td>270, 338</td>
</tr>
<tr>
<td>Buncefield mass disaster litigation: civil claims</td>
<td>326–33</td>
</tr>
<tr>
<td>chronology of litigation</td>
<td>328–33</td>
</tr>
<tr>
<td>compensation claims/negotiations</td>
<td>262, 273, 321, 323–4, 332–3, 338</td>
</tr>
<tr>
<td>costs issues</td>
<td>333</td>
</tr>
<tr>
<td>disclosure</td>
<td>331</td>
</tr>
<tr>
<td>insurers settling claims</td>
<td>327, 328, 340</td>
</tr>
<tr>
<td>judicial case management of</td>
<td>320–21, 331, 338–9</td>
</tr>
<tr>
<td>parties and claims: organising the groups</td>
<td>326–7</td>
</tr>
<tr>
<td>settlement of claims</td>
<td>332–3, 339–40</td>
</tr>
<tr>
<td>strategic decisions by oil companies</td>
<td>327–8</td>
</tr>
<tr>
<td>Buncefield: regulatory investigation and enforcement proceedings</td>
<td>333–8</td>
</tr>
<tr>
<td>Competent Authority</td>
<td>333–4</td>
</tr>
<tr>
<td>fines</td>
<td>275–6, 335–6</td>
</tr>
<tr>
<td>investigation team</td>
<td>334–5</td>
</tr>
<tr>
<td>lessons learnt for future behaviour</td>
<td>337–8</td>
</tr>
<tr>
<td>prosecutions</td>
<td>335–7</td>
</tr>
<tr>
<td>public oversight response</td>
<td>334</td>
</tr>
<tr>
<td>public prosecutors initiating proceedings</td>
<td>264</td>
</tr>
<tr>
<td>regulatory response</td>
<td>334–5</td>
</tr>
<tr>
<td>reports, production of</td>
<td>335, 337–8</td>
</tr>
<tr>
<td>vigorous investigatory and enforcement process</td>
<td>275–6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case Management</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Procedure Rules</td>
<td>326, 340</td>
</tr>
<tr>
<td>Jackson review</td>
<td>325</td>
</tr>
<tr>
<td>negotiated settlement, encouragement of</td>
<td>321, 324–5, 340</td>
</tr>
<tr>
<td>pre-action protocols</td>
<td>325</td>
</tr>
<tr>
<td>procedure/commencement of litigation</td>
<td>325</td>
</tr>
<tr>
<td>traditional approach, Woolf reform</td>
<td>324</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Governmental Agency Model</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>non-profit association model</td>
<td>37–8</td>
</tr>
<tr>
<td>victims, associations of</td>
<td>91</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Tobacco Litigation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>see under Brazil</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Union Litigation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>see under Taiwan</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>United Kingdom/England</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>13, 15</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Buncefield Mass Disaster Litigation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>civil claims</td>
<td>326–33</td>
</tr>
<tr>
<td>damage caused by explosion and fire, nature of</td>
<td>323–4</td>
</tr>
<tr>
<td>explosion and fire</td>
<td>322–3</td>
</tr>
<tr>
<td>facts of</td>
<td>262, 320, 322–4</td>
</tr>
<tr>
<td>local authorities as claimants</td>
<td>264, 266</td>
</tr>
<tr>
<td>media coverage, effect of</td>
<td>390</td>
</tr>
<tr>
<td>overview</td>
<td>320–21</td>
</tr>
<tr>
<td>regulatory investigation and enforcement proceedings</td>
<td>333–8</td>
</tr>
</tbody>
</table>
class actions exclusively for competition claims 7
court/judges
Costs Judges 325
cost management powers 325
informal ad hoc strategies 6
judicial case management 17, 325–6, 339, 389
media, and 44–5
Environment Agency, powers of 340–41
group litigation in England and Wales 6, 17, 324–6
adversarial procedure 324
case management approach to 326
Civil Procedure Rules 324–5
Group Litigation Order 320, 325–6, 339
mass claims 325–6
mass product liability cases 325
no class action procedure 17
judicial case management 17, 325–6, 389
Buncefield, in 320–21, 331, 338–9, 388–9
GLO, and 339, 389
tobacco litigation 52
United States (US) 13, 15
‘American fee rule’ 155, 156
BP Deepwater Horizon litigation 26, 92, 104–13, 389
agency problems 396
background 94, 104
claims administration centralized 35
claims administrator, challenge to independence of 46
class action supplanting claims fund 26, 35, 46, 111–13
cultural destruction, avoiding risk of 105–6
emergency and interim payments 107, 112
environmental recovery of Gulf area 113
extent of pollution 94, 104
facts of 26, 34–5, 94, 104
Feinburg’s administration of fund 106–8
Feinburg’s independence, concerns about 110–11, 396
felony misconduct, BP’s admission of 112
fraudulent claims 109–10, 113, 389
fraudulent claims, media coverage drawing 33, 35, 95, 109, 113
fully informed consent to settlement, concerns about 47
Gulf Coast Claims Facility 26, 35, 44, 46, 95, 104–6, 112
informal business practices, expectations of 109, 14
insurance claims 106–7
mass claims incentivising legal adaptation 392–3
media coverage, impact of 93, 95, 104–5, 106, 113, 390
penalties on BP 112
President Obama and creation of claims fund 26, 35, 44, 46, 48, 94, 104–6
pro bono legal assistance available 108
prosecution of fraudulent claims 94, 110, 113
regulatory entities, review of efficacy of 113, 399–400
review of Facility’s treatment of claims by US Coastguard 113
strict liability of BP 34
town hall meetings and Gulf Coast Claims facility outreach 108–9, 110
civil litigation/compensation, deterrent value of 271
class actions
adoption of 155
adverse costs, no risk of 156
aggregated monetary claims 6–7, 155, 272
‘American fee rule’ 155, 156
arbitration clauses forbidding collective dispute resolution 9
attorney fees in successful class actions 145, 147
Index

attorney-initiated class actions not permitted 145
class attorneys 156–7
class certification 157
commercial litigation/ third party funders 147, 157
common fund approach 160
contingency fees 155, 182–3
counsel’s fees, deciding 183
federal and state procedure rules, under 3, 155
free rider problem, eliminating 398
incentive payments limited 154, 156
informal ad hoc strategies 6
lead counsel 156–7, 182–3
monitoring litigation 156
Multi-District Litigation procedure 156–7, 388
Plaintiff Steering Committees 156–7
representative plaintiffs 156
securities litigation, choosing class representative in 143, 318
small numbers of class actions only 9
collective interest claims 6–7
contingency fees 139, 145, 147, 155
growth of plaintiff bar resulting 155, 156
lodestar fees 152, 155
percentage of fund approach 155
cultural injury, claims funds assuaging 48–9
Deutsche Telekom litigation 261, 285–6
Federal Rules of Civil Procedure 214
group litigation procedures 6, 17
judges/courts
judicial case management 17, 43
media, and 44
role of judge increasingly active 44–5
websites, publication of cases on 44
L&H litigation 316–17
Legal Service Corporation 150
maintenance and champerty rules 148
Manual for Complex Litigation 43
MTBE litigation 342–61
background 262–3
common law claims 269–70
compensation 273
federal law 344–7, 349, 358
government institutions at cross-purposes 265
impact of public and private processes 357–61
intersection of public and private processes 269–70
legal environment 344–9
legislative and administrative proposals 357
litigation: early claims 349–50
litigation: MTBEI 350–51
litigation: MTBEII 351–54
MTBE, nature of 343–4, 349
MTBE, permitted use of 269, 343
MTBE pollution, effects of 262, 343–4, 358
plaintiffs, government as 266
regulatory investigation of MTBE 269
regulatory response to pollution 262, 269–70, 275, 400
settlement of claims 354–6
state law 347–9, 358
pro bono work by lawyers 150–51
Royal Dutch/Shell Transport litigation 138, 389
agency problems 394–5
attorneys competing for control of class 145
background 171–3
class representative, appointment of 138, 143, 155, 173, 174, 177
competing class actions brought 174
costs 138
denouement 181–6
Dutch solution for foreign investors 138, 178–81, 398–9
facts of 138, 171–3
jurisdictional dispute 174–8
lawyers, paying 186–8, 398–9
lead plaintiff counsel, appointment of 138, 143, 155, 173–4, 177
media coverage, effect of 390
regulatory investigations 172, 174
settlement of claims 177–8, 182, 185–6
special purpose foundation as lead plaintiff in Amsterdam143–4
start of litigation 173–4
tobacco litigation 52
Toyota unintended acceleration
  litigation 25–6, 92–104, 113–14, 388, 398
  background 93–4, 95
  bias against Toyota, allegations of 97–8, 114
  corporate and regulatory safety reform, ongoing 103–4
costs 104
facts of 25–6, 34, 95
fraudulent claims, media drawing 101, 113
investigations by NHTSA and Congress 93–4, 95–6, 97
judicial case management of 43

mass litigation, extent and complexity of 98–9, 114
media coverage, impact of 33, 34, 93, 96–8, 101–3, 113–14
media-created mass tort 101–3, 390
no problem with cars identified 94, 100–101
payment for reduced vehicle resale value 26, 33, 34, 37, 94, 98–9, 103
personal injury trial lost by Toyota 26, 94, 102
recall of cars 94, 95, 96
regulatory oversight triggered 93–4, 95–6, 99–100, 399
settlement of personal injury cases 26, 94, 102–3
standing: entrepreneurial lawyer model 37
vehicle modifications 95, 103, 113
trans-substantive class actions 7

Vie d’Or litigation see under Netherlands

Class actions in context