

## Mass Justice and Its Challenges

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### 1. Introduction

Our legal world is one of growing ‘massification’. Standard contracts affect multiple customers, mass torts (whether arising from product injuries or disastrous events) involve numerous victims and sometimes numerous tortfeasors; environmental problems affect communities as a whole and may have scattered or hard to trace effects; and insolvencies concern a collective of creditors. Various pressures can deepen the impact of these developments, including the economic feasibility of mass rather than individual representation on the claimants’ side, given the economies of scale enjoyed by many defendants. At the same time, the emergence of shared goals and a common interest in deterrence or “peace-keeping” functions of civil liability may create a demand for collective representation, in some instances leading to a blurring of the boundaries between public and private law as collective solutions take on a regulatory or at least ‘public interest’ flavour. The motivation for this collection lies in a recognition that the search for ‘mass’ civil justice throws up novel challenges for legal systems which have so far barely been addressed. For example, the ambition to deliver or secure “mass justice” raises questions about the possibility of fair representation of all individual interests in the context of settlements reached on behalf of a group; about questions of access and civil procedure; and about the very goal or purpose of ‘compensation’. Inherently, the balance between individual and collective interests, and between private and public goals of civil law, is called into question in new ways by these developments. For example, “group” interests may be said to stand somewhere between the interests of individuals, and of the public as a whole, raising questions of hybridization from the start. Alternatively, the interests of members of the group may actually be in competition, for example where compensation must be made to a large number from limited resources. There may also be efforts to maximise the sources of compensation, for example through reinsurance, or through early settlement and reduced transaction costs.

Against this background, we suggest there is an obvious need for consideration of what we would like to call ‘mass justice’, and of the challenges which are raised by this aspect of legal evolution. We observe that while standard law school curricula tend to remain focused on individual claims and doctrinal details, legal systems have begun to shift to give effect to “mass justice” issues in a range of ways, in numerous areas which can at first appear entirely separate, but which give rise to certain shared themes and challenges. Questions of procedure, representation, costs, and effectiveness, at least as much as doctrinal detail, are key to these developments.<sup>1</sup>

We have particularly selected for emphasis the issues of representation and distribution which arise from the ‘massification’ of claims. These are, to some extent, issues which require a focus on relevant actors (legal and other). The reality is that the boundaries and evolution of ‘private law’ rights and duties are, in this context, deeply influenced by collective issues, whether through the availability of insurance funds (and the organisational response to liabilities of insurers), by the operation of class or group actions in the more formal sense, by the need to negotiate with or compensate a wide range of individuals, by the mechanisms of fair distribution of insufficient assets in insolvency proceedings, or simply by the spectre of a large number of potential claims.

Equally, collective action and, more broadly, the need to have regard to the interests of numerous parties with diverging interests raise their own issues of practical justice.

Issues of representation may arise for example if a foundation or association litigates a mass tort case in the interests of, but not as the authorized representatives of a group of injured persons. On what basis, other than consent or contract, can an organisation litigate on behalf of individuals? The legitimacy to act in the interest of others may be equally troublesome where a labour union bargains for collective employment conditions in the interest of workers but where only a minority of those workers are actually union members. Relevant matters in distribution include the extent of the ‘*pari passu*’ rule in insolvency, and the related dilemma of liability insurers having to distribute an insured sum among multiple claimants whose claims exceed the value of the sum. These are, typically, issues relating to limited funds.

We argue that ‘massification’ and the need for ‘mass justice’ raise particular questions of legitimacy and accountability which are made more apparent through a focus upon representation and distribution. The contributions to this book address a number of such questions. With this chapter, we introduce the contributions and identify the general themes of the volume.

## 2. The themes of this volume

### 2.1. A diverse experience

As can be expected, the topics covered under the banner of ‘mass justice’ are of wide variation. Mass justice involves a range of thematic issues which have exercised policy-makers, courts and legal advisors throughout the world, but have only recently begun to be seriously debated by academic lawyers in European jurisdictions. Modern legal systems have to deal with the question how the law should react in cases where a large number of parties – victims, injurers, and others – are involved. At the same time, issues of mass justice can be seen to operate in a diversity of legal contexts which have rarely been investigated together. These contexts include environmental and consumer litigation, and personal injury claims arising from industrial disease, for example; collective bargaining in the context of industrial relations; distributional issues arising from corporate insolvency for unsecured creditors; and the distribution of liabilities between insurers, whose funds underpin the availability of civil compensation. This volume is not comparative in the narrower sense of setting out to compare the same issues across a range of jurisdictions. Rather, it draws upon diverse experience to generate themes of common concern and to debate a range of problems and solutions. As such, it sets out to assist in the identification of the parameters of ‘mass justice’ issues in contemporary law.

We have roughly ordered the contributions into five kindred categories. Although by no means watertight, the division between the categories reflects the emphasis of the various contributors. The first category concerns mass resolution of mass torts with particular emphasis on procedural issues and their wider implications, and the second brings to the fore issues of enforcement and access to court. We then turn to questions about the availability and distribution of funds. The third category deals with insolvency as a distributional mechanism of mass justice, and the fourth with the closely related issues of insurance and funds. The fifth category finally deals with collective bargaining and the issues of representation it evokes.

### 2.2. Mass resolution of mass torts

Wherever ‘mass torts’ are discussed, attention will inevitably turn at some stage to the United States and its distinctive ‘class action’ – whether as a model for future development, or as an indication of the dangers that lie in massification of civil claims. The US class action has never been immune from deep controversy in its homeland, and the nature of its present development demands some subtle exploration. In his chapter “Mass resolution of mass torts: emerging issues in the United States and the global future”, Richard A. Nagareda focuses on the arrangements available in U.S. law to facilitate the mass resolution of civil claims in tort. His chapter thus develops the analysis set forth in his book *Mass Torts in a World of Settlement*.<sup>2</sup> The arrangements for mass resolution under U.S. law range from relatively overt procedures for aggregation (including the classic class action) to other aggregate measures that operate in a much more opaque fashion. Nagareda argues that the clampdown in class action doctrine in recent decades has made class settlements a relatively unattractive vehicle through which to resolve mass tort claims. This development, in turn, has had an unanticipated, detrimental effect. Specifically, the effect has been for demands for mass resolution of tort claims not to dissipate but, instead, to gravitate over to other types of arrangements that are much less well understood. This is exemplified by the recent settlement in the Vioxx prescription drug litigation. The Vioxx settlement is neither a class action settlement (subject to Rule 23 of the Federal Rules of Civil Procedure) nor an “aggregate settlement” (regulated by the ethical stricture of Rule 1.8(g) of the Model Rules of Professional Conduct). Rather, the Vioxx settlement takes the form of contracts between the defendant manufacturer (Merck) and various law firms within the plaintiffs’ bar that represent Vioxx users in large numbers. The crux of the contracts is this: the plaintiffs’ law firms effectively must commit their entire claim inventories to the settlement in order to participate at all.

Law firms thus commit themselves by contract – which is obviously not a procedural mechanism for judicial oversight like Rule 23 of the Federal Rules of Civil Procedure – and in doing so they also indirectly affect their clients’ rights to push their cases forward (at least with the counsel of the law firm thus bound). Here, one might say, the mass character of mass representation on the plaintiffs’ side is being turned against itself in order to push the resolution of Vioxx claims. Nagareda questions the constraints currently embraced as a matter of legal ethics in the aggregate settlement rule and as a matter of class action procedure in Rule 23. Briefly, he argues that in modern mass society, what the law needs is more, not less, above-board examination of mass claims resolution and the questions of adequate representation that they present.

Nagareda’s chapter raises some themes of fundamental importance for the collection, highlighting in particular the important role of lawyers themselves in driving forward a range of solutions applicable not only to mass torts, but to a range of other ‘mass justice’ questions. Moreover, he explains that these solutions lie along a continuum in terms of their legitimating features, from arrangements whose legitimacy is based in consent of parties, to arrangements which have legislative legitimacy. Here, he raises the vitally important question of ‘hybridization’ along different parts of this continuum, raising the possibility that legitimacy is not so easily secured when different elements are mixed. Equally, he raises the fundamental importance of a particular goal - ‘global peace’ - in mass claiming. This goal is often shared by the legal representatives of claimants and by defendants, and potentially by legislators and administrators too since predictability and closure effectively release new funds for compensation. But the possibility is raised that collective interests (and lawyers’ interests) could be in conflict either with the interests, or the wishes, of individual claimants. The group element of mass justice is not always compatible with securing the interests of all claimants in full.

This is particularly clear in cases of distribution of limited funds, but it is equally clear in litigation where final settlements are reached with application to future claimants. Issues of legitimacy are therefore particularly significant.

European approaches to mass claiming generally stand at an earlier stage of development. A problem of mass resolution which is especially topical in European consumer and competition law enforcement, concerns so-called “scattered damage”. Here, collective goals may come to the fore, and questions surround the use of private law in securing these goals. Geraint Howells in his chapter “Cy-près for consumers – Ensuring class action reforms deal with “scattered damages”” investigates examples of small value consumer claims that affect many consumers and which are thought to merit litigating because in aggregate they represent a significant consumer detriment and an unfair competitive advantage to the offending trader. Nagareda’s chapter was centrally concerned with mass settlement and the proper route to seeking mass justice for numerous claimants and potential claimants. Its central theme was the securing and maximisation of funds for compensation, and the legitimacy of global settlement terms. This chapter is concerned with the very different state of affairs where the damage suffered by any individual consumer is not sufficiently significant to justify their bringing a legal action. Its central theme is not therefore compensation in its own right, but deterrence of activity which benefits rule-breaking defendants. Here, the goal of liability is more than compensation, and encompasses deterrence.

The problems of enforcing liability in ‘scattered damage’ cases leads Howells to favour some sort of opt-out class action procedure given that individuals are unlikely to litigate for small amounts and regulators are unlikely to be able to deal with all such individual claims satisfactorily. However, he also insists that such a procedure by itself will not be enough for these types of claims so long as such schemes remain premised on the compensatory model, which assumes that damages are payable only to those directly injured. Individuals will typically fail to ‘opt in’ by actively claiming their individual rights. Moreover, their individual rights are not always easy to define in terms of quantum of compensation. Therefore, a cy-près (as close as possible to the original) solution may be sought: an alternative distribution arrived at by alternative rules for calculating and awarding compensation. Howells finds that new actors – consumer organisations – need to be encouraged by the promotion of an organisational cy-près trust fund. Under this scheme, organizations protecting the consumers would be able to litigate and in appropriate cases damages would be given to a trust fund to promote the consumer interest. While this illustrates perfectly, though in a very different context, Nagareda’s point about hybridization in response to mass justice issues, the nature of the hybrid is very different. The questions raised are about the goals of compensation, as either collective (deterrence of anti-competitive practices), or individual (making good harm suffered and/ or correcting an individual wrong). Here, consumer and competition law may raise particular challenges, but they are not necessarily unique. One reason for the rise of consumer law as a distinct category is the imbalance of power and resources between corporate defendants and individual consumers. The suggestions in this chapter take a further logical step, toward litigation on behalf of consumers as a class to secure deterrence via private law.

In the final chapter of this category, “Cross-border Mass Litigation: A Particular Challenge for European Law”, Astrid Stadler deals with issues of court competence, applicable law and recognition of foreign judgments concerning mass litigation. As mentioned earlier, European legal systems hold diverging views on the desirability of ‘massification’ of claims litigation. This may also cause considerable policy differences at state level as far as cross-border collective redress is concerned. The European

regulations on private international law contain no specific provisions relating to cross-border mass claim litigation. As far as competence is concerned, the applicable European rules (European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Reg. 44/2001/EC)) did not really foresee that litigation could be anything other than individual. Moreover, with its fixed choice-of-law-rule in the Rome I- and II-Regulations, European courts have little discretion in terms of the conflict-of-laws questions and there are no specific rules in the Regulations on applicable law concerning mass disputes. This lack of direction may prove difficult in the coming years.

Stadler argues this uncertainty is not fixed by European harmonisation of substantive law. Although the level of harmonisation in some areas such as consumer law is quite high there are still considerable parts of the law in which member states of the EU retain autonomy. So, it is important to have clear rules on which collective mechanism may be applied to cross-border cases in which either the victims or tortfeasors are domiciled in different states or there are multiple places where the acts were committed and damage occurred. Since neither rules on competence nor on choice-of-law point to one single jurisdiction or set of rules, it seems fair to say that the current European rules on private international law are not suitable at all for mass claim litigation.<sup>3</sup> Indeed, Stadler argues, in terms of the Regulation 44/2001/EC nobody can predict at present whether judgments based on an opt-out litigation will be enforced in other Member States or whether recognition can be denied due to public policy reasons (Art. 34 no. 1 of the Regulation).

Stadler then goes on to discuss some of the reasons for harmonized rules of private international law at a European level. For instance, if forum-shopping and cross-border legal entrepreneurship are to be regulated, perhaps unifying both the rules on competence, applicable law and recognition is in order. This will not be easy, Stadler concedes, because any approach will fall short of full predictability in terms of competent court and applicable law. Moreover, a European initiative would have to take a position in the debate to what extent so-called 'opt out' litigation mechanisms in themselves are compatible with principles of fair trial and access to courts under the European Convention on Human Rights, given that these mechanisms do not necessarily provide for adequate service of documents to individuals. Then, Europe would need to answer the question (apart from the obvious issue of competence of the EU in the first place to regulate) whether the upsurge of mass claim litigation warrants full harmonization of civil mass claims procedure or a less intrusive instrument of first harmonizing private international law rules on mass litigation.

Generally, Stadler concludes that for the sake of a uniform handling of recognition of those proceedings in other Member States, the Brussels I Regulation should set out a standard for the recognition and enforcement of mass claims litigated under judicial oversight.

### 2.3. Enforcement and access to court

In the second category of contributions, the authors focus not so much on pecuniary compensation as on the policy issues underlying collective enforcement and access as such. Christopher Hodges explores the "Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress". He focuses on the policy initiatives and debates at a European level, notably the initiatives on collective enforcement of consumer and competition law through collective damages claims.<sup>4</sup> In a step-by-step analysis, he first addresses what exactly the goals of enforcement are. In European legal thinking, compensation *ex post facto* is usually seen as a goal in itself although a spillover effect of influencing corporate behaviour is not excluded. This, he argues, highlights a marked

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difference from US doctrine concerning class actions, which are said to serve a regulatory and deterrent function. This, as already explained, is linked to the arguments about ‘scattered damages’ in the contribution to the present volume by Geraint Howells. Hodges argues that once the goals of enforcement are identified, European policymakers should then ask what the appropriate instruments are for achieving these goals. Building on his earlier work,<sup>5</sup> Hodges explores the use of both private law procedures, administrative procedures involving some sort of agency authorized to deal with mass claims, and the combination of both. He then goes on to suggest that there is a need for a framework within which the various procedures that are available in Europe for collective redress can be combined into a coherent and effective system to achieve the basic objectives. Private law solutions may provide some incentives for businesses but – to summarize Hodges’ arguments – these usually are ‘too little too late’. Therefore, research should be considered into whether administrative law could deliver more ‘mass justice’ at lower costs.

In Hodges’ framework of analysis, there are three pillars of private enforcement techniques. The first is conciliatory by nature and consists of easily available dispute settlement systems such as complaints boards and consumer ADR arrangements. The second comprises the adoption of public authority assistance in delivering compensation and the third is the classical route through the civil court system. What the framework does, is to accentuate that several solutions for the complexities of mass claims litigation are available and that no single solution has yet proved superior to the others. Hodges recommends empirical testing of all ‘pillars’ involved in the analysis. Hodges’ chapter illustrates the way in which ‘mass justice’ issues tend to push analysis toward investigation of the public and goal-oriented aspects of private law, as well as highlighting the importance of procedural issues and their close relationship to goal-oriented questions. His contribution is concerned to point out that in judging the effectiveness and success of ‘mass justice’ processes, it is vital to be clear about the goals of the process.

Eva Kocher then continues with her analysis of “Collective rights and collective goods - Enforcement as a collective good”. Kocher returns to some of the issues raised by both Howells and Hodges. Kocher takes a conceptual approach to ‘massification’ of claims. Her analysis confirms that collective action and redress procedures exist in various shapes, ranging from injunctive action to damages claims, from representative action to group/multi-party litigation, and that all these instruments are built on the underlying concept that individual rights are enforced and vindicated by collective means. As a consequence, representative actors, private or public, can only step in where specific rights have been assigned to them or where they have somehow been authorised to act in the interest of third parties. This issue of authority prompts Kocher to examine the function of representative action in cases where individuals are rationally apathic and omit to vindicate their individual rights and to question to what extent such representative action can serve as a regulatory instrument. She asserts that though “regulation through litigation” is a self-evident function of private law in the US legal system, it is still disputed in European civil law systems, and that a legitimate concern against widespread use of private representative action is the fear of “punitive” elements entering into the European civil courts (e.g., damages which are not compensatory by nature). She also raises the issue of coordination between private and public law mechanisms, such as the principle against double jeopardy. Kocher then explores ways in which to allocate the representation of collective interests to collective agents while at the same time ensuring that the total of the aggregate individual interests is not surpassed. She thus advocates a stringent conceptual division between collective and

individual interests. This is in contrast with the ‘goal-driven’ approach of Chris Hodges, with its acceptance that hybrid creations straddling public and private law may (subject to establishing their effectiveness) provide the most suitable way forward.

Robert Lee and Radoslaw Stech conclude the series of essays on enforcement and access to court with a switch in focus from private to public law. In their chapter “Access to environmental justice in England and Wales: Funding representation for court reviews of administrative action”, the authors explain the problems which beset attempts to litigate environmental cases through private law in England and Wales, even in cases where tangible injury or damage appears to have been suffered. These are predominantly ‘toxic torts’ of a widespread nature, where a group or class action might be expected to be the appropriate solution.<sup>6</sup> Lee and Stech argue that problems of financing such litigation have acted as a bar to compensation in such cases, effectively pushing potential claimants towards public law as the only means of challenging decisions. At the same time, the House of Lords made clear its view that in the area of environmental protection, regulatory solutions were the most appropriate, and used this as a reason for restriction in the opportunity for ‘toxic torts’ litigation through restrictive interpretation of the principles of the law of tort. Unfortunately, as the authors point out, the suggestion that public law provides a more appropriate mechanism of challenge disguises a significant problem of access for affected citizens, which is that the costs of bringing a challenge at public law may also be prohibitive for individuals or groups. Thus there is a difficulty of representation for the masses who consider environmental decision-making to be having an adverse effect on their interests. Indeed the absence of an established damages remedy in such cases removes a potential incentive to lawyers in the form of ‘uplifts’ associated with conditional fees or, on the US model, even contingency fees. This chapter, therefore, illustrates that in an area where public law has been considered a more legitimate mechanism of challenge, the economic realities of funding place this mechanism beyond the reach of perhaps the majority of potential litigants.

In doing this, the chapter illustrates some key themes for this collection. First, it underlines the pervasive point that attention to doctrinal developments at the expense of questions of procedural justice tend to miss out the true direction of change in our civil justice systems. In this instance, while there has been liberalization in the principles of standing applicable to judicial review actions, questions of access to justice are of prime importance in determining the effectiveness of judicial review as an alternative to private law. Second, it raises the question of incentives to lawyers to develop or provoke new forms of justice or new routes to settlement or distribution. While other chapters consider whether compensatory damages might appropriately be made available in order to pursue public goals other than compensation itself (primarily promoting compliance), this chapter raises the question of whether absence of financial redress removes not so much the incentive for claimants (damages not being the motivation for the complaints examined in the underlying research), but their means of affording legal representation.

After examining various funding models which could in principle support environmental judicial review actions, Lee and Stech outline the findings of their own empirical research testing the significance of costs barriers in deterring potential judicial review applications, and argue forcefully that this raises questions as to the extent of UK compliance with its international obligations under the Aarhus Convention and connected EC obligations, given the difficulties in bringing to account public agencies through mechanisms for environmental judicial review. While earlier chapters underlined that in consumer and competition law, the boundaries between compensatory

and regulatory objectives were capable of being mixed (though with some disagreement as to the desirability of ‘hybridization’), this chapter suggests that the particular tendency in the UK to assume that environmental law by contrast should be seen as a matter of public and not private law may lead to an undermining in the role of citizens, because of the costs of litigation and the absence of an effective funding mechanism.

#### 2.4 Insolvency and distribution

For more than one reason, insolvency is a key issue for our ‘mass justice’ theme. First, the arrival of ‘mass torts’ and mass liability have themselves created many insolvencies and directly raised their own problems of limited liability and distribution of resources.<sup>7</sup> The rules on insolvency and liability insurance of an insolvent liable party will affect the extent to which successful tort claimants will, in many instances of substantial mass claiming, be able to secure compensation. Insolvency is also, more broadly, an important device by which liabilities become limited. Therefore, any insolvency raises questions as to how to distribute scarce resources. Our third category of essays deals directly with insolvency and the issues of fair and proportionate distribution of assets and liabilities .

David Milman in his chapter “Promoting distributional justice on corporate insolvency in the 21st century” aims his attention at the distributional dilemmas in English corporate insolvency law. Unavoidably, insolvency law has to provide solutions for the issue of who loses out when an insolvent estate fund is found to be insufficient to satisfy all competing claims against it. There is often no question of full redress or reinstatement of rights in this scenario: rather the issue is one of allocating losses between competing interest groups. Equally, there is no call for collective action, since the liquidator is appointed precisely in order to consider the interests of all creditors.

Though focusing on English corporate law, Milman’s analysis is relevant for the questions faced by any system of forced distribution of assets. Should it stick to the *pari passu* rule? Should it allow “carve outs” based upon either pre-insolvency contractual arrangements between the debtor and its creditors? And should some creditors be allowed to take statutory priority based upon some sort of societal efficiency or fairness consideration? Over the course of the past two decades the English legal system has shown considerable developments in this area. Milman charts these developments and then reflects upon whether further reforms could be made to promote efficiency.

As Milman explains, the distribution of assets of insolvent private companies is not a conceptually isolated issue. The winding-up process is closely connected to the very concept of limited liability and its use (or abuse) by owner managers to shield themselves from personal liabilities. To Milman it is clear that the real victims of limited liability are unsecured creditors; these may be individuals who have contracted with the company or involuntary creditors with enforceable tort claims against the company. Limited liability was itself a legal concept designed to facilitate dealing with the masses in terms of attracting investment by a wider constituency, but it has generated a problem of allocation of liability where only the limited assets of the company are made available to meet business debts. This problem is exacerbated by the practice of allowing ‘carve outs’. In practice, the ideal of winding up as a collective procedure was seriously eroded; distributions to the mass of unsecured creditors were minimal. This prompted a realignment of priorities by the Enterprise Act 2002: the Crown lost its preferential debt status, and floating charge holders gave up funds via the prescribed part mechanism. The upshot of this reform is that it reinforces the position of unsecured creditors by virtually guaranteeing them (in most cases anyway) a modest return.



Milman's overall conclusion is that the moves towards a more balanced distribution of assets – including the introduction of a reserved fund for unsecured creditors - is positive and will promote the cause of distributional justice. He does, however, posit that there should be no sacred principles that are immune from re-evaluation in improving the distributional justice on insolvency. In particular, Milman identifies some avenues to explore, such as disallowing excessive secured debts, subordination of debts due to directors and related parties, and priority for creditors owed small claims.

In turn, Frank Verstijlen in his “Dealing with damages in insolvency - The insolvency administrator's collective claim for damages versus individual claims of creditors” focuses on the other side of the distribution coin. Whereas Milman was concerned with the issue of fair distribution, Verstijlen concerns himself with the preceding issue of representation. Liquidators in insolvency proceedings have the task of representing ‘the mass’ of creditors but does this also imply that they have exclusive authority to instigate claims against third parties (directors, tortfeasors, etcetera) and collect these claims in the interest of ‘the mass’? Or do individual creditors of the insolvent debtor retain individual claims against these third parties?

Here, the principles of liability law may collide with the distributional principles of insolvency law. Verstijlen performs an in-depth comparative analysis of French, German and Dutch law to answer questions such as to what extent the liquidator has a claim, whether the creditors themselves can claim compensation, and how the proceeds of the insolvency administrator's claim should be divided between the creditors.

Verstijlen finds that all the legal systems under consideration struggle with these questions, especially in relation to wrongful continuation of an insolvent business. It is apparent that all these systems accept the power of the liquidator to claim on behalf of the body of creditors and that in the majority of cases individual creditors are barred from claiming their share of the collective damages individually. Nevertheless, the dividing line between the collective claim of the insolvency administrator and the individual claims of creditors is drawn differently in the various legal systems. Particularly in cases where an insolvent business is wrongfully continued, different outcomes are reached. In those cases, under French law the rules of insolvency law preempt liability law in the sense that creditors that have entered into a contract with the already insolvent debtor cannot receive full compensation for their loss. By contrast, in German law preference is given to liability law and the insolvency administrator cannot claim ‘Quotenschaden’ for new creditors to the detriment of insolvency law and the *pari passu* principle. In the Netherlands, in these cases the insolvency administrator is – at least according to lower courts – also authorized to claim compensation of ‘collective damage’ of all creditors, but in general individual creditors can circumvent the insolvency procedure by individually claiming compensation of their proper damage, putting the *pari passu* principle at risk. Verstijlen's appraisal of the three legal systems thus shows that, ideally speaking, insolvency regimes in dealing with the masses should clearly demarcate the domain of individual claims from the domain of ‘massification’ of assets and liabilities under the exclusive care of the liquidator.

## 2.5. Insurance, funds and the challenge of mass claims

In the fourth category of essays, distributional issues of insurance and alternative compensation funds are the focus of attention. In their chapter “Historic Asbestos Exposure and Insurance”, Rob Merkin and Jenny Steele illustrate the use of private mechanisms to achieve distributive goals, considering the distributive implications of insurance litigation surrounding large-scale tort liabilities, and the questions that still

persist about the ultimate destination of such liabilities. In particular, they use the example of asbestos-related claims in the United Kingdom to illustrate the strain long-tail claims exert on the legal system when submitted on a large scale and affecting a large number of victims, tortfeasors, insurers and re-insurers. Asbestos-related claims challenge the viability of existing liability principles, and their accepted interpretation for the purpose of settlement of claims, for a number of reasons. The scale of the problem and the delay in both onset and diagnosis are the main causes. Moreover, asbestos litigation has brought about special rules on attribution of responsibility in case of multiple and/or alternative causation; in UK law, it has led to redefinition of the concept of causation and laying down of principles governing anticipated injury. The legislature has not acted in order to make whole-sale changes to the methods by which liability is established, but has taken small steps making clear the legislative policy that private law should work effectively to secure compensation for those suffering from occupational asbestos-related diseases. Underlying this general objective is a set of little-explored issues. For example, there is the issue of attribution of insurers' responsibilities: which of the employer's liability insurers are responsible for meeting any claim for indemnification? How are liability insurance policies construed? Which policy is triggered by the event? Do insurers in case of multiple liabilities have rights of contribution amongst themselves? And how does all this affect reinsurance arrangements?

What all of these questions illustrate is that while considerable litigation surrounds tort liabilities and contractual questions of insurance cover, this litigation is a prelude to distribution of loss through insurance and reinsurance. The ultimate destination of the liabilities is a question fraught with difficulty, in which principles of tort, contract, and insolvency interact. The legislative policy in the UK has not been to take these claims out of the tort system and establish a compensation fund from which all such claimants may be compensated, but to intervene in order to bring home the liabilities so far as possible to insurers. Whereas in the case of the US class action, claimant lawyers with a large client base have had a large influence over the process of legal development, the UK asbestos cases have not involved new initiatives in the style of claiming, and liability insurers have to a large extent been able to dictate the pattern of litigation by determining when to resist settlement of claims, and whether to cooperate on the division of liabilities.<sup>8</sup> The experience of the most recent years suggests significant litigation, as the underlying principles of liability remain contested. Tort and insurance between them here create a form of 'mass justice' in which developments essential to the ultimate distribution of liabilities have received relatively little widespread attention compared to headline issues about doctrinal developments in the law of tort, for example.

A very different approach can be seen in the operation of the International Oil Pollution Compensation (IOPC) Funds. In "The International Oil Pollution Compensation Funds and Dealing with the Masses", Willem Oosterveen gives an insider's account of the operation of the IOPC Funds. The IOPC treaties have laid the basis for a unique mixed system of strict liability for persistent oil (cargo) spillage from oil tankers, compulsory insurance and residual compensation funds fed by levies on oil importing countries.<sup>9</sup> The IOPC Funds are intergovernmental organisations, with more than 100 Member States worldwide, that provide compensation to persons and entities suffering oil pollution damage caused by spills of persistent oil from tankers. Major oil spill incidents inevitably lead to mass claims situations and during the more than 30 years of its existence the IOPC Funds have gained a lot of experience dealing with the complexities involved in such situations. The IOPC Funds' role is such that they are

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J. Steele, W.H. van Boom, Mass Justice and its challenges, in: Jenny Steele, Willem H. van Boom (eds.) "Mass Justice - Challenges of Representation and Distribution", Cheltenham: Edward Elgar 2011, p. 1-26

involved in the practical, administrative, legal and logistical side of such mass claims incidents. Oosterveen firstly gives a brief overview of the nature and role of the IOPC Funds. Then the IOPC Funds' claims handling and assessment procedures, and how they work in theory and in practice, is outlined. The main problems and complications encountered by the IOPC Funds in dealing with large-scale oil pollution incidents are set out. Finally, a description and some analysis is given of the various ways in which the IOPC Funds have endeavoured to overcome these problems in the past, as well as recent developments within the Funds to work towards a more structural policy for dealing with the masses.

Oosterveen's account elucidates the vast logistical tasks of distribution these Funds are charged with, giving an insight into the complexities of delivering 'mass justice' in a fair and effective manner. The Funds manage the entire claims handling and assessment process, instruct all experts, surveyors and administrative staff dealing with an incident. The distributional duties normally involve setting up a local claims office in the country (or countries) affected in order to assess the extent of damage and to pay to claimants individually in principle. The Funds quite literally deal with the masses because of the sheer number of claims in large scale oil pollution incidents in recent times. Oosterveen shows that since the Funds work on the basis of the principle of individual assessment of each individual claim there is a constant challenge of balancing, on the one hand, the need to distribute compensation quickly if it is to be meaningful, and on the other the need to secure a decent procedure and fair decision making for individual claimants. In particular Oosterveen points to the fact that in recent years the IOPC Funds have been confronted with oil pollution incidents where large numbers of claims of a very similar nature for relatively small amounts were received, in particular in the (subsistence) fisheries and tourism sectors. A common feature of these claims is that they are not, or very minimally, substantiated by supporting (documentary) evidence, which makes it both very difficult and time-consuming to assess and settle such claims. Another relevant aspect is that the combination of absent or minimal (documentary) evidence and the relatively low value of the individual claims can easily lead to disproportionate costs of assessing and settling them. In view of the logistical inefficiencies of individual assessment, the Funds are considering alternative ways of dealing with such mass claims, which Oosterveen hopes will lead to a quicker claims assessment process and to lower marginal costs.

Apart from the detailed consideration of the logistics of representation and distribution in such cases, it is worth considering the overall goals and nature of the funds. Unlike the asbestos, product liability, and consumer claims considered by previous chapters, oil pollution claims arising from spills from tankers have been identified by participating nations as a continuing problem which requires shared solutions. The goals of the funds are to provide compensation; to reach amicable settlement; and to achieve consistency. The funds are 'fed and led' with a different mindset than insurance funds, and again the effect is to reduce conflict and enhance the opportunities for amicable settlement. This is a useful contrast in that it shows an area in which the responsibility for providing compensation for harm has been accepted and transaction costs reduced so far as possible through shared agreement. Even so, the valuable account provided by Oosterveen here also shows the formidable investment in administration which is necessary for such solutions.

## 2.6. Collective bargaining and issues of representation

Zef Even's account of "Representation in collective bargaining on employment conditions in the Netherlands" in the sixth and final category of essays sheds a different

light on issues of mass representation. Whereas the previous chapters were concerned with distribution of assets and liabilities and the ensuing problems of representation, accountability and efficiency, Even concentrates on the collective bargaining on mass employment conditions in Dutch law. According to Dutch law, a collective labour agreement is an agreement concluded between one or more employers, or associations of employers on the one hand, and one or more trade unions on the other, principally or exclusively setting out the terms of employment applicable to individual employment agreements covered by the collective agreement. Economically speaking, collective labour agreements are important in the Netherlands. The employment terms of about 70-80% of all employees in the Netherlands are nowadays governed by a collective labour agreement. Even, however, does point at an increasing anxiety over representativeness of trade unions. In contrast to the high number of employees covered by a collective labour agreement, there is a continuously declining rate of membership of trade unions amongst the Dutch working population. This effectively means that trade unions that directly represent only a minority of workers are in charge of negotiating a collective labour agreement binding a majority of all employees. Against this background, Even sets out to investigate whether and to what extent representativeness is an important element or source of leverage in collective labour agreements. Even's overall conclusion is that the current situation is one of insufficient legitimization of trade unions carrying on negotiations for the benefit of all employees involved.

Finally, drawing on experiences abroad, Even lists some suggestions on encouraging trade unions to become more representative by enabling them to improve their density and on the introduction of more stringent rules, such as minimum representativity demands for collective bargaining agreements, to ensure representativeness of unions acting as self-appointed agents.

To some extent, what Even illustrates here is the challenge of achieving legitimate representation at a time when perceptions of shared interest and any particular shared identity is perhaps waning. In this, the problems of legitimacy faced by a trade union are now not so different from the problems faced by the legal representative in a class action. There is an interesting link here with the role of union lawyers and advisors in the UK occupational asbestos disease cases, for example, as well as a wide variety of other cases such as discrimination and health and safety claims. Like the conduct of individual complaints more generally, representation of members' interests through litigation provides a means by which unions may more easily claim legitimacy (securing individual rights, albeit on a mass scale, rather than advancing the collective interests of their members against the interests of others).

### 3. Some reflections following the contributions

#### 3.1. Key players in 'mass justice'

There are at least three key players involved in mass justice issues, namely the distributors, the courts and the legislature. To these, one could add legal advisors and representatives as key players in their own right, as Nagareda's chapter in particular makes clear. In some instances, legal advisors take on the role of distributors, for example when negotiating class settlements. But more broadly, they may also have a key role in influencing the development of 'mass justice' processes.

Firstly, one can look at the role of the distributor: the person in charge of or otherwise faced with the daunting task of distributing assets or liabilities. The distributor may be a court-appointed administrator or liquidator in an insolvency procedure charged with the

distribution of assets, or a voluntarily appointed or even a self-appointed agent of a group of individuals taking on the mission of securing and distributing compensation from a single tortfeasor. In turn, an average adjuster in maritime cases charged with adjusting and apportionment of general average can equally be considered to be a distributor.

Both in legal terms and from a practical point of view, acting as a liquidator in insolvency proceedings may not be all that different from establishing a general average in maritime salvage cases: in both cases the official involved has to distribute proceeds and losses and in the process of doing so take account of all the interests involved. A number of relevant questions concerning the role of distributors can be raised. For instance, what specific requirements of procedural justice follow from the role of distributor? How can the role of distributor be best described, both in legal terms and logistical terms? What abilities fit the distributor best (dealmaker or good lawyer)? How much leeway does a distributor have in the distribution process? Is he or she bound by strict rules on ‘who gets what’ and ‘who pays what?’ or is he or she to some extent able to negotiate or play the distribution game with different parties simultaneously?

Moreover, distributors represent the interest of third parties. This representative role puts them on par with representatives who are charged with obtaining injunctive relief for the benefit of a collective (e.g., consumer associations) and those who are charged with brokering a collective agreement (e.g., labour unions). In practical terms, the role of representative negotiator is quite similar to the mechanism of collective bargaining for collective labour agreements. Conducting negotiations on behalf of a labour organisation in a pay-raise dispute may not really be all that different from negotiating a settlement on behalf of a group of personal injury victims. In both cases negotiating parties have to bargain for the best possible outcome in the light of both legal uncertainty, their legal position as agents and keeping in mind what is best for their backing. The legal rules on collective mass claiming and collective labour agreements respectively serve as the backdrop against which such negotiations are conducted.

Secondly, we can look at the role of courts as monitors of the work of distributors and representatives. In most legal systems, courts are involved in insolvency proceedings by overlooking the distributor’s activities. In some jurisdictions, courts have specific roles in mass claim procedures. In managing such multi-party proceedings, do courts not themselves take on the role of distributor and representative? And how do they balance the widely felt need for reasonably expedient and efficient adjudication and the law’s ideal of “restitutio in integrum” in every individual case?

Obviously, the courts’ room for manoeuvring to a large extent depends on the stance of the third key player, the legislature. In dealing with the masses, the legislature has to weigh the need for quick and efficient administration against fundamental individual access to justice and it has to guarantee essential principles such as accountability and transparency as well as attain procedural and substantive fairness within a reasonable time. Some legislatures feel more pressure than others to set up specific mass justice procedures. Obviously, insolvency procedures are omnipresent but the extent to which European legal systems have embraced mass claim procedures, representative actions and collective bargaining with third party effects, differs significantly. What is clear though is that recent developments in Europe show that legislatures are slowly embracing some attenuated version of a European class action.<sup>10</sup> The issue of the goals to be secured by such actions, and the potential problems of legitimacy which they create, are therefore more urgent.

Thirdly, there is the legislature to consider. It is clear that the legislature has a cardinal position as it generally stipulates the rules of the distributional game (or, in the case of distribution via private law, it often intervenes to steer these rules). In doing so, the legislature will typically have to seek a balance between the individual and the collective interests involved. In this respect, legal culture is of paramount influence. Comparative legal analysis shows that some legal systems adhere to a strict principle of individual adjudication and that these legal systems are inclined to hostility against ‘massification’ of procedures and distributional processes. Other legal systems, in contrast, are more receptive to the need for mass justice and more easily adjust existing and create new arrangements in response.

These issues arise in fields of law in which distribution of assets and liabilities has to be achieved. They are, however, by no means restricted to those areas. In collective actions for interests with other than purely monetary value, the law is faced with a similar dilemma. If it were to allow any foundation, association or other legal person with a self-proclaimed representative function to have standing in court and thus to defend third party interests (for instance, in consumer associations actively pursuing claims for injunction for the benefit of communities of consumers), would it not have to ensure that accountability and transparency of these self-proclaimed agents is guaranteed? Likewise, in cases where some public authority has the right to declare a contract or other legal relationship binding upon third parties – as is the case with collective labour agreements in some countries – a similar question can be asked: how does the law safeguard adequate representation and avoid “surprise clauses”? The underlying theme remains that of protection of all individuals in circumstances where effective solutions require a ‘mass’ character.

### 3.2. The representative as the servant of the mass

As Nagareda shows, it seems that a threefold typology can be made as far as representation is concerned.<sup>11</sup> Firstly, there is voluntary individual authorisation to represent. If individuals voluntarily and on the basis of informed decision-making decide to pool their claims or join forces to appoint a legal representative, this would generally be considered a mere extension of party autonomy in most legal systems. Individuals ‘opting in’ to some sort of voluntary consolidated action and allowing a representative to bargain for them and settle on their behalf, would be considered at most as a group of individuals who on the basis of unanimity push their individual yet consolidated claims forward.

Secondly, there are those institutional arrangements that bind individuals by default to an outcome reached without their consent. An opt-out class action operation is a classic example: the default rule is that – subject to certain safeguards – individuals are part of a ‘mass justice’ mechanism which defines and possibly modifies their legal rights unless they actively distance themselves from the outcome. As Nagareda convincingly proposes, however, the semi-voluntary nature of such arrangements of distribution and representation does imply that although unanimity is not needed there clearly is a minimum requirement such as a majority or even qualified majority for this type of arrangement to be viable.

Thirdly, there are those compulsory arrangements where opting out is not allowed and by which some individuals are therefore affected without their consent. The distributional rules of insolvency are a case in point. The fair distribution of insufficient assets in accordance with the *pari passu* rule or with whatever intricate system of priorities should preferably not be short-circuited by allowing carve-outs. As the chapter by Even shows, in some legal systems collectively bargained labour agreements that

have been declared binding upon all employers and employees in a certain branch of industry also belong to those compulsory arrangements. Having said that, the opportunity arises for individuals to join and influence the operation of the union.

In the first two types of arrangements, the representation may be fully based on voluntary and actual appointment or on some legal assumption of the appointed or self-proclaimed agent's representativeness. Obviously, the weaker the nexus between agent and representee, the greater the need for legal instruments safeguarding representativeness, legitimacy and accountability. Hence, procedures involving certification and appointment as well as substantive rules of conduct applicable to the agent play a role in guaranteeing the proper functioning of the instruments of representation and distribution.

There can be either *ex post* or *ex ante* controls on the agent's behaviour, either by court control in the specific case, or by setting regulatory standards for the quality of agents in general. An example of the former approach can be found in the certification stage of the U.S.-style class action.<sup>12</sup> The latter strategy can be found in legal systems where consumer associations can only claim for injunctions for the benefit of consumers if they are on a list of associations deemed of sufficient quality to represent consumer interests.<sup>13</sup>

In the third category, where there is high degree of compulsion for the masses, state intervention is inevitable. Legislative majority then trumps individual preferences, and for good reasons. In case of inherent and incompatible competition between legal positions – as is the case with creditors claiming pay-out from an insolvent estate with insufficient funds – the legal framework should be allowed to force the masses into a generic mould – whether they agree or not. If, however, individuals cannot 'opt out' there is an irrefutable need for quality control of the work undertaken by distributors and other representatives. That is why insolvency administrators, liquidators and average adjusters, whatever the definition of their legal duties, are usually considered to perform a public function and why there is some sort of judicial monitoring of their activities.<sup>14</sup> Perhaps the same reasoning to some extent applies to trade unions negotiating collective labour agreements; arguably, in those legal systems where public authorities have the authority to grant or reject a general binding declaration there is in fact such a monitoring activity.

This issue of compelling the masses to enter into an ineluctable procedure of distribution and representation underlines the need for clear demarcation of what is and what is not part of such a procedure. Both the dilemmas presented in the chapters by Milman and Verstijlen illustrate this need.

### 3.3 Goals of mass justice

The observations above should illustrate that the mass nature of 'mass justice' gives rise in one way or another to a need for legitimacy, and that the satisfaction of this need often points in turn to some sort of public element. Likewise, 'mass justice' creates a challenge not just for courts and legal representatives, but also for legislatures, for they are not only a source of legitimacy, but themselves require legitimacy for their actions. Added to this are the transboundary and international elements of mass justice, which are clearly addressed in the chapters by Nagareda, Stadler, and Oosterveen, but which are also apparent for example in connection with insurance liabilities, in the chapter by Merkin and Steele. Consideration of the public element, as well as the potential for conflict between individual and collective interests, in turn leads us to question the goals of mass justice. What technique or set of techniques is best – most efficient and most

legitimate – in order to attain the particular goals which may be identified for the proposed solutions?

Very broadly, the goals of mass justice identified and explored by the contributors to this volume can be divided into three. First of these is compensation for the victims of mass ‘events’, or of mass harm caused more gradually. The need for such compensation is not self-evident from the mere fact of its occurring, and this is evidenced by the fact that not all harms in society are the subject of compensation. Reasons for thinking that compensation is required may in fact be quite varied. There may be an underlying judgment as to injustice of the harm suffered, either on traditional ‘corrective justice’ grounds (a tort or other wrong has been committed), or for more distributive reasons (this may be the case for example if no lack of care is disclosed or required, in the case of schemes premised on strict liability). ‘Enterprise liability’ of one sort or another may be a reason for thinking that compensation is required in such cases. Alternatively, the reasons for compensation may be based in simple compassion, or a more practical need to maintain confidence in investment, for example in the case of economic loss on the part of ordinary creditors of insolvent companies. In some such instances therefore, the goal of compensation may exist quite independently of any goal of deterrence of the harm-creating conduct or activity. Indeed compensation schemes may provide important political legitimacy to the conduct in question – this may be the case, for example, in respect of oil pollution funds.

A second goal of ‘mass justice’ is enforcement or deterrence. This goal was particularly identified in the discussions by Howells, Kocher, and Hodges, in respect of competition and consumer law, for example. This goal is likely to be pursued in the public interest, though it is quite possible for individuals or groups of citizens to identify their own interests as requiring enforcement of rules. The goal of enforcement or deterrence is particularly evident in cases where the breach is of significance collectively more than it is for individuals. In ‘scattered damages’ cases, consumers individually could shrug off the effects on them personally, but would eventually suffer the consequences of widespread breaches in the absence of enforcement, because of incentives to breach the rules. By contrast in many product liability cases, as in asbestos-related occupational claims, the impact on individuals is devastating and this is amplified into a ‘mass justice’ case through the sheer scale of the problem. It is less clear whether the ‘scattered damages’ cases require the same sort of solution as mass personal injury cases, and indeed these cases call into question the nature of ‘damages’, as well as their role. For those who are resistant to ideas of hybridization however, there is some food for thought in the research by Lee and Stech, presented in their chapter. In an area where domestic courts have been emphasising the ‘public’ nature of the applicable issues, the economics of access to justice are such that citizen challenges to administrative decision-making are exceedingly hard to maintain. This also raises the important question of who is able to challenge the decision-makers, if the ‘externalities’ created do not impact directly in damage for which a private law claim can be pursued.

The third important goal of ‘mass justice’ is perhaps the least widely encountered in traditional accounts of the purposes of civil law. In mass justice cases it is indeed one of the most important, given the inherent collectivity, at some level, of all such cases, and their potential political significance. Broadly, this third goal could be called ‘peace’. This may take the form of a search for closure, for example so that claimants and defendants, as well as their insurers, can be clear that the contest is finished. As Nagareda explains, closure for the collective and for the defendant in a mass claim is not necessarily in the interests of, or with the consent of, each individual potential claimant. This serves to underline the very strength of the goal to the extent



that ultimately and inevitably, at some stage it will prevail. ‘Peace’ could be defined much more broadly to encompass both an important future-regarding element in which the events are left behind and the participants (or their families) can move on, and a past element in which there is a sense that a reasonable and distributively just solution has been reached, in light of the past and in light of what is achievable. In this final sense, the balance between what is ‘just’ (in terms of corrective or even retributive justice), and what is reasonable and effective, is in question, and questions of mass civil justice therefore have something in common with those other issues of mass justice – for example for mass human rights abuses – which arise in quite separate parts of our legal systems today.<sup>15</sup> ‘Mass justice’ in its civil form could be seen as a means of avoiding, as well as resolving, conflict, to the extent that processes can be put in place to avoid or limit the impact or the legacy of a range of events, and to some extent to moderate the side-effects of continuing activity. Quite simply, the challenges of mass justice are not only about the satisfaction of claimants’ rights (in many instances, such as distribution on insolvency, this will not be possible in full), or the effective achievement of goals. They also involve the balancing and resolution of a range of potentially conflicting interests in an acceptable, and legitimate, manner. To what extent do the processes of “mass” civil justice depart from the formal notions of “justice” more usually encountered in private law?

In summary, the evident need to address issues of ‘mass justice’ poses particular practical problems, but also challenges legal systems and academics to make sense of new pressures and patterns in civil claiming. In many instances these pressures have led to hybridization, challenging a preference for neat taxonomising of legal liabilities. For academic lawyers, these issues demand engagement with quite practical and often procedural elements of the law, and exploration of this sort is capable of raising new challenges for established positions about the underlying purpose and philosophy of civil law. For law-makers, pressing policy choices lie ahead. We hope that the contributions to this volume will have helped to illustrate the range and extent of the issues that arise, and also the depth of the underlying issues for resolution.

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<sup>1</sup> It has been suggested that in the US, the study of doctrinal detail has declined and the study of civil procedure has grown, showing an inversion of the current hierarchy of attention (and status) in the UK at least: Saiman 2010. Mass claiming and mass representation are undoubtedly implicated in any such change in emphasis.

<sup>2</sup> Nagareda, 2007.

<sup>3</sup> Stadler 2009, p. 164-165.

<sup>4</sup> European Commission 2005; European Commission 2007\*; European Commission 2008; European Commission 2008\*; European Commission 2009; European Commission 2009\*.

<sup>5</sup> Hodges 2008.

<sup>6</sup> A Group Litigation Order was made in respect of the Corby Litigation which has recently been settled after a first instance judge found in favour of the claimants on the subject of breach: *Corby Group Litigation* [2009] EWHC 1944. This was an action against a local authority which the claimants argued was responsible for their birth defects, given the manner in which it had cleaned up contaminated land in the area. This however is a rare success for claimants in an environmental 'toxic torts' case in the UK. A much less successful claim was *Hunter v Canary Wharf* [1997] AC 655, brought by various residents of London's Docklands, which proceeded to the House of Lords: note the discussion of the litigation in this case, including its funding, by John Evans in Hodges (2001), Chapter 26. In *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264, the primacy of public law in environmental matters was expressly emphasised by the House of Lords.

<sup>7</sup> The deeper ramifications for loss distribution are explored by Merkin and Steele in the following section of the book.

<sup>8</sup> In this respect, reinsurers may be at the mercy of their assured, as they do not have the same control over the settlement process.

<sup>9</sup> The original 1969 IOPC Civil Liability Convention and 1971 IOPC Fund Convention were (partially) succeeded by the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (to be read in conjunction with the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage).

<sup>10</sup> See the contributions to Hensler, Hodges and Tulibacka 2009. Cf. Cafaggi and Micklitz 2009.

<sup>11</sup> Compare the typology by Van Boom and Faure 2007 of 'compensation systems' (ranging from voluntary, market-driven risk-pooling arrangements to involuntary schemes based on notions of political solidarity).

<sup>12</sup> Nagareda (2009) 42 ff. Cf. Klonoff, Bilich and Malveaux 2006 46 ff; Mulheron 2004 24 f.

<sup>13</sup> In Germany, for instance, the State is authorized exclusively to designate associations deemed fit to represent consumers in claims for injunction in the interest of consumers at large. For an overview, see, e.g., Baetge 2009 127 ff.; Halfmeier 2006, 51 ff.

<sup>14</sup> Cf. Camensuli-Feuillard 2008 275 ff.

<sup>15</sup> See for example Shaw and Waldorf 2010.

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